AKHILESH YADAV ETC. ETC.

v.

VISHWANATH CHATURVEDI & ORS.

(Review Petition (Civil) No. 272 of 2007 etc.)

IN

(Writ Petition (Civil) No. 633 of 2005)

DECEMBER 13, 2012.

[ALTAMAS KABIR, CJI., AND H.L. DATTU, J.]

Code of Civil Procedure, 1908 - Order 47 - Review petition - Maintainability, scope and ambit of - Writ petition (PIL) before Supreme Court for direction to prosecute four members of a political family (respondent nos. 2 to 5) under the Prevention of Corruption Act for acquiring assets more than the known source of their income - Court directing the CBI to submit its report with UOI and liberty was given to UOI to take further steps - Order challenged in review - Held: The order under review was neither irregular nor without jurisdiction - Supreme Court has jurisdiction to direct CBI inquiry in the matter - Review of a judgment is permissible on account of error on the face of the record - Such error has to be decided in the facts of the case - An erroneous decision by itself does not warrant a review - The judgment under review does not suffer from any error apparent on the face of the record except for the directions given in the case of respondent no. 4 - Investigation launched against respondent no. 4 liable to be dropped since she was not holding any public office or Government post, and was essentially a private person - The Court's direction to CBI to submit its Inquiry Report to UOI is erroneous since CBI is an independent body and not under obligation to report to UOI - Such a course is not contemplated in the scheme of Delhi Special Police Establishment Act - Direction given to CBI to take independent action, as it considers fit - Delhi Special Police Establishment Act, 1946

- Supreme Court Rules, 1966 - Order 40 - Constitution of India, 1950 - Articles 32 and 137 - Prevention of Corruption Act, 1988.

The Writ petition (PIL) was filed against respondent Nos. 2 to 5 before this Court seeking direction to prosecute respondent Nos. 2 to 5 under Prevention of Corruption Act, 1988 for acquiring assets more than the known source of their income, by misusing their power and authority. This Court by order dated 1.3.2007 directed Central Bureau of Investigating (CBI) to inquire into the allegations relating to acquisition of wealth by respondent Nos. 2 to 5, and to find out as to whether there was any truth in the allegations. Respondent Nos. 2 to 5 filed petitions for review of the order.

The main questions for consideration were whether the High Court or Supreme Court had jurisdiction to direct a CBI Inquiry and whether the investigation and/or inquiry could also be extended to the assets of respondent No. 4, though she neither held any post under the Government nor was she involved in the activities of her husband or father-in-law (two other respondents).

Disposing of the Review Petition, the Court

HELD: 1.1 Review of a judgment on account of some mistake or error apparent on the face of the record is permissible, but an error apparent on the face of the record has to be decided on the facts of each case, as an erroneous decision by itself does not warrant a review of each decision. [Para 1] [955-C-D]

1.2 The scope and ambit of a review proceeding is limited and the order dated 1st March, 2007, in respect of which review has been sought, was neither irregular nor without jurisdiction and was passed after considering the submissions made on behalf of the respective parties.

The review proceedings cannot be converted into an appeal. [Para 30] [969-B-C]

2.1 A direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to the CBI to investigate a cognizable offence alleged to have been committed within the territory of a State, without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law. Being the protectors of civil liberties of the citizens, Supreme Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly. However, the power which is vested in the superior courts should be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instill confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing fundamental rights. [Paras 26 and 27] [967-F-H; 968-A-C]

Supreme Court Bar Association Vs. Union of India and Anr. **(1998) 4 SCC 409: 1998 (2) SCR 795 - relied on.**

2.2 This Court had jurisdiction to direct the CBI to make an inquiry into the accumulation of wealth by the political leader and his family members in excess of their known source of income, based on the allegations made in the writ petition. By its judgment dated 1st March, 2007, this Court merely directed an investigation into the allegations made in the writ petition and to submit a report to the Union Government. [Para 28] [968-D-E]

State of West Bengal and Ors. Vs. The Committee for

Protection of Democratic Rights, West Bengal and Ors. **2006 (12) SCC 534 - followed.**

3. The judgment under review does not suffer from any error apparent on the face of the record, except for the directions given in the case of respondent No. 4. When the order under review was passed, respondent No. 4 in the writ petition had neither held any Public Office nor Government post and was essentially a private person notwithstanding her proximity to the two political leaders. The investigation launched against her on the issue of amassing wealth beyond her known source of income, is liable to be dropped. The Review Petition, so far as respondent No. 4 is concerned, is, accordingly, allowed and the investigation conducted by the CBI against her should, therefore, be dropped. [Paras 29 and 31] [968-F-H; 969-A, C-D]

4. While disposing of the writ petition and directing the CBI to inquire into the alleged acquisition of wealth by respondent Nos. 2 to 5, the CBI was directed to submit a report to the Union of India and on receipt of such report, the Union of India was given the liberty to take further steps depending upon the outcome of the preliminary inquiry into the assets of the said respondents. Since, the CBI is an independent body and is under no obligation to report to the Union of India in regard to investigations undertaken by it, the direction to submit a report of the inquiry to the Union of India and the liberty given to the Union of India to take further steps on such report is not contemplated in the scheme of the Delhi Special Police Establishment Act, 1946. It is for the CBI to decide what steps it wishes to take on the basis of the inquiry conducted. Therefore, the order dated 1st March, 2007 is modified and the directions given to the CBI to submit a report of its inquiry to the Union of India and the liberty given to the Union of India to take further steps on such report, is directed to be deleted from the

order. The CBI may take such independent action, as it considers fit, on the basis of the inquiry conducted by it pursuant to the directions given by this Court in the judgment under review, without seeking any direction from the Union of India or on the basis of any direction that may be given by it. [Paras 31 and 32] [969-D-G; 970-B]

Common Cause, A Registered Society Vs. Union of India and Ors. **(1999) 6 SCC 667: 1999 (3) SCR 1279;** *A.R. Antulay Vs. R.S. Nayak* **(1988) 2 SCC 602:1988 (1) Suppl. SCR 1;** *Supreme Court BarAssociation Vs. Union of India* **(1998) 4 SCC 409: 1998 (2) SCR 795;** *Mohd. Anis Vs. Union of India* **(1994) Supp. 1 SCC 145: 1993 (1) Suppl. SCR 263;** *Textile Labour Association Vs. OfficialLiquidator* **(2004) 9 SCC 741: 2004 (3) SCR 1161;** *M.S. AhlawatVs. State of Haryana* **(2000) 1 SCC 278: 1999 (4) Suppl. SCR 160;***Advance Insurance Company Vs. Gurudasmal* **(1970) 3 SCR 881;***Kazi Lhendup Dorzi Vs. CBI* **(1994) Supp. 2 SCC 116;** *Prem ChandGarg Vs. Excise Commissioner, U.P., Allahabad* **(1962) Supp. 1 SCR 885;** *State of West Bengal Vs. Sampat Lal* **(1985) 1 SCC 317: 1985 (2) SCR 256 ;** *Bihar State Construction Co. Vs. Thakur Munendra Nath Sinha* **(1988) Supp. SCC 542;** *King Emperor Vs. Khwaja NazirAhmed* **AIR 1945 PC 18;** *Bhajan Lal Vs. State of Haryana* **(1992)Supp. 1 SCC 335: 1990 (3) Suppl. SCR 259;** *Parsion Devi Vs.Sumitri Devi* **(1997) 8 SCC 715: 1997 (4) Suppl. SCR 470;** *Sir Hari Shankar Pal and Anr. Vs. Anath Nath Mitter and Ors.* **(1949) FCR 36 - Cited.**

Case Law Reference:

1999 (3) SCR 1279	**Cited**	**Para 8**
1988 (1) Suppl. SCR 1	**Cited**	**Para 9**
1998 (2) SCR 795	**Cited**	**Para 9**
1993 (1) Suppl. SCR 263	**Cited**	**Para 13**

2004 (3) SCR 1161	**Cited**	**Para 13**
1999 (4) Suppl. SCR 160	**Cited**	**Para 13**
(1970) 3 SCR 881	**Cited**	**Para 14**
(1994) Supp. 2 SCC 116	**Cited**	**Para 14**
(1962) Supp. 1 SCR 885	**Cited**	**Para 15**
1985 (2) SCR 256	**Cited**	**Para 17**
(1988) Supp. SCC 542	**Cited**	**Para 17**
AIR 1945 PC 18	**Cited**	**Para 17**
1990 (3) Suppl. SCR 259	**Cited**	**Para 17**
1997 (4) Suppl. SCR 470	**Cited**	**Para 21**
(1949) FCR 36	**Cited**	**Para 21**
2006 (12) SCC 534	**Followed**	**Para 25**
1998 (2) SCR 795	**Relied on**	**Para 27**

CIVIL ORIGINAL JURISDICTION

Review Petition (Civil) No. 272 of 2007 in W.P. (C) No. 633 of 2005.

WITH

R.P. (C) Nos. 339, 347 and 348 of 2007.

Mohan Parasaan, ASG, Uday U. Lalit, Rakesh Dwivedi, KTS Tulsi, Gaurav Bhatia, Irshad Ahmad, Faizal Sherwani (for Bhatia & Co.), A.D.N. Rao, Atul Sharma, Nitesh Jain, Ejaz Maqbool, Adarsh Upadhyay (for Bhatia & Co.), Nikhil Sharma for Bhatia & Co.), T.A. Khan, Arvind Kumar Sharma, S.N. Terdal Raj Kamal, Santosh Kumar Tripathy, Maheen Pradhan and Neha Gupta for the appearing parties, Ashutosh Srivastava (applicant-in-person).

The Judgment of the Court was delivered

ALTAMAS KABIR, CJI. 1. Certain questions of fact and law were raised on behalf of the parties when the review petitions were heard. Review petitions are ordinarily restricted to the confines of the principles enunciated in Order 47 of the Code of Civil Procedure, but in this case, we gave counsel for the parties ample opportunity to satisfy us that the judgment and order under review suffered from any error apparent on the face of the record and that permitting the order to stand would occasion a failure of justice or that the judgment suffered from some material irregularity which required correction in review. The scope of a review petition is very limited and the submissions advanced were made mainly on questions of fact. As has been repeatedly indicated by this Court, review of a judgment on account of some mistake or error apparent on the face of the record is permissible, but an error apparent on the face of the record has to be decided on the facts of each case as an erroneous decision by itself does not warrant a review of each decision. In order to appreciate the decision rendered on the several review petitions which were taken up together for consideration, it is necessary to give a background in which the judgment and order under review came to be rendered.

2. One Vishwanath Chaturvedi, claiming to be an Advocate by profession and unconnected with any political party or parties, filed Writ Petition (Civil) No.633 of 2005, inter alia, for the following relief :-

> "(a) issue an appropriate writ in the nature of mandamus directing Respondent No.1 to take appropriate action to prosecute Respondent Nos.2 to 5 under the Prevention of Corruption Act, 1988, for acquiring amassed assets more than the known source of their income by misusing their power and authority;"

3. In the Writ Petition, the Writ Petitioner provided instances of the wealth allegedly acquired by the said Respondents beyond their known source of income. After a contested hearing, this Court was of the view that the inquiry should not

be shut out at the threshold because political elements were involved. The prayer in the Writ Petition was, therefore, moulded and the same was disposed of on 1st March, 2007, with a direction upon the Central Bureau of Investigation, hereinafter referred to as the "CBI", to inquire into the allegations relating to acquisition of wealth by the Respondent Nos.2 to 5. The CBI was also directed to find out as to whether there was any truth in the allegations made by the Petitioner regarding acquisition of assets by the said Respondents disproportionate to their known source of income and to submit a report to the Union of India which could take further steps in the matter.

4. Soon, thereafter, the Respondent Nos.2 to 5 filed Review Petitions for review of the aforesaid judgment dated 1st March, 2007 in Writ Petition (Civil) No.633 of 2005 and the same was directed to be posted before the Court on 16th March, 2007. Subsequently, the Review Petitions were placed for hearing before the Court on 20th March, 2007 and ultimately on 10th February, 2009, the Court directed notice to issue thereupon. On 1st April, 2009, when the Review Petitions were taken up for hearing, a submission was made on behalf of the Review Petitioners that one of the questions, which could have a vital bearing on the matters, related to the question as to whether the Court could issue directions to the CBI, notwithstanding the provisions of Section 6 of the Delhi Special Police Establishment Act, 1946, which was under consideration of the Constitution Bench in Civil Appeal Nos.6249-6250 of 2001 filed by the State of West Bengal. The hearing of the Review Petitions was, therefore, adjourned till a decision was pronounced by the Constitution Bench in the above Appeals. The Constitution Bench ultimately held that the High Court was within its jurisdiction in directing the CBI to investigate into a cognizable offence alleged to have been committed within the territory of a State without the consent of that State and the same would neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of powers

and would be valid in law. However, a note of caution was also given and it was further observed that the extra-ordinary power conferred by Articles 32 and 226 of the Constitution of India has to be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instill confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing fundamental rights.

5. Thereafter, the Review Petitions were again taken up for hearing on 8th February, 2011.

6. Five broad propositions were canvassed on behalf of the Review Petitioner, Shri Akhilesh Yadav, namely,

(i) Can this Court direct a CBI inquiry without the consent of the State concerned?

(ii) Does a Court have jurisdiction to refer the matter to the CBI for investigation without forming a opinion as to whether a prima facie case of the commission of an offence had been made out?

(iii) Can the Supreme Court order a CBI investigation without expressly invoking its jurisdiction under Article 142 of the Constitution of India?

(iv) Could the Supreme Court have entertained the Writ Petition filed by the Respondent No.1 in the Review Petition under the garb of a public interest litigation? and

(v) Does the judgment and order dated 1st March, 2007, passed in Writ Petition (Civil) No.633 of 2005 warrant a review thereof?

7. Mr. Rakesh Dwivedi, learned Senior Advocate, appearing for the Review Petitioners, Shri Akhilesh Yadav and

Smt. Dimple Yadav did not press the first proposition, since, as indicated hereinbefore, the said question had been settled by the Constitution Bench.

8. On the second proposition, Mr. Dwivedi urged that in the decision rendered by this Court in *Common Cause, A Registered Society Vs. Union of India & Ors.* [(1999) 6 SCC 667], a Bench of three Judges of this Court had specifically held that the CBI should not be involved in an investigation unless a prima facie case is found and established against the accused. Mr. Dwivedi pointed out that this Court had inter alia observed that the right to life engrained in Article 21 of the Constitution means something more than mere survival or animal existence. A man had, therefore, to be left alone to enjoy life without fetters and should not be allowed to be hounded either by the police or CBI only to find out as to whether he had committed any offence or was living as a law abiding citizen. This Court also observed that even under Article 142 of the Constitution, this Court could not issue such a direction ignoring the substantive provisions of law and the constitutional rights available to a person.

9. On the third proposition relating to cases where this Court had directed the CBI to investigate, Mr. Dwivedi submitted that there were cases involving gross atrocities and State apathy and there were also cases which stand on a different footing and are concerned with corruption. Learned counsel submitted that in the present case no prima facie case of corruption had been established against the review petitioners and/or any of the proforma respondents and, accordingly, the direction given to the CBI to conduct investigations against them was ex facie illegal. Referring to various judgments in which directions had been given by this Court to the CBI to conduct investigation, there were special reasons for doing so in each case and not without a prima facie case having been made out against them in such cases. Mr. Dwivedi urged that the CBI has no jurisdiction to inquire or

investigate into a matter where there is no material to show prima facie that an offence has been committed. Mr. Dwivedi submitted that in the case of *A.R. Antulay Vs. R.S. Nayak* [(1988) 2 SCC 602], this Court had held that no jurisdiction can be conferred beyond the scope of the Act by Courts of law even with consent. He also urged that in the case of *Supreme Court Bar Association Vs. Union of India* [(1998) 4 SCC 409], this Court had observed that even the powers under Article 142 of the Constitution vested in this Court could not be exercised in a manner which was contrary to the Statute. It is only on account of special reasons where it was felt that an investigation by the local police would prove to be ineffective, that directions had been given to the CBI to take up the investigation. Mr. Dwivedi submitted that there were no such special reasons in the instant case which warranted the directions being given to the CBI to conduct investigation into the allegations of corruption and police excesses as well as human rights violations.

10. As far as Smt. Dimple Yadav is concerned, Mr. Dwivedi submitted that except for the fact that she is the wife of Akhilesh Yadav, who had been a Member of Parliament since 2000, there is no other ground to treat her as a public servant for the purposes of inquiry by the CBI. Mr. Dwivedi submitted that Smt. Dimple Yadav carried on her own business in agricultural produce and had her own income which had been wrongly clubbed by the Writ Petitioner with the assets of Shri Akhilesh Yadav to bring her within the ambit of the investigation by the CBI under the provisions of the Prevention of Corruption Act. It was further submitted that there is also no allegation that Smt. Dimple Yadav had, in any way, aided or abetted any public servant to commit any act which could have attracted the provisions of the Prevention of Corruption Act and including Smt. Dimple Yadav in the inquiry against those who could be said to be public servants, amounts to harassment of a private individual having a separate source of income in respect of which no offence under the aforesaid Act could be made out. Mr. Dwivedi contended that the inquiry directed to be conducted

by the CBI in relation to the assets held by Shri Adkhilesh Yadav and Smt. Dimple Yadav was contrary to the procedure established by law and could not have been ordered even upon invocation of powers under Article 142 of the Constitution and was, therefore, liable to be set aside in review.

11. As far as the fourth proposition is concerned, as to whether the Supreme Court could have entertained the writ petition filed by the Respondent No.1 in the review petition in the garb of Public Interest Litigation, Mr. Dwivedi submitted that the writ petitioner had not made any specific allegation against the review petitioners which merited a direction by the Court to the CBI to conduct an investigation into the allegations relating to acquisition of wealth by the Respondent Nos.2 to 5 in the writ petition, beyond their known sources of income. Furthermore, the Writ Petitioner had links with the Indian National Congress, although, he had denied any connections with the Congress Party. Mr. Dwivedi urged that the Respondent No.1 herein had no locus standi to maintain the writ petition as a Public Interest Litigation, since it was more of a personal enmity rather than a public cause which had resulted in the filing of the writ petition. Mr. Dwivedi submitted that the entire exercise had been undertaken to malign the Respondent Nos.2 to 5 and was without any factual basis and the writ petition had been filed only to harass the Respondent No.2 to 5 therein and to tarnish their reputation amongst the people of Uttar Pradesh and also other parts of the country. Mr. Dwivedi submitted that the writ petition had been filed with the mala fide intention of discrediting the Review Petitioner and his family members in the eyes of the local public and to adversely affect their political fortunes in the State.

12. In addition to Mr. Dwivedi's submissions, Mr. Mukul Rohatgi, learned Senior Advocate, who also appeared for Smt. Dimple Yadav, submitted that merely because she belongs to a family of politicians, she had been included within the ambit of the scope of the investigation which was unwarranted, since

it did not have any nexus with the objects sought to be achieved by such an inquiry.

13. Mr. Rohatgi also submitted that since despite his denial it was amply clear that the Writ Petitioner, Mr. Vishwanath Chaturvedi, was a representative of the Congress Party, the Writ Petition ought to have been dismissed in limine. Mr. Rohatgi submitted that the explanation given in the judgment under review for invoking the Court's powers under Article 142 of the Constitution relying on the decision of this Court in *Mohd. Anis Vs. Union of India* [(1994) Supp. 1 SCC 145], needed a second look in view of the decision in the *Supreme Court Bar Association* case (supra). Mr. Rohatgi submitted that in *Mohd. Anis's* case (supra), it had been held that in order to do complete justice, the Supreme Court's power under Article 142 of the Constitution was not circumscribed by any statutory provision, and the Supreme Court could direct an investigation by the CBI into an offence committed within a State without a notification or order having been issued in that behalf, in public interest, to do complete justice in the circumstances of a particular case. However, in exercise of its powers under Article 142 of the Constitution, the Supreme Court should not direct a fishing inquiry without reference to the facts and circumstances of the offence of disproportionate assets under the Prevention of Corruption Act, 1988. Mr. Rohatgi urged that subsequently in the *Supreme Court Bar Association* case (supra), this Court held that the powers conferred on this Court under Article 142 of the Constitution are inherent in the Court and are complementary to those powers which are specifically conferred on the Court by various Statutes, though not limited by those Statutes. These powers exist independent of the Statutes with a view to do complete justice between the parties. However, the powers conferred on the Court under Article 142 of the Constitution, being curative in nature, cannot be construed as powers which authorize the Court to ignore the substantive rights of a litigant while dealing with the cause pending before it. It was further observed that "Article 142, even with the width

of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly. The very nature of the power must lead the Court to set limits for itself within which to exercise those powers and ordinarily it cannot disregard a statutory provision governing a subject, except perhaps to balance the equities between the conflicting claims of the litigating parties by 'ironing out the creases' in a cause or matter before it." It was submitted that the decision in the *Supreme Court Bar Association* case (supra) cannot be reconciled with the reasoning of the decision in *Mohd. Anis's* case (supra). Mr. Rohatgi submitted that all the decisions rendered subsequent to the decision rendered in the *Supreme Court Bar Association* case (supra), following the earlier decision in *Mohd. Anis's* case (supra), were per incuriam. In support of his submission, Mr. Rohtagi referred to the decision of this Court in *Textile Labour Association Vs. Official Liquidator* [(2004) 9 SCC 741] wherein while examining the plenary power of this Court under Article 142 of the Constitution, it referred to the decision in the *Supreme Court Bar Association* case (supra). Mr. Rohatgi concluded on the note that under Article 142 of the Constitution, the Supreme Court could always correct any error made by it and to that effect it could recall its own order, as was held in *M.S. Ahlawat Vs. State of Haryana* [(2000) 1 SCC 278].

14. Mr. Ashok Desai, learned Senior Advocate, who appeared for Shri Mulayam Singh Yadav, the Review Petitioner in Review Petition (C) No.339 of 2007, based his submissions mainly on the powers of the Supreme Court to direct the CBI to conduct an investigation in respect of an offence committed within a State, without the consent of the State Government as envisaged in Section 6 of the Delhi Special Police Establishment Act, 1946, hereinafter referred to as 'the 1946 Act'. Mr. Desai attempted to distinguish the decisions rendered by this Court in the case of *Advance Insurance Company Vs.*

Gurudasmal [(1970) 3 SCR 881 = (1970) 1 SCC 633] and in the case of *Kazi Lhendup Dorzi Vs. CBI* [(1994) Supp. 2 SCC 116]. Mr. Desai submitted that while in the first case, the Government of Maharashtra had given its consent to the investigation by the CBI, in the latter case the question involved was not of grant of permission to investigate into the case, but withdrawal of such consent which had already been granted.

15. Mr. Desai reiterated the contentions, both of Mr. Dwivedi and Mr. Rohatgi, that powers under Article 142 of the Constitution could not be invoked in contravention of the provisions of a Statute and a fortiori the provisions of the Constitution. Mr. Desai also urged that in the *Supreme Court Bar Association* case (supra) not only had the decision in *Mohd. Anis's* case (supra) been referred to, but this Court had expressly disapproved the observation made therein by Mr. V.C. Misra that the law laid down in *Prem Chand Garg Vs. Excise Commissioner, U.P., Allahabad* [(1962) Supp. 1 SCR 885], in which it had been observed that despite the width of the powers conferred on the Supreme Court by Article 142(1), even this Court could not under the said provision make an order which was plainly inconsistent with the express statutory provisions of substantive law, much less, inconsistent with any constitutional provision, was no longer good law.

16. Mr. Desai submitted that since the decision in the *Supreme Court Bar Association* case (supra) had not been considered by this Court while rendering the judgment under review and the relief had been moulded without any discussion on such issue, the judgment was liable to be reviewed.

17. Dr. Rajiv Dhawan, Senior Advocate, who appeared for the Respondent No.5, Shri Prateek Yadav, reiterated the submissions made by Mr. Dwivedi, Mr. Rohatgi and Mr. Desai in relation to the decision rendered by this Court in the *Supreme Court Bar Association* case (supra). Dr. Dhawan submitted that the CBI, as a statutory body for the purpose of conducting criminal investigation in extra-ordinary

circumstances with the consent of the State Government, could exercise powers within the limits and constraints of the Delhi Special Police Establishment Act, 1946, which fact had not been considered in the decisions rendered in *State of West Bengal Vs. Sampat Lal* [(1985) 1 SCC 317], *Bihar State Construction Co. Vs. Thakur Munendra Nath Sinha* [(1988) Supp. SCC 542] and also in *Mohd. Anis's* case (supra). Dr. Dhawan submitted that within the constitutional framework, the CBI could not encroach upon the powers of the police of several States. Referring to Entry 80 in List I of the Seventh Schedule to the Constitution and Article 239AA, Dr. Dhawan submitted that the Central Government was not entitled to extend the powers and jurisdiction of the members of the police force belonging to any area outside the State so as to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the State Government of that State in which such area is situated. Dr. Dhawan submitted that it was, therefore, clear that the direction given by this Court to the CBI, which is a creation of the Delhi Special Police Establishment Act, 1946, to investigate into a State subject, was contrary to the constitutional safeguards engrafted in Entry 80 of List I of the Seventh Schedule to the Constitution. Reference was also made by Dr. Dhawan to the principles evolved by the Privy Council in *King Emperor Vs. Khwaja Nazir Ahmed* [AIR 1945 PC 18] and *Bhajan Lal Vs. State of Haryana* [(1992) Supp. 1 SCC 335], wherein it was observed that judicial review is subject to the principles of judicial restraint and must not become unmanageable in other aspects relating to the power of the Union or State Governments. Reference was also made to Section 5 of the 1946 Act which listed the classes of offences which may be inquired into by the CBI.

18. Dr. Dhawan also contended that while entertaining a public interest litigation, it was always necessary for the Court to be extra cautious since at the very initial stage no opportunity is given to the Respondent to state his case before notice is

issued and at times it could result in premature reference to the CBI on a view short of a prima facie case, particularly where the public interest litigation was politically motivated to adversely affect the political consequences of the persons involved. Dr. Dhawan lastly submitted that the direction given to the CBI after completion of the inquiry to submit its report to the Union of India was clearly contrary to law and could not be sustained under any circumstances.

19. In addition to the above petitions, we had also considered I.A. Nos.16 and 17 of 2009 which had been filed by one Shri Ashutosh Srivastava, who appeared in-person in support of his application for being impleaded. Having heard learned counsel for the Respondents and the Applicant in-person, we had reserved orders on the same.

20. In the facts and circumstances of the case, we are not inclined to implead Shri Srivastava in these proceedings and his application for being impleaded stands rejected.

21. Appearing for the Writ Petitioner, Vishwanath Chaturvedi, Mr. K.T.S. Tulsi, learned Senior Advocate, submitted that every order in which a mistake may be noticed does not automatically call for a review and that the power of review could be invoked only in circumstances as contained in Order 47 Rule 1 of the Code of Civil Procedure (CPC). Referring to the decision dated 16th June, 2008 of this Court in *State of West Bengal Vs. Kamal Sengupta and Anr.* in Civil Appeal No.1694 of 2006, Mr. Tulsi submitted that the term "mistake or error apparent" which finds place in Order 47 Rule 1 CPC, by its very connotation signifies an error which is evident per se from the record of the case and does not require any detailed examination, scrutiny and elucidation either of the facts or legal position. In fact, in *Parsion Devi Vs. Sumitri Devi* [(1997) 8 SCC 715] it was observed that if an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the

face of the record for the purpose of Order 47 Rule 1 CPC. In other words, an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken on a point of fact or law, as the Court could not sit in appeal over its own judgment. Similar views were expressed by a Five-Judge Bench of the Federal Court in *Sir Hari Shankar Pal and Anr. Vs. Anath Nath Mitter & Ors.* [(1949) FCR 36], wherein it was, inter alia, observed that a decision being erroneous in law is certainly no ground for ordering review.

22. Various other decisions were also referred to which will only serve to duplicate the decisions of this Court on the said issue.

23. As has been indicated in paragraph 5 of this judgment, five broad propositions were canvassed on behalf of the review petitioner, Shri Akhilesh Yadav, which were mainly confined to the jurisdiction of the High Court and the Supreme Court to direct a CBI inquiry in respect of an offence alleged to have been committed within a State, without the consent of the State concerned. Along with the above, the locus standi of the writ petitioner to maintain the writ petition was also raised on behalf of Shri Yadav. While the submissions on behalf of all the review petitioners were centered around the said two propositions, a specific issue was raised by Mr. Mukul Rohatgi as to whether the investigation and/or inquiry could also be extended to the assets of Smt. Dimple Yadav, wife of Shri Akhilesh Yadav, since she had neither held any post under the Government nor was she involved in the activities of her husband or father-in-law, Shri Mulayam Singh Yadav. The acquisition of wealth by her was attributed to her agricultural income and not to any source of income through her husband and her father-in-law.

24. Same were the submissions made by Dr. Rajiv Dhawan, appearing for Shri Prateek Yadav, and, in addition, it was submitted that the said Respondent did not get a reasonable opportunity of stating his case before the judgment

was delivered in Writ Petition (C) No.633 of 2005 on 1st March, 2007.

25. As far as the first contention is concerned, the same has been set at rest by the Constitution Bench in State of West Bengal & Ors. Vs. The Committee for Protection of Democratic Rights, West Bengal & Ors., being Civil Appeal Nos.6249-6250 of 2001. In the very first paragraph of its judgment the Constitution Bench set out the issue, which had been referred to it for its opinion in the following terms :

> "The issue which has been referred for the opinion of the Constitution Bench is whether the High Court, in exercise of its jurisdiction under Article 226 of the Constitution of India, can direct the Central Bureau of Investigation (for short "the CBI"), established under the Delhi Special Police Establishment Act, 1946 (for short "the Special Police Act"), to investigate a cognizable offence, which is alleged to have taken place within the territorial jurisdiction of a State, without the consent of the State Government."

26. After considering the various decisions on this point, as also Article 246 of the Constitution, the Constitution Bench ultimately answered the reference in the manner following :

> "In the final analysis, our answer to the question referred is that a direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to the CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law. Being the protectors of civil liberties of the citizens, this Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly."

27. A note of caution was also given by the Constitution Bench, which, in fact, finds place in all the decisions relating to this issue, namely, that the power which is vested in the superior courts should be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instill confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing fundamental rights. The said note of caution is an echo of the observations made by this Court in *Supreme Court Bar Association Vs. Union of India & Anr.* [(1998) 4 SCC 409], that such an inquiry by the CBI could be justified in certain circumstances to prevent any obstruction to the stream of justice.

28. That this Court had jurisdiction to direct the CBI to make an inquiry into the accumulation of wealth by Shri Mulayam Singh Yadav and his family members in excess of their known source of income, based on the allegations made in the writ petition, cannot be questioned. By its judgment dated 1st March, 2007, this Court merely directed an investigation into the allegations made in the writ petition and to submit a report to the Union Government. The submissions made on behalf of the review petitioners in this regard, must, therefore, be rejected, except in regard to the direction given to the CBI to submit a report of its inquiry to the Union Government.

29. In addition, the submissions made qua Smt. Dimple Yadav merits consideration, since when the order under review was passed, she had neither held any public office nor Government post and was essentially a private person notwithstanding her proximity to Shri Akhilesh Yadav and Shri Mulayam Singh Yadav. On reconsideration of her case, we are of the view that the investigation launched against her on the issue of amassing wealth beyond her known source of income, is liable to be dropped. The review petition, so far as Smt. Dimple Yadav is concerned, is, accordingly, allowed and the

investigation conducted by the CBI against her should, therefore, be dropped.

30. As far as the other review petitioners are concerned, we have to keep in mind the fact that the scope and ambit of a review proceeding is limited and the order dated 1st March, 2007, in respect of which review has been sought, was neither irregular nor without jurisdiction and was passed after considering the submissions made on behalf of the respective parties. The review proceedings cannot be converted into an appeal.

31. The judgment under review does not, in our view, suffer from any error apparent on the face of the record, except for the directions given in the case of Smt. Dimple Yadav. There is another error which we ourselves are inclined to correct. While disposing of the writ petition and directing the CBI to inquire into the alleged acquisition of wealth by the Respondent Nos.2 to 5, the CBI was directed to submit a report to the Union of India and on receipt of such report, the Union of India was given the liberty to take further steps depending upon the outcome of the preliminary inquiry into the assets of the said respondents. Since, the CBI is an independent body and is under no obligation to report to the Union of India in regard to investigations undertaken by it, the direction to submit a report of the inquiry to the Union of India and the liberty given to the Union of India to take further steps on such report is not contemplated in the scheme of the Delhi Special Police Establishment Act, 1946. It is for the CBI to decide what steps it wishes to take on the basis of the inquiry conducted. We, therefore, modify the order dated 1st March, 2007, and direct that the directions given to the CBI to submit a report of its inquiry to the Union of India and the liberty given to the Union of India to take further steps on such report, be deleted from the order.

32. The review petitions are disposed of with the following directions :

i) The CBI shall drop the inquiry into the assets of the Respondent No.4, Smt. Dimple Yadav, wife of Shri Akhilesh Yadav;

ii) The CBI may take such independent action, as it considers fit, on the basis of the inquiry conducted by it pursuant to the directions given by this Court in the judgment under review, without seeking any direction from the Union of India or on the basis of any direction that may be given by it.

K.K.T. Review Petitions disposed of.

ASHOK KUMAR
v.
STATE OF UTTARAKHAND & ORS.
(Criminal Appeal No. 2038 of 2012)

DECEMBER 13, 2012

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

Code of Criminal Procedure, 1973:

ss.145 and 146 (1) - Application u/s. 145 - Praying for attachment of property - Civil suit and application for interim injunction in respect of the same property pending before civil court - Police enquiry report stating that one of the parties was in possession - SDM passing order for attachment - Order confirmed by High Court - On appeal, held: The SDM had wrongly invoked powers u/s. 146(1) as there is nothing to show that an emergency existed so as to attach the property - He could not have passed order of attachment on the ground of emergency when the reports indicated that one of the parties was in possession - The issue of possession, since was pending, it was for the civil court to decide the issue.

ss. 145 and 146 (1) - Scope of - Held: The object of s. 145 is merely to maintain law and order and to prevent breach of peace by maintaining one or other of the parties in possession - The scope of enquiry u/s. 145 is in respect of actual possession without reference to the merits - Order of attachment u/s. 146(1) can be passed only in case of emergency - s. 146 can only be read in the context of s. 145 - The ingredients necessary for passing order u/s. 145(1) would not automatically attract for attachment of property - Case of emergency has to be distinguished from a mere case of apprehension of breach of peace - To infer a situation of emergency, there must be material on record before Magistrate.

The second respondent filed a suit against the appellant and third respondent as defendants, praying for a decree of temporary injunction, restraining them from interfering with their peaceful enjoyment and possession of the property in question. An application for interim injunction was also filed. The suit and the application are still pending.

Thereafter, the second respondent filed an application u/s. 145 Cr.P.C. in respect of the same property, for an order of attachment of the property in question. As per enquiry report by the police, the appellant was in possession of the property and there was possibility of breach of peace. SDM, after referring to the police report passed an order attaching the property u/s. 146(1) Cr.P.C. The order of SDM was confirmed by the High Court. Hence the present appeal.

Disposing of the appeal, the Court

HELD: 1. The SDM has not properly appreciated the scope of Sections 145 and 146(1), Cr.P.C. The object of Section 145, Cr.P.C. is merely to maintain law and order and to prevent breach of peace by maintaining one or other of the parties in possession, and not for evicting any person from possession. The scope of enquiry u/s.145 is in respect of actual possession without reference to the merits or claim of any of the parties to a right to possess the subject of dispute. [Para 7] [976-E-F]

2. The SDM has wrongly invoked the powers under Section 146(1),Cr.P.C. Under Section 146(1), a Magistrate can pass an order of attachment of the subject of dispute if it be a case of emergency, or if he decides that none of the parties was in such possession, or he cannot decide as to which of them was in possession. Sections 145 and 146 Cr.P.C. together constitute a scheme for the resolution of a situation where there is a likelihood of a

breach of the peace and Section 146 cannot be separated from Section 145. It can only be read in the context of Section 145. If after the enquiry under Section 145, the Magistrate is of the opinion that none of the parties was in actual possession of the subject of dispute at the time of the order passed under Section 145(1) or is unable to decide which of the parties was in such possession, he may attach the subject of dispute, until a competent court has determined the right of the parties thereto with regard to the person entitled to possession thereof. [Para 12] [978-E-H]

3. The ingredients necessary for passing an order u/s.145(1) Cr.P.C. would not automatically attract for the attachment of the property. Under Section 146, a Magistrate has to satisfy himself as to whether emergency exists before he passes an order of attachment. A case of emergency, as contemplated u/s.146, has to be distinguished from a mere case of apprehension of breach of the peace. The Magistrate, before passing an order under Section 146, must explain the circumstances why he thinks it to be a case of emergency. To infer a situation of emergency, there must be a material on record before Magistrate when the submission of the parties filed, documents produced or evidence adduced. [Para 13] [979-A-C]

4. In the present case, there is nothing to show that an emergency existed so as to invoke Section 146(1) and to attach the property in question. When the reports indicate that one of the parties is in possession, rightly or wrongly, the Magistrate cannot pass an order of attachment on the ground of emergency. The order acknowledges the fact that the appellant had started construction in the property in question, therefore, possession of property was with the appellant, whether it was legal or not, was not for the SDM to decide. [Para 14] [979-D-F]

5. The respondent had also filed a civil suit for injunction before Civil Judge and an application for interim injunction is also pending, on which the civil court has issued only a notice. An Amin report was called for and Amin submitted its report. Civil suit was filed prior in point of time, it is for the civil court to decide as to who was in possession on the date of the filing of the suit. Civil Court is directed to pass final orders on the interim application filed by the second respondent. [Paras 15 and 16] [979-F-G; 980-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2038 of 2012.

From the Judgment & Order dated 27.03.2012 of the High Court of Uttarakhand at Nainital in C.M.P. (C482) No. 1029 of 2010.

Ambrish Kumar, Ajai Kumar Bhatia, Sunil Kumar Jain for the Appellant.

Vivek Gupta, Saket Agarwal for the Respondents.

The Judgment of the Court was delivered by

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

2. We are, in this case, concerned with the validity of an Order of attachment passed under Section 146(1) of the Code of Criminal Procedure by Sub Divisional Magistrate (SDM), Haridwar on 25.11.2009 attaching property situated in khasra No. 181 admeasuring 0.400 hectares situated at Gram Subhash Garh, Pargana Jawala Pur, Tehsil and District Haridwar. The above-mentioned order was affirmed by the High Court of Uttarakhand at Nainital in Criminal Misc. Application (C482) No. 1029 of 2010 dated 27.03.2012.

3. Mona Sharma, the second respondent herein, mother of minor children, preferred O.S. No. 168 of 2009 before the

Court of Civil Judge (J.D.) Haridwar with the appellant and third respondent as defendants praying for a decree of temporary injunction restraining them from interfering with their peaceful enjoyment and possession of the above-mentioned and few other items of properties. The suit was instituted on 02.09.2009. An application was also preferred under Order XXXIX Rules 1 and 2 read with Section 151 of the Code of Civil Procedure for an order of interim injunction. The Civil Court did not grant any interim injunction, but only ordered notice to the respondents on 14.9.2009.

4. Mona Sharma later filed an application under Section 145, Cr.P.C. on 19.9.2009 in respect of the disputed property before SDM for an order of attachment of the property in question. An enquiry was conducted through the Pathri P.S., District Haridwar and Sub-Inspector of Police who submitted the report dated 01.10.2009 before the SDM, Haridwar. It was indicated in the report that house of Ashok Kumar is situated in the land in dispute where he has undertaken some construction. Further, it was also opined that the possibility of breach of peace in the locality could also be not ruled out. Meanwhile, in the civil suit, after conducting a local inspection, a report was submitted by the Amin on 21.11.2009 stating that the plaintiff is in possession of the property and the construction is going on. After referring to the report of the Sub-Inspector dated 01.10.2009, SDM Haridwar passed the impugned order dated 25.11.2009 attaching the property under Section 146(1), Cr.P.C., the validity of which is under challenge in these proceedings.

5. Shri Ambrish Kumar, learned counsel appearing for the appellant, submitted that the SDM has committed a grave error in passing an order under Section 146(1), Cr.P.C. attaching the property in question since possession of the property by the appellant was not disputed by the respondent while the civil suit was filed, so also when an application under Section 145 was preferred. Learned counsel submitted that the SDM has

exceeded its jurisdiction in passing an order dated 25.11.2009, when the same issue is pending consideration in a civil court. Learned counsel also pointed out that the respondent could not get an order of injunction from the civil court, hence he invoked the jurisdiction of the SDM under Section 146(1), Cr.P.C. and got an order of attachment of the property. Learned counsel submitted that the SDM has committed a gross illegality in passing the order, when possession of the property by the appellant has not been disputed.

6. Shri Vivek Gupta, learned counsel appearing for the respondents, on the other hand, submitted that there is no illegality in the order passed by the SDM attaching the property under Section 146(1), Cr.P.C., since there is dispute regarding the possession of the property in question and tension is existing and peace can be breached at any time. Learned counsel submitted that there is no error in the order passed by the High Court, confirming the order of the SDM.

7. We are of the view that the SDM has not properly appreciated the scope of Sections 145 and 146(1), Cr.P.C. The object of Section 145, Cr.P.C. is merely to maintain law and order and to prevent breach of peace by maintaining one or other of the parties in possession, and not for evicting any person from possession. The scope of enquiry under Section 145 is in respect of actual possession without reference to the merits or claim of any of the parties to a right to possess the subject of dispute.

8. We may notice, in the instant case, the application was preferred by the respondent under Section 145, Cr.P.C. and on that application, a report was called for and the Sub-Inspector of Police submitted its report before the SDM on 01.10.2009. It is stated in the enquiry report that the Sub-Inspector of the village went to Subhashgarh and noticed that even though the landed property stood in the name of Mona Sharma yet it was found that Ashok Kumar, appellant herein was in possession of the land in question in khasra No. 181.

The relevant portion of the report reads as follows:

"It is submission of applicant Mona Sharma that above both Ashok Kumar and Narendra Kumar have taken possession over her land and above both have stated that they have purchased land from Bal Krishan husband of Mona Sharma whereas, this land comes in the category of 10(Ka), which cannot be sold/purchased.....In land there is situated under constructed house of Ashok Kumar in present time and eucalyptus and mangoes trees of Narendra Kumar s/o Jairam, r/o Subhashgarh are standing."

9. Further, it is relevant to note that even in the SDM order dated 25.11.2009, the possession of the property by the appellant - Ashok Kumar has been noticed. The operative portion of the impugned order dated 25.11.2009 reads as follows:

"Applicant wants to take possession over the property in question, but opp. Party Ashok in forcible manner does not leave possession and there is full tense of spot taking possession, the peace can break at any time, therefore, the property in question should be attached. The property in question was given to father in law of the applicant on lease by State Government."

10. The order also records the statement of learned counsel of the appellant, which reads as follows:

"The applicant has no possession over the property in question. Applicant accepts the possession of opposite party Ashok on property in question, there is not any dispute regarding possession."

11. The SDM then stated as follows:

"In view of report of Sub Inspector P.S. Pathri also

there is dispute in parties regarding possession of property in question on spot and the tension is existing and peace can breach at any time hence, it appears just and proper to attach the property in question during hearing and to give any (sic) anyone for maintaining peace law and order situation on spot."

The operative portion of the order, further, reads as follows:

"Hence, property in question khasra No. 181, rakba 0.400 hectares situated in mauja Subhashgarh stands attached u/s 146(1) Cr.P.C. S.O. Pathri is directed that he may go on spot and by taking the property in question in his possession ensure giving the same in (sic) of anyone and sent (sic) in this court at any time before fixed date 30.12.2009. Put up on 30.12.2009 for written statement of first party."

12. The above order would indicate that the SDM has, in our view, wrongly invoked the powers under Section 146(1),Cr.P.C. Under Section 146(1), a Magistrate can pass an order of attachment of the subject of dispute if it be a case of emergency, or if he decides that none of the parties was in such possession, or he cannot decide as to which of them was in possession. Sections 145 and 146 of the Criminal Procedure Code together constitute a scheme for the resolution of a situation where there is a likelihood of a breach of the peace and Section 146 cannot be separated from Section 145, Cr.P.C. It can only be read in the context of Section 145, Cr.P.C. If after the enquiry under Section 145 of the Code, the Magistrate is of the opinion that none of the parties was in actual possession of the subject of dispute at the time of the order passed under Section 145(1) or is unable to decide which of the parties was in such possession, he may attach the subject of dispute, until a competent court has determined the right of the parties thereto with regard to the person entitled to possession thereof.

13. The ingredients necessary for passing an order under Section 145 (1) of the Code would not automatically attract for the attachment of the property. Under Section 146, a Magistrate has to satisfy himself as to whether emergency exists before he passes an order of attachment. A case of emergency, as contemplated under Section 146 of the Code, has to be distinguished from a mere case of apprehension of breach of the peace. The Magistrate, before passing an order under Section 146, must explain the circumstances why he thinks it to be a case of emergency. In other words, to infer a situation of emergency, there must be a material on record before Magistrate when the submission of the parties filed, documents produced or evidence adduced.

14. We find from this case there is nothing to show that an emergency exists so as to invoke Section 146(1) and to attach the property in question. A case of emergency, as per Section 146 of the Code has to be distinguished from a mere case of apprehension of breach of peace. When the reports indicate that one of the parties is in possession, rightly or wrongly, the Magistrate cannot pass an order of attachment on the ground of emergency. The order acknowledges the fact that Ashok Kumar has started construction in the property in question, therefore, possession of property is with the appellant - Ashok Kumar, whether it is legal or not, is not for the SDM to decide.

15. We also notice that the respondent herein has filed a civil suit for injunction before Civil Judge (J.D.) Haridwar on 02.09.2009 and an application for interim injunction is also pending, on which the civil court has issued only a notice. An Amin report was called for and Amin submitted its report on 21.11.2009. Civil suit was filed prior in point of time, it is for the civil court to decide as to who was in possession on the date of the filing of the suit. In any view, there is nothing to show that there was an emergency so as to invoke the powers under Section 146(1) to attach the property, specially, when the civil

court is seized of the matter. Under such circumstances, we are inclined to set aside the order passed by the SDM dated 25.11.2009 and the order of the High court dated 27.03.2012.

16. Learned counsel appearing for the appellant submitted that he will not change the character of the property or create third party rights in respect of the property in question till the civil court passes final orders on the application filed by the respondent for temporary injunction. The submission of the learned counsel is recorded and we direct the civil court to pass final orders on the interim application filed by the respondent for injunction. We make it clear that we have also not expressed any final opinion on the contentions raised by the learned counsel. We have however found that no ground exists to attach the property under Section 146, Cr.P.C.

17. The appeal is disposed of, as above.

K.K.T. Appeal disposed of.

HARADHAN DAS
v.
STATE OF WEST BENGAL
(Criminal Appeal No. 148 of 2007)

DECEMBER 13, 2012

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

Penal Code, 1860 – ss. 302/149 – Murder – Five accused including the appellant-accused entering the house of the victims – Causing death of one and injuries to two – Eyewitnesses to the incident – Appellant-accused identified by the witnesses including injured witnesses – Three witnesses declared hostile – Accused charged u/ss. 148, 302/149, 326/149 and 460 IPC – One of the accused died during trial and hence the case against him abated – Trial court acquitted three accused and convicted the appellant-accused u/s. 302/149 – The order of trial court was confirmed by High Court – On appeal, held: Prosecution proved its case beyond reasonable doubt – Presence of eye-witnesses (two of them injured) at the place of occurrence is not doubtful – Their evidence is also corroborated by the three hostile witnesses – The evidence of injured witnesses were also corroborated by medical evidence and evidence of Investigating Officer – Other accused even if acquitted u/s. 302/149 on account of lack of evidence for having pre-determined mind and for not having been identified, appellant accused could be convicted u/s. 302 as there was direct evidence against him – Appellant-accused could also have been convicted with the aid of s. 149 – If five or more accused are charged u/s. 302 r/w s. 149 and if identification, role and object in participation against some accused not proved, still others against whom the case is proved, can be punished with the aid of s. 149 – s. 149 would include the acquitted persons – Conviction affirmed.

Witness – Hostile witness – Evidentiary value – Held:

Evidence of such witness, so far as it supports the prosecution case, is admissible.

Administration of Criminal Justice – Criminal case – Investigation took 4 years and trial took 14 years – Advice to the State and the courts to gear up administrative machinery, so that at least trial of heinous offence gets concluded within reasonable period.

Five accused, including the appellant-accused, were prosecuted for house-breaking and causing death of one and causing injuries to two. Son of the deceased, who was an eye-witness lodged FIR. However, he could not be examined in the court as he died during trial. Two of the witnesses were injured. The appellant-accused was duly identified by the injured witnesses as well as the other witnesses present in the house at the time of the occurrence. The accused were charged u/ss. 148, 302/149, 326/149 and 460 IPC. Trail against one of the accused abated because of his death. Trial court acquitted three accused on the ground that they were not identified and there was no direct evidence implicating them. The appellant-accused was convicted by trial court u/s. 302/149 IPC. The order of trial court was confirmed by High Court.

In appeal, the appellant contended that as there was common evidence against all the accused, the courts below could not have convicted him having acquitted other accused; that no specific role was assigned to him; that he was entitled to benefit of doubt as PWs 1, 3 and 5 were declared hostile; and that conviction with the aid of s. 149 IPC was not permissible.

The State contended that even if a case is not made out against the accused u/s. 302/149 IPC, still he could be convicted u/s. 460 IPC for which he was charged and tried.

Dismissing the appeal, the Court

HELD: Per Swantanter Kumar, J:

1. The statements of PWs 1, 3 and 5, though declared hostile, do provide support to the case of the prosecution. They suggest that an incident of dacoity had taken place at the house of the deceased who was badly injured and taken to the hospital. There was a bomb blast at the house and the presence of these witnesses at the stated places cannot be doubted. It is a settled principle of law that the statement of a witness who has been declared hostile by the prosecution is neither inadmissible nor is it of no value in its entirety. The statement, particularly the examination-in-chief, in so far as it supports the case of the prosecution, is admissible and can be relied upon by the Court. [Paras 13 and 14] [993-H; 994-A-C]

Bhajju @ Karan v. State of Madhya Pradesh **(2012) 4 SCC 327 – relied on.**

2. PW8, PW9 and PW10, the eye-witnesses are the witnesses whose presence at the place of occurrence cannot be doubted as they were sleeping in their own house at such late hour of night. Out of these three witnesses, PW9 and PW10 were injured. These witnesses have categorically stated that a number of people had gathered there and had taken their injured parents to the hospital. These facts are duly corroborated even by the hostile witnesses PW1, PW3 and PW5. In face of this evidence, it cannot be said that these witnesses are not reliable or truthful. Their statement cannot be doubted merely by the virtue of their close relationship with the deceased. At such late hour of the night, their presence in their own house was normal. In fact, these witnesses lost their close relation and had suffered serious injuries

themselves. Thus, there is no occasion for them to falsely implicate the accused persons. As per the statement of the doctor and the investigating officer, the chain of events, as stated by the prosecution stands proved beyond reasonable doubt. These facts to some extent are even corroborated by the statement of hostile witnesses. [Paras 20 and 21] [999-B-G]

3. The evidence of the injured witnesses has to be examined in light of the statement of the doctors and the investigating officers. The doctor specifically stated that the wounds on the person of the deceased were sufficient to cause death and that the injuries were caused by a sharp weapon. To complete the chain of events, the prosecution had examined the investigating officer who conducted the investigation after it was marked to him for investigation. He had gone to the spot, prepared the site sketch map, sent the dead body for post mortem examination and seized ruminants of the crackers from the spot, blood-stained earth and other articles under the seizure list. He recorded the statement of various witnesses who stated that they could identify the dacoits. The statement of these witnesses read together clearly show that the prosecution has been able to prove its case beyond reasonable doubt. [Paras 21 and 23] [999-G; 1000-E-G]

4. The trial court acquitted the accused persons except the appellant, since there was no evidence of pre-determined mind of the accused persons to commit such an offence and except the appellant, other accused were not even identified. Even if other accused were acquitted in the above circumstances for an offence under Section 302/149 IPC, still there was direct evidence involving the appellant in committing the offence and particularly for causing the vital injuries to the deceased. The appellant had duly been identified by PW9, wife of the deceased

who was present in the room itself. There is no reason to disbelieve her statement. The injuries were caused with the intention to kill the deceased and they were caused on the vital parts of the body. From the medical evidence on record itself, it is clear that the ribs of the deceased were fractured, the abdominal wall was injured and on the head there was an injury which continued to bleed till death of the deceased. Due identification of role attributable to the appellant clearly establishes the ingredients of Section 302 IPC and thus, makes him liable to be punished for the said offence. [Para 25] [1001-D-H]

5. If five or more accused are charged with an offence under Section 302 read with Section 149 IPC and the Court finally finds that the person's identification, role and object in participation against some of those accused is not proved, still other persons forming the unlawful assembly and against whom the prosecution is able to prove its case beyond reasonable doubt can be punished for an offence under Sections 302/149 IPC. The statutory principle provided under the provision of Section 149 IPC will include the persons who were acquitted because that is the case of the prosecution. The conviction recorded by the trial court cannot be vitiated on that ground. [Para 26] [1002-A-C]

Khem Karan and Ors. v. The State of U.P. and Anr. **AIR 1974 SC 1567: 1974 (3) SCR 863 – relied on.**

6. The accused persons were charged for the offence u/s. 460 IPC and were tried for the same offence. The trial court has not returned any finding as to the guilt of the accused under Section 460 IPC and found the accused persons guilty of the offence under Section 302 read with Section 149 IPC. Even the High Court has not dwelled upon this discussion. The bare reading of s. 460 IPC shows that every person who is jointly concerned in

committing the offence of lurking house trespass by night or house breaking by night is to be punished with life imprisonment where death has been caused or with imprisonment which may extend to ten years where grievous hurt has been caused to any person. This joint liability is based upon the principle of constructive liability. Thus, the person who has actually committed the death or grievous hurt would be liable to be punished under the relevant provisions i.e. Section 302 or Section 326, as the case may be, while committing the offence of lurking house trespass by night. It is possible that common intention or object be not the foundation of an offence under Section 460 IPC. Thus, to establish an offence under Section 460, it may not be necessary for the prosecution to establish common intention or object. Suffice it will be to establish that they acted jointly and committed the offences stated in Section 460 IPC. The principle of constructive liability is applicable in distinction to contributory liability. Thus, the conviction of the accused under Section 302 IPC itself would be sustainable and the accused would be liable to be punished accordingly. [Paras 27, 28 and 29] [1003-A-B, F-H; 1004-A-B, D]

Abdul Aziz v. State of Rajasthan **(2007) 10 SCC 283: 2007 (5) SCR 1166 – relied on.**

Per Madan B. Lokur, J: (Supplementing)

In the present case, the investigation took almost four years to complete, despite eye-witnesses who knew the appellant. The trial concluded after another 14 years or about 18 years after the murder. This is a rather unhappy state of affairs. It is high time that the State and the Courts gear up their administrative machinery so that at least a trial for a heinous offence gets concluded within a reasonable period. [Para 2] [1004-G-H]

Case Law Reference:

(2012) 4 SCC 327	**Relied on**	**Para 14**
1974 (3) SCR 863	**Relied on**	**Para 26**
2007 (5) SCR 1166	**Relied on**	**Para 28**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 148 of 2007.

From the Judgment & Order dated 20.05.2005 of the High Court of Calcutta in Criminal Appeal No. 280 of 2001.

Rohit Minocha for the Appellant.

Kabir Shankar Bose, Abhijit Sengupta, Satish Vig for the Respondent.

The Judgments of the Court was delivered by

SWATANTER KUMAR, J. 1. The present appeal is directed against the concurrent judgment of conviction dated 29th June, 2001 and order of sentence dated 30th June, 2001 passed by the learned Additional Sessions Judge, Cooch Behar affirmed by judgment of the High Court dated 20th May, 2005.

2. The investigative machinery of the police was put into motion by one Shri Somnath Mukherjee son of Shri Barindra Nath Mukherjee, the deceased, by lodging a written complaint at about 8.00 a.m. on 9th October, 1983. According to the complainant at about 12.00 a.m. a dacoity took place in the house of Barindra Nath Mukherjee. It was further stated that 3-4 persons armed with weapons, criminally trespassed into the house, committed dacoity and also hurled bombs. First, they entered into the room of Barindra Nath Mukherjee and his wife Anuva Mukherjee, PW9, assaulted them and demanded the documents relating to their land-property. Thereafter, they entered into the room of the daughter of Barindra Nath

Mukherjee and searched for their only son, Somnath Mukherjee. The miscreants then attacked the room of the brother of Barindra Nath Mukherjee, Jiten Mukherjee, PW10 and even threw a bomb causing injury to the said Jiten. Barindra Nath Mukherjee, his wife, Anuva and brother Jiten were taken to the hospital the next morning. Due to the injuries inflicted by the miscreants upon Barindra Nath Mukherjee, he succumbed to his injuries in the hospital.

3. On the basis of the written complaint, the Police completed its investigation and submitted a charge sheet against five accused persons, namely, Chandra Kumar Das, Ram Kumar Das Rabindra Nath Sil, Haradhan Das and Krishna Kumar Das under Sections 458, 459, 326, 302 and 120B of the Indian Penal Code, 1860 (for short 'IPC'). However, charge against the accused persons were framed under Sections 148, 302/149, 326/149 and 460 of the IPC. The accused persons were committed to the Court of Sessions to face trial on these charges.

4. It may be noticed here that during the trial, one of the accused, namely, Krishna Kumar Das, died. Thus, the case against him came to be closed as having been abated. The prosecution examined as many as 18 witnesses including the daughter, injured witnesses, investigating officer, etc. The accused persons did not lead any defence and took up the plea of complete denial in their statement under Section 313 of the Code of Criminal Procedure, 1973 (for short 'CrPC'). The learned Trial Court, after discussing the ocular and the documentary evidence noticed that there was a long standing civil litigation between the parties and also found certain discrepancies in the case of the prosecution. It acquitted three accused persons, namely, Chandra Kumar Das, Ram Kumar Das and Rabindra Nath Sil of all the charges and directed their discharge. However, the Trial Court convicted the accused Haradhan Das for an offence punishable under Section 302/149 IPC and sentenced him to life imprisonment and to pay a

fine of Rs.10,000/- and in default to suffer imprisonment for one year under the said provision.

5. At this stage, I may usefully refer to the discussion of the Court as under:

> "I think on the facts and evidence of the witnesses as discussed above coupled with the medical evidence that there were no serious discrepancies between the testimonies of P.Ws.8 to 10, 14 and 15 and the story of the F.I.R. regarding the time, place and manner of occurrence and the name of the assailants as disclosed by P.Ws.8 to 10, 14 and 15 and duly corroborated by P.Ws.2 and 4, the evidence as it was held in a reported decision that the evidence of an eye witness were held to be true and reliable and it was further held that some discrepancies, deviating and embellishment a minor. This part of argument of learned lawyer for the defence since rather hallow to me as because there are many occasions where Haradhan and the accused persons have chances to meet the family members of Barin Muherjee. Now, from the side of the defence the certified copy of the plaint of T.S. 23/62 (Ext.A), certified copy of judgment of decree of Title Appeal no.20/63 (Ext.B), certified copy of judgment and decree of T.S. 23/62 (Ext.C) and certified copy of Appeal (Ext.D) are filed but all these exhibits do not at all help the accused persons. These only show that there are long standing Civil litigation in between the accused persons and the family member of Barin Mukherjee but pendency of these civil litigation or result does not give any person right to commit murder. If the witnesses who are near relation to Barin Mukherjee have hatred for the accused persons then they promptly named or identified all the four accused persons facing trial in the instant case. But Anuva Mukherjee and her three daughters and Daor have only stated that they have been able to identify Haradhan Das among the other miscreants. The presence

> of Anuva Mukherjee at the spot cannot be doubted. After perusing the evidence of Anuva Mukherjee and her daughters there is no such confimrity (sic) which may call upon the testimony of these witnesses doubtful or untrustworthy. It was held in a Calcutta decision that when there was no serious discrepancy between the testimony of eye witness and the story in the F.I.R. regarding the time, place and manner of the occurrence and the name of the assailants, the testimony of eye witness were also corroborated by medical evidence, the evidence of eye witness was held to be true and reliable and it was further held that some discrepancies deviation and embellishment in minor details do not warrant rejection of the entire testimony. May be I pointed earlier that according to settled position of law the evidence of injured witnesses as in this case Anuva Mukherjee (P.W.9) cannot be easily discarded and disbelieved because their presence at the time of occurrence remains doubted. Merely because their relation to each other, their evidence cannot be thrown overboard on that ground alone when there are convincing reason to accept them.
>
> Thus, it is established from the evidence adduced from the prosecution side as well as from the defence that the injury upon Barin Mukherjee is done by Haradhan Das. Thus, I have no hesitation to hold that Haradhan Das is responsible for the murder of Barin Mukherjee but there is no sufficient evidence to show who assaulted Anuva Mukherjee (P.W.9) and Jiten Mukherjee (P.W.10) have not stated anything against other three accused persons and so they are entitled to get reasonable benefit of doubt. Thus, the prosecution has been able to bring home the charge under Section 149/302 IPC against the accused Haradhan Das and the accused Chandra Kumar Das, Ram Kumar Das and Rabindra Nath Sil are entitled to get reasonable benefit of doubt in the instant case.

In the premises, on consideration of the facts, circumstances and materials on record the prosecution, as I find, has been able to bring home the charge under Section 149/302 IPC against the accused Haradhan Das beyond all reasonable doubt. As such, the said accused Haradhan Das is found guilty under Section 149/302 I.P.C. and the accused Chandra Kumar Das, Ram Kumar Das and Rabindra Nath Sil are found not guilty of the charge labelled against them and as such they are acquitted from this case under Section 235(1) Cr.P.C. and be discharged from their respective bail bonds at once."

6. The High Court affirmed the judgment of the Trial Court. Aggrieved from the judgment of the High Court, Haradhan Das, the accused, has filed the present appeal before this Court.

7. The learned counsel appearing for the appellant has, with some vehemence, argued that :

(a) There was common evidence against all the accused persons and the learned Trial Court as well as the High Court having acquitted three other accused persons could not have returned a finding of conviction against the appellant. Conviction of the appellant was not even permissible with the aid of Section 149 IPC. The judgment under appeal, thus, suffers from a patent error of law and that of appreciation of evidence.

(b) No specific role was assigned to the appellant and, therefore, he could not be convicted for the offence.

(c) PW1, PW3 and PW5 had been declared hostile by the prosecution. This aspect seen in conjunction with the fact that no recoveries were made from the appellant, he was entitled to benefit of doubt and, thus, to an order of acquittal.

8. To the contra, the submission on behalf of the State is that the accused has rightly been convicted for an offence under Section 302/149 IPC. Even if, for the sake of argument, it is assumed that the said offence was not made out, still the appellant could be convicted for committing an offence under Section 460 IPC, the offence for which the accused was charged and tried.

9. From the above version of the prosecution, it is clear that the miscreants had come to the house of Barindra Nath Mukherjee on 9th October, 1983. They had committed dacoity, injured persons including Barindra Nath Mukherjee very seriously and had even asked for the papers of the land-property for which a civil dispute was pending between the parties.

10. First and foremost, I may deal with the effect of the hostile witnesses. PW1, Bhiguram Sealsarama in his examination-in-chief has stated that he was sleeping on the night of occurrence at his house and after hearing the hue and cry, two persons namely Dhurjadhan Sarkar and Aloke had come to his house and told him that the condition of Somnath's father was serious. He made his statement 13-14 years subsequent to the date of event. He stated that one Khagen had taken father of Somnath on rickshaw to the hospital while he had taken Somnath and his mother to the hospital. After reaching the house of Barindra Nath Mukherjee, at about 1.00 a.m. in the night he had heard that a dacoity had taken place in that house. He also heard that the dacoits had hurled bombs. However, he stated that he did not know who had committed the dacoity. Subsequently, he was declared hostile by the prosecution.

11. PW3, Khagen Das, stated that at about 1.00 a.m. in the night a dacoity was committed in the house of Barindra Nath Mukherjee. There was a *pucca* road between his house and the house of Barindra Nath Mukherjee. He also rushed to the house of Barindra Nath Mukherjee after hearing the hue and

cry from that house. He found Barindra Nath Mukherjee in blood-stained condition with head injury. His wife had also sustained serious injuries all over her body. Barindra Nath Mukhrejee's younger brother had also received injury by bomb. In his van he had taken Sima, Barindra Nath Mukherjee and Hiru to MJN Hospital, Cooch Behar. He had heard from members of the family of Barindra Nath Mukherjee that 6-7 persons had committed dacoity in their house. However, they did not tell him who had committed the dacoity at that stage. He was also declared hostile.

12. PW5, Bidhan Das stated that about 17 years ago, an incident had taken place at Barindra Nath Mukherjee's house. He was a member of the R.G. party who were patrolling from village to railway over bridge of the pucca road. A jeep was coming from Alipurduar side near the village and before they could reach near the jeep, it went away towards the southern direction. The jeep came back after 10-15 minutes when they were on the *pucca* road. They heard the sound of door breaking from a distance. There were sounds of hue and cry. Some people came to them and after crossing the bridge they heard the sound of a bomb blast. People started walking towards the house and on the way they saw that Barindra Nath Mukherjee was being taken to the hospital by the rickshaw van. They walked towards Barindra Nath Mukherjee's house. According to this witness, Barindra Nath Mukherjee had three daughters who were present in the house and the young daughter Latu was his student. At their request PW5 along with the members of his party stayed in the house of the deceased, Barindra Nath Mukherjee, till the next morning but they did not inform or disclose the identity of the miscreants. At this stage, this witness was declared hostile.

13. No doubt, these three witnesses were declared hostile by the prosecution but still one fact remains that the examination-in-chief and particularly the above recorded portions of their statements do provide support to the case of

the prosecution. They suggest that an incident of dacoity had taken place at the house of Barindra Nath Mukherjee who was badly injured and taken to the hospital. There was a bomb blast at the house and the presence of these witnesses at the stated places cannot be doubted. One of them was staying opposite to the house of Barindra Nath Mukherjee while the other was at some distance and PW5 was on R.G. Duty.

14. It is a settled principle of law that the statement of a witness who has been declared hostile by the prosecution is neither inadmissible nor is it of no value in its entirety. The statement, particularly the examination-in-chief, in so far as it supports the case of the prosecution is admissible and can be relied upon by the Court. It will be useful at this stage to refer to the judgment of this Court in the case of *Bhajju @ Karan v. State of Madhya Pradesh* [(2012) 4 SCC 327] where this Court, after discussing the law in some elaboration, declared the principle as follows:-

> "**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.
>
> **34.** Para 6 of the said judgment reads as under: (*Munnu Raja case*, SCC pp. 106-07)
>
> "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 BombayAIR 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 CrPC, 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".

15. Another important aspect of the case is that all these witnesses had appeared at the place of occurrence or near the place of occurrence or in the house of Barindra Nath Mukherjee only after the incident was over. Even if these witnesses were informed by some other persons as to how the incident had occurred or other persons including injured persons as to how the incident took place once they arrived at the place of occurrence, it may not have been a very valuable piece of evidence as *ex facie* it would be hearsay evidence. It is not the quantity but the quality of evidence which is of Court's concern.

16. Now, I should examine the above version stated by

these hostile witnesses in conjunction with the statement of the eye-witnesses and other crucial witnesses produced by the prosecution. Unfortunately, Somnath Mukherjee, son of the deceased who was an eye-witness to the entire episode right from the beginning to the end, died during the pendency of the trial without appearing in the Court as a witness. According to PW10, Jiten Mukherjee, Somnath Mukherjee, son of the deceased on the relevant date, was sleeping in the western side room of southern viti with him. His four nieces along with their maternal uncle Biswajit were sleeping in the eastern side of the room of the southern viti. According to this witness, at about 12.30 a.m., he had heard hue and cry from the room of his elder brother, late Barindra Nath Mukherjee. He had also heard a person demanding papers from his elder brother. Then there was total silence. In the light of a torch which was in the hands of the miscreants, he was able to identify Haradhan Das. He could even identify this accused from his voice. He stated that he knew Haradhan Das prior to the incident. Then, the miscreants entered into the room of his niece by breaking open the door. They were looking for Somnath. Sima, his niece, informed them that Somnath was out of station. He heard all of this and saw the accused Haradhan Das by peeping through the wall made of bamboo. Sima offered articles to miscreants but they refused to take anything. When the miscreants were moving in the courtyard, PW10 was able to identify Ram Kumar Das and Chandra Kumar Das in the light of the torch. They were armed with bamboo sticks. The miscreants then hurled a bomb in the room where this witness was staying. He suffered injuries on his leg as a result of the bomb. Thereafter, they fled away and when PW10 came out of his room and rushed to his elder brother's room, he found that his brother was bleeding and was badly injured and that his sister-in-law had become unconscious. A lot of other people had also gathered there. PW10 narrated the incident to them and shifted the injured to the hospital. The inquest report, Ext.2 was prepared in his presence and it bore his signatures. He identified the accused persons in Court.

17. PW8, Smt. Sima Mukherjee is the daughter of the deceased. According to this witness, she along with her sisters and maternal uncle, Biswajit Chatterjee, was sleeping in the eastern side of the room of southern viti. She heard sound of door of the room of her father breaking. She woke up and heard her parents crying. She also recognized Haradhan Das from his voice as well as the other accused. She confirmed that the accused were asking for her brother, Somnath. After the miscreants left the premises, they took their parents to hospital in two rickshaw vans and on the way, her mother told her that they were assaulted by Haradhan Das and that she had identified him in the torch light. The accused, Haradhan Das, Ram Kumar Das and Chandra Kumar Das were identified by Sima, her uncle, PW10, and her brother Somnath. On the next day, her father died of the injuries. In her statement, she categorically stated that there was a long standing dispute between the accused and her father which they had won and the judgment had been passed in their favour. She also stated that many people had assembled at the place of incident.

18. PW9, Anuva Mukherjee, is an injured eye-witness and is wife of the deceased. She stated that there was dacoity in their house at about 12.30 a.m. on 8th October, 1983. She gave complete description of her family and stated that three miscreants had entered into their room by breaking open the door and after entering they demanded the deed of their land and other documents relating thereto. She told them that the papers were in Court but on hearing that they pulled down the deceased from the cot and started assaulting him with weapons. The deceased begged for mercy but to no avail. As a result of the assault, her husband Barindra Nath Mukherjee sustained serious injuries. Then they assaulted her by giving her a dagger blow on her head and even she sustained injuries. Thereafter she became unconscious. She could identify Haradhan Das in the light of the torch. She heard about the rest of the incident from her Devar, PW10, Jiten and her daughter.

19. PW 14 and PW15, namely, Ketaki and Shipra, the daughters of the deceased were also examined as witnesses and they duly supported the case of the prosecution on similar lines as PW8, PW9 and PW10. They had also identified Haradhan Das in light of the torch.

20. All these three witnesses, PW8, PW9 and PW10 were cross-examined at great length but nothing material or damaging to the case of the prosecution could come out. These are the witnesses whose presence at the place of occurrence cannot be doubted as they were sleeping in their own house at such late hour of night. Out of these three witnesses, PW9 and PW10 were injured. These witnesses have categorically stated that a number of people had gathered there and had taken their injured parents to the hospital. These facts are duly corroborated even by the hostile witnesses, PW1, PW3 and PW5. In face of this evidence, the contention of the appellant that these witnesses are not reliable or truthful is without any substance. Their statement cannot be doubted merely by the virtue of their close relationship with the deceased. At such late hour of the night, their presence in their own house was normal. In fact, these witnesses lost their close relation and had suffered serious injuries themselves. Thus, there is no occasion for them to falsely implicate the accused persons. As per the statement of the doctor and the investigating officer, the chain of events, as stated by the prosecution stands proved beyond reasonable doubt. To this extent, the findings recorded by the Courts do not call for interference.

21. These facts to some extent are even corroborated by the statement of hostile witnesses PW1, PW3 and PW5. The evidence of the injured witnesses has to be examined in light of the statement of the doctors and the investigating officers. According to PW16, Dr. V. Kumar who had examined Barindra Nath Mukherjee when he was brought to the hospital, the son of the patient had disclosed to him that the patient was attacked by some persons at his residence at about 12.30 a.m. with

some sharp weapon. The patient was extremely restless, his pulse was not recordable and respiration was 30 per minute. There was active bleeding from the left ear. The injuries on the deceased were noticed as follows:-

> "1. One sharp cut injury 3½" x 1" over deep encircling the base of left thumb & dorsal and palmar aspect of left palm.
>
> 2. Another sharp cut injury 2½" x 1" over lateral aspect of lower 1/3rd of left arm."

22. According to PW16, the patient Barindra Nath Mukherjee died on the same day, i.e. 9th October, 1983. The post mortem on the body of the deceased was performed by PW11, Dr. S.C. Pandit, who noticed the above injuries and also stated in the Court that upon dissection, he noticed that the abdominal wall and the spleen were injured and there was a fracture in the left temporal.

23. The doctor specifically stated that these kind of wounds were sufficient to cause death and that the injuries were caused by a sharp weapon. To complete the chain of events, the prosecution had examined PW18, the investigating officer who conducted the investigation after it was marked to him for investigation. He had gone to the spot, prepared the site sketch map, Ext.8, sent the dead body for post mortem examination and seized ruminants of the crackers from the spot, blood stained earth and other articles under the seizure list Ext. 4/1. He recorded the statement of various witnesses who stated that they could identify the dacoits. The statement of these witnesses read together clearly show that the prosecution has been able to prove its case beyond reasonable doubt. I see no reason to interfere with the findings of the Court, recorded in the judgments impugned in the present appeal.

24. The accused persons were charged under Section 302 read with Sections 149, 148 and 326 as well as Section 460 IPC. The FIR had been lodged by Somnath Mukherjee, son

of the deceased who, as already noticed, expired during the course of the trial. As per the statement of witnesses, the miscreants were five in number. The present appellant had duly been identified by the injured witnesses as well as by other persons who were present in the house at the time of occurrence. The Trial Court acquitted three accused primarily on the ground that they had not been identified and there was no direct evidence implicating the said three accused in the commission of the crime. This finding of the Trial Court had attained finality as the State did not challenge the same. One accused died during the trial.

25. The appellant alone has been found guilty and punished by the Trial Court and his sentence stands confirmed by the High Court. Five persons had got together to commit the offence of lurking house trespass and causing the death of Barindra Nath Mukherjee. Since there was no evidence of pre-determined mind of the accused persons to commit such an offence and except the appellant other accused were not even identified, the Trial Court acquitted the accused persons except the appellant. Even if other accused were acquitted in the above circumstances for an offence under Section 302/149 IPC, still there was direct evidence involving the appellant in committing the offence and particularly for causing the vital injuries to the deceased. The appellant had duly been identified by PW9, wife of the deceased who was present in the room itself. There is no reason to disbelieve her statement. The injuries were caused with the intention to kill the deceased and they were caused on the vital parts of the body. From the medical evidence on record itself, it is clear that the ribs of the deceased were fractured, the abdominal wall was injured and on the head there was an injury which continued to bleed till death of the deceased. Due identification of role attributable to the appellant clearly establishes the ingredients of Section 302 IPC and thus, makes him liable to be punished for the said offence.

26. If five or more accused are charged with an offence under Section 302 read with Section 149 IPC and the Court finally finds that the person's identification, role and object in participation against some of those accused is not proved, still other persons forming the unlawful assembly and against whom the prosecution is able to prove its case beyond reasonable doubt can be punished for an offence under Sections 302/149 IPC. The statutory principle provided under the provision of Section 149 IPC will include the persons who were acquitted because that is the case of the prosecution. The conviction recorded by the Trial Court cannot be vitiated on that ground. This Court in the case of *Khem Karan and Others v. The State of U.P. and Another* [AIR 1974 SC 1567], while discussing somewhat similar circumstances and dealing with an offence under Section 307 read with Section 149 IPC, applied the principle of constructive liability and held as under:-

> "7. What remains is the question of sentence. It is true that those assailants who did not receive injuries have escaped punishment and conviction has been clamped down on those who have sustained injuries in the course of the clash. It is equally true that those who have allegedly committed the substantive offences have jumped the gauntlet of the law and the appellants have been held guilty only constructively. We also notice that the case has been pending for around ten years and the accused must have been in jail for some time, a circumstance which is relevant under the new Criminal Procedure Code though it has come into operation only from April 1, 1974. Taking a conspectus of the various circumstances in the case, some of which are indicated above, we are satisfied that the ends of justice would be met by reducing the sentence to three years rigorous imprisonment under S. 307, read with S. 149, and one year rigorous imprisonment under S. 147, IPC, the two terms running concurrently. With this modification regarding sentence, we dismiss the appeal."

27. There is another perspective from which the present case can be examined. As already noticed, the accused persons were charged for the offence under Section 460 IPC and were tried for the same offence. The Trial Court has not returned any finding as to the guilt of the accused under Section 460 IPC and found the accused persons guilty of the offence under Section 302 read with Section 149 IPC. Even the High Court has not dwelled upon this discussion in the judgment impugned. The provisions of Section 460 IPC read as follows:-

> "**460. All persons jointly concerned in lurking house-trespass or house- breaking by night punishable where death or grievous hurt caused by one of them.**—If, at the time of the committing of lurking house-trespass by night or house- breaking by night, any person guilty of such offence shall voluntarily cause or attempt to cause death or grievous hurt to any person, every person jointly concerned in committing such lurkking house-trespass by night or house- breaking by night, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

28. The bare reading of the above provision shows that every person who is jointly concerned in committing the offence of lurking house trespass by night or house breaking by night is to be punished with life imprisonment where death has been caused or with imprisonment which may extend to ten years where grievous hurt has been caused to any person. This joint liability is based upon the principle of constructive liability. Thus, the person who has actually committed the death or grievous hurt would be liable to be punished under the relevant provisions i.e. Section 302 or Section 326, as the case may be, while committing the offence of lurking house trespass by night. It is possible that common intention or object be not the foundation of an offence under Section 460 IPC. Thus, to

establish an offence under Section 460, it may not be necessary for the prosecution to establish common intention or object. Suffice it will be to establish that they acted jointly and committed the offences stated in Section 460 IPC. The principle of constructive liability is applicable in distinction to contributory liability. This Court in the case of *Abdul Aziz v. State of Rajasthan* [(2007) 10 SCC 283], clearly stated that if a person committing housebreaking by night also actually commits murder, he must attract the penalty for the latter offence under Section 302 and the Court found it almost impossible to hold that he can escape the punishment provided for murder merely because the murder was committed by him while he was committing the offence of housebreaking and that he can only be dealt with under Section 460.

29. Viewed from this angle, the conviction of the accused under Section 302 itself would be sustainable and the accused would be liable to be punished accordingly.

30. For the reasons afore-recorded, I see no reason to interfere with the judgments impugned in the present appeal. Consequently, the appeal is dismissed.

MADAN B. LOKUR, J. 1. While agreeing with Brother Swatanter Kumar, I would like to add that the murder was committed on the intervening night of 8th and 9th October, 1983. A charge sheet was filed sometime in 1987 and the Trial Court delivered its judgment on 29th June, 2001. These time gaps are telling.

2. The investigation took almost four years to complete despite eyewitnesses who knew the appellant. The trial concluded after another 14 years or about 18 years after the murder. This is a rather unhappy state of affairs. It is high time that the State and the Courts gear up their administrative machinery so that at least a trial for a heinous offence gets concluded within a reasonable period.

K.K.T. Appeal dismissed.

VINAY TYAGI
v.
IRSHAD ALI @ DEEPAK & ORS.
(Criminal Appeal Nos. 2040-41 of 2012)

DECEMBER 13, 2012

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

Code of Criminal Procedure, 1973:

s.173 – Whether in exercise of its powers u/s.173, the trial court has the jurisdiction to ignore any one of the reports, where there are two reports by the same or different investigating agencies in furtherance of the orders of a Court and if so, to what effect – Held: The court of competent jurisdiction is duty bound to consider all reports, entire records and documents submitted therewith by the Investigating Agency as its report in terms of s.173(2) – This Rule is subject to only the following exceptions; (a) Where a specific order has been passed by the Magistrate at the request of the prosecution limited to exclude any document or statement or any part thereof; (b) Where an order is passed by the higher courts in exercise of its extra-ordinary or inherent jurisdiction directing that any of the reports i.e. primary report, supplementary report or the report submitted on 'fresh investigation' or 're-investigation' or any part of it be excluded, struck off the court record and be treated as non est.

s.173 – Whether the Central Bureau of Investigation (CBI) is empowered to conduct 'fresh'/'re-investigation' when the cognizance has already been taken by the Court of competent jurisdiction on the basis of a police report u/s.173 – Held: No investigating agency is empowered to conduct a 'fresh', 'de novo' or 're-investigation' in relation to the offence for which it has already filed a report in terms of s.173(2) – It is only upon the orders of the higher courts empowered to

pass such orders that aforesaid investigation can be conducted, in which event the higher courts will have to pass a specific order with regard to the fate of the investigation already conducted and the report so filed before the court of the Magistrate.

The following questions arose for consideration of this Court in the present appeal:1) Whether in exercise of its powers under Section 173 CrPC, the Trial Court has the jurisdiction to ignore any one of the reports, where there are two reports by the same or different investigating agencies in furtherance of the orders of a Court and if so, to what effect and 2) Whether the Central Bureau of Investigation (CBI) is empowered to conduct 'fresh'/'re-investigation' when the cognizance has already been taken by the Court of competent jurisdiction on the basis of a police report under Section 173 CrPC.

Partly allowing the appeal, the Court

HELD: 1.1. The court of competent jurisdiction is duty bound to consider all reports, entire records and documents submitted therewith by the Investigating Agency as its report in terms of Section 173(2) CrPC. This Rule is subject to only the following exceptions; (a) Where a specific order has been passed by the Magistrate at the request of the prosecution limited to exclude any document or statement or any part thereof; (b) Where an order is passed by the higher courts in exercise of its extra-ordinary or inherent jurisdiction directing that any of the reports i.e. primary report, supplementary report or the report submitted on 'fresh investigation' or 're-investigation' or any part of it be excluded, struck off the court record and be treated as *non est*. [Para 40] [1043-H; 1044-A-D]

1.2. No investigating agency is empowered to conduct a 'fresh', '*de novo*' or 're-investigation' in relation

to the offence for which it has already filed a report in terms of Section 173(2) of CrPC. It is only upon the orders of the higher courts empowered to pass such orders that aforesaid investigation can be conducted, in which event the higher courts will have to pass a specific order with regard to the fate of the investigation already conducted and the report so filed before the court of the magistrate. [Para 40] [1044-E-F]

1.3. In the present case, report in terms of Section 173(2) CrPC had already been filed by the Special Cell of the Delhi Police even before the investigation was handed over to CBI to conduct preliminary inquiry. Furthermore, the final investigation on the basis of the preliminary report submitted by the CBI had also not been handed over to CBI at that stage. Once a Report under Section 173(2) CrPC has been filed, it can only be cancelled, proceeded further or case closed by the court of competent jurisdiction and that too in accordance with law. Neither the Police nor a specialised investigating agency has any right to cancel the said Report. In the present case, the High Court had passed no order or direction staying further investigation by the Delhi Police or proceedings before the court of competent jurisdiction. On the contrary, the court had noticed explicitly in its order that it was a case of supplementary or further investigation and filing of a 'supplementary report'.Once the Court has taken this view, there is no question of treating the first report as being withdrawn, cancelled or capable of being excluded from the records by the implication. In fact, except by a specific order of a higher court competent to make said orders, the previous as well as supplementary report shall form part of the record which the trial court is expected to consider for arriving at any appropriate conclusion, in accordance with law. The CBI itself understood the order of the court

and conducted only 'further investigation' as is evident from the status report filed by the CBI before the High Court. The trial court, therefore, has to consider the entire record, including both the Delhi Police Report filed under Section 173(2) CrPC as well as the Closure Report filed by the CBI and the documents filed along with these reports. The trial court may have three options, firstly, it may accept the application of accused for discharge. Secondly, it may direct that the trial may proceed further in accordance with law and thirdly, if it is dissatisfied on any important aspect of investigation already conducted and in its considered opinion, it is just, proper and necessary in the interest of justice to direct 'further investigation', it may do so. [Paras 47, 48, 49, 50, 51 and 52] [1047-E-H; 1048-A-F]

Amit Kapur v. Ramesh Chander & Anr. **JT 2012 (9) SC 329;** *Sidhartha Vashisht v. State (NCT of Delhi)* **(2010) 6 SCC 1: 2010 (4) SCR 103;** *Gudalure M.J. Cherian & Ors. v. Union of India & Ors.* **(1992) 1 SCC 397: 1991 (3) Suppl. SCR 251;** *R.S. Sodhi, Advocate v. State of U.P.* **1994 SCC Supp. (1) 142;** *K. Chandrasekhar v. State of Kerala* **(1998) 5 SCC 223: 1998 (3) SCR 72;** *Ramachandran v. R. Udhayakumar* **(2008) 5 SCC 413: 2008 (8) SCR 439;** *Nirmal Singh Kahlon v State of Punjab & Ors.* **(2009) 1 SCC 441: 2008 (14) SCR 1049;** *Mithabhai Pashabhai Patel & Ors. v. State of Gujarat* **(2009) 6 SCC 332: 2009 (7) SCR 1126;** *Babubhai v. State of Gujarat* **(2010) 12 SCC 254: 2010 (10) SCR 651;** *State of Punjab v. Central Bureau of Investigation* **(2011) 9 SCC 182: 2011 (11) SCR 281;** *Minu Kumari & Anr. v. State of Bihar & Ors.* **(2006) 4 SCC 359: 2006 (3) SCR 1086;** *Hemant Dhasmana v. CBI* **(2001) 7 SCC 536: 2001 (1) Suppl. SCR 646;** *Union Public Service Commission v. S. Papaiah & Ors* **(1997) 7 SCC 614: 1997 (4) Suppl. SCR 56;** *State of Orissa v. Mahima* **(2003) 5 SCALE 566;** *Kishan Lal v. Dharmendra Bhanna & Anr.* **(2009) 7 SCC 685: 2009 (11) SCR 234;** *State of Maharashtra v. Sharat Chandra*

Vinayak Dongre **(1995) 1 SCC 42: 1994 (4) Suppl. SCR 378;** *Bhagwant Singh v. Commissioner of Police & Anr.* **(1985) 2 SCC 537: 1985 (3) SCR 942;** *Reeta Nag v. State of West Bengal & Ors.* **(2009) 9 SCC 129: 2009 (13) SCR 276;** *Ram Naresh Prasad v. State of Jharkhand and Others* **(2009) 11 SCC 299: 2009 (2) SCR 369;** *Randhir Singh Rana v. State (Delhi Administration)* **(1997) 1 SCC 361: 1996 (10) Suppl. SCR 880;** *Disha v. State of Gujarat & Ors.* **(2011) 13 SCC 337: 2011 (9) SCR 359;** *Vineet Narain & Ors. v. Union of India & Anr*. **(1998) 1 SCC 226: 1997 (6) Suppl. SCR 595;** *Union of India & Ors. v. Sushil Kumar Modi & Ors.* **1996 (6) SCC 500: 1996 (8) Suppl. SCR 393;** ***Rubabbuddin Sheikh v. State of Gujarat & Ors.*** **(2010) 2 SCC 200: 2010 (1) SCR 991 and** *Sivanmoorthy and Others v. State represented by Inspector of Police* **(2010) 12 SCC 29 – referred to.**

Case Law Reference:

JT 2012 (9) SC 329	**referred to**	**Para 11**
2010 (4) SCR 103	**referred to**	**Para 16**
1991 (3) Suppl. SCR 251	**referred to**	**Para 16**
1994 SCC Supp. (1) 142	**referred to**	**Para 16**
1998 (3) SCR 72	**referred to**	**Para 18**
2008 (8) SCR 439	**referred to**	**Para 18**
2008 (14) SCR 1049	**referred to**	**Para 18**
2009 (7) SCR 1126	**referred to**	**Para 18, 21**
2010 (10) SCR 651	**referred to**	**Para 18**
2011 (11) SCR 281	**referred to**	**Para 20**
2006 (3) SCR 1086	**referred to**	**Para 22**
2001 (1) Suppl. SCR 646	**referred to**	**Para 23, 26**

1997 (4) Suppl. SCR 56	**referred to**	**Para 24, 25, 26**
(2003) 5 SCALE 566	**referred to**	**Para 24**
2009 (11) SCR 234	**referred to**	**Para 24**
1994 (4) Suppl. SCR 378	**referred to**	**Para 24**
1985 (3) SCR 942	**referred to**	**Para 26, 29**
2009 (13) SCR 276	**referred to**	**Para 27, 29**
2009 (2) SCR 369	**referred to**	**Para 27 29**
1996 (10) Suppl. SCR 880	**referred to**	**Para 27, 29**
2011 (9) SCR 359	**referred to**	**Para 34**
1997 (6) Suppl. SCR 595	**referred to**	**Para 34**
1996 (8) Suppl. SCR 393	**referred to**	**Para 34**
2010 (1) SCR 991	**referred to**	**Para 34**
(2010) 12 SCC 29	**referred to**	**Para 40**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 2040-2041 of 2012 etc.

From the Judgment & Order dated 28.08.2009 of the High Court of Delhi at New Delhi in Criminal Revision No. 107 of 2009 & Criminal Miscellaneous Case No. 781 of 2009.

WITH

Crl. A. No. 2044, 2045, 2042-2043 of 2012.

Mukul Gupta, U.U. Lalit, Pramod Kumar Dubey, C.D. Singh, Smriti Sinha, Parul Thapliyal, Shiv Chopra, Vibhor Garg, T.A. Khan, Sangram Singh, B.V. Balramdas, A.K. Sharma, Umesh Joshi, Anil Katiyar, M. Sufian Siddiqui, M. Tabish Zia, Aftab Ali Khan, Narendra Kumar, Pravesh Thakur, Abhishek C. Kannan for the appearing parties.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Leave Granted.

2. The following two important questions of law which are likely to arise more often than not before the courts of competent jurisdiction fall for consideration of this Court in the present appeal :

Question No.1: Whether in exercise of its powers under Section 173 of the Code of Criminal Procedure, 1973 (for short, 'the Code'), the Trial Court has the jurisdiction to ignore any one of the reports, where there are two reports by the same or different investigating agencies in furtherance of the orders of a Court? If so, to what effect?

Question No.2: Whether the Central Bureau of Investigation (for short 'the CBI') is empowered to conduct 'fresh'/'re-investigation' when the cognizance has already been taken by the Court of competent jurisdiction on the basis of a police report under Section 173 of the Code?

Facts :-

3. Irshad Ali @ Deepak, Respondent No.1, in the present appeal was working as an informer of the Special Cell of Delhi Police in the year 2000. He was also working in a similar capacity for Intelligence Bureau. Primarily, his profession and means of earning his livelihood was working as a rickshaw puller. On 11th December, 2005, it is stated that he had a heated conversation with the Intelligence Bureau officials for whom he was working. It was demanded of him that he should join a militant camp in Jammu & Kashmir in order to give information with respect their activities to the Intelligence Bureau. However, the said respondent refused to do the job

and consequently claims that he has been falsely implicated in the present case. In fact, on 12th December, 2005, a report was lodged regarding disappearance of respondent no.2 by his family members at Police Station, Bhajanpura, Delhi. Not only this, the brother of the respondent no.2 also sent a telegram to the Prime Minister, Home Minister and Police Commissioner on 7th and 10th January, 2006, but to no avail. On 9th February, 2006, a report was published in the Hindustan Times newspaper, Delhi Edition, through SHO, Police Station, Bhajanpura, Delhi with the photograph of respondent no.2 seeking help of the general public in tracing him. On that very evening, it is stated that the Special Cell of the Delhi Police falsely implicated both the respondents in a case, FIR No. 10/ 2006, under Sections 4 and 5 of the Explosive Substances Act and under Section 120B, 121 and 122 of the Indian Penal Code, 1860 (for short 'IPC') read with Section 25 of the Arms Act. Both the respondents were described as terrorists. In the entire record, it was not stated that the respondents were working as informers of these agencies. At this stage, it will be pertinent to refer to the FIR that was registered against the accused persons, relevant part of which can usefully be extracted herein: -

> "To, the Duty Officer, PS Special Cell, Lodhi Colony, New Delhi. During the 3rd week of January, 2006 information was received through Central Intelligence Agency that militant of Kashmir based Organisation has set up a base in Delhi. One Irshad Ali @ Deepak is frequently visiting Kashmir to get arms, ammuniation and explosives or the instructions from their Kashmir based Commanders. He is also visiting different parts of the country to spread the network of the militant organizations. As per the directions of senior officers, a team under the supervision of Sh. Sanjeev Kumar, ACP Special Cell led by Inspector Mohan Chand Sharma was formed to develop this information and identify Irshad and 'his whereabouts in Sultanpuri area, Secret sources were deployed. During the course of

developments of information, it came to knowledge that above noted Irshad Ali @ Deepak is resident of Inder Enclave, Phase-II, Sultanpuri, Delhi. It also came to notice that one Mohd. Muarif Qamar @ Nawab r/o Bhajanpura, Delhi is also associated with the militant organization. During the development of this information, it was revealed that both Irshad Ali and nawab had gone to J&K on the directions of their handlers to receive a consignment of arms and explosives. Today on February 09, 2006 at about 4 PM, one of these sources telephonically informed SI Vinay Tyagi in the office of Special Cell, Lodhi Colony that Irshad A.li(sic) @ Deepak along with his associate Mohd. Muarif Qamar @ Nawab R/o Bajanpura, Delhi is coming from Jammu in JK SRTC Bus No. JK-02 Y-0299 with a consignment of explosives, arms & ammunition and will alight at Mukarba Chowk, near Karnal Bypass in the evening. This information was recorded in Daily Dairy (sic) and discussed with senior officers. A team consisting of Insp. Sanjay Dutt, myself, SI Subhash Vats, SI Rahul, SI Ravinder Kumar Tyagi, S.I Dalip Kumar, SI Pawan Kumar, ASI Anil Tyagi, ASI Shahjahan, HC Krishna Ram, HC Nagender, HC Rustam, Ct. Rajiv and Ct. Rajender was constituted to act upon this information. Thereafter the team members in 3 private vehicles and 2 two wheelers armed with official weapons as per Malkhana register, departed from the office of Special Cell, Lodhi Colony at about 4.30 PM and reached G.T. Karnal Depot at 5.30 PM where Insp. Sanjay Dutt met the informer. Insp. Sanjay Dutt asked 6/7 persons to join the police party after disclosing them about the information. All of them went away citing genuine excuses. The police party was briefed by Insp. Sanjay Dutt and was deployed around Mukarba Chowk, Interstate Bus Stand. At about 7.35 PM, above mentioned Irshad and Nawab were identified by the informer when they had alighted from the bus No.JK-02 Y-0299 coming from Jammu. Both were scene (sic) carrying blue and green-red check coloured airbags each on their right

shoulders. In the meantime, team posted near by was alerted and when they were about to cross the outer Ring Road to go towards Rohini side, were overpowered. Cursory search of the above-mentioned persons was conducted and from the right *dhub* of the pant worn by Mohd Muarif Qamar @ Nawab mentioned above, apprehended by me with the help of Dalip Kumar, one Chinese pistol star Mark.30 calibre along with 8 live cartridges in its magazine was recovered. On measuring the length of the barrel and body 19.4 cms, magazine 10.8 cms, butt 8.9 cms and diagonal length of pistol is 21.5 cms Number 19396 is engraved on the butt of the pistol. On checking the blue coloured bag recovered from the possession of Nawab, one white envelope containing non-electronic detonators, one ABCD green coloured Timer, one AB cream coloured Timer was also recovered which was concealed beneath the layers of clothes including one light blue coloured shirt and dark gray coloured pant in the bag, and from the red green coloured bag recovered from the possession of Irshad Ali mentioned above, apprehended by SI Ravinder Tyagi with the help of Ct. Rajender Kumar, one Chinese pistol star Mark .30 calibre along with 8 live cartridges in its magazine was recovered. On measuring the length of the barrel and body 19.4 cms, magazine 10.8 cms, butt 8.9 cms and diagonal length of pistol is 21.5 cms, Number 33030545 is engraved on the barrel and body of the pistol. One white polythene containing a mixture of black and white oil based explosive material kept in a black polythene and was also concealed beneath the layers of clothes. On weighing the explosive was found to be 2 kg. Out of this two samples of 10 gms each were taken out in white plastic small jars. The remaining recovered explosive kept back in black polythene, pulinda prepared and sealed with the seal of 'VKT'. Sample explosive were marked as S1 and S2 and sealed with the seal of 'VKT'. The ABCD timer and AB Timer were kept in a plastic jar and sealed with the seal

of 'VKT' marked as 'T' and 3 non electric detonators along with envelope were kept in a transparent plastic jar with the help of cotton and sealed with the seal of "VKT' marked as 'D'. The recovered Star Mark pistol from the possession of accused Mohd. Muarif @ Nawab and Irshad ali were kept in separate pulindas and marked as M&I respectively and sealed with the seal of "VKT'. The blue coloured airbag and clothes recovered from the possession of accused Mohd. Muarif @ Nawab and kept in a cloth pulinda and sealed with the seal of 'T' and the green-red colour check bag recovered from the possession of accused Irshad Ali containing clothes was kept in a pulinda sealed with the seal of 'VKT' and CFSL forms were filled-up and sealed with the seal of "VKT". Seal after use was handed over to SI Ravinder Kumar Tyagi. During their interrogation, both the accused Irshad Ali @ Deepak S/o Mohd. Yunus Ali R/o F-247-A, Inder Enclave, Phase-II, Sultnpuri, Delhi aged 30 years and Mohd. Muarif Qamar @ Nawab R/o Vill. Deora Bandhoh, P.O.-Jogiara, PS-Jale, Distt.-Darbhanga, Bihar, stated that they brought the recovered consignment of arms, ammunitions and explosives from J&K from their Commanders in J&K and was to be kept in safe custody and was to be used for terrorist activity in Delhi on the directions of their handlers in J&K. Militant Irshad Ali and Nawab above mentioned have kept in their possession explosives, ABCD Timer, AB Timer, Non Electronic detonators and arms and ammunition which were to be used for the purpose of terrorist activities in order to overawe the sovereignty, integrity and unity of India in order to commit terrorist and disruptive activities and there by committing offences punishable u/s 121/121A/122/123/ 120B IPC r/w 4/5 Explosive Substance Act and 25 Arms Act. Rukka is being sent to you for registration of the case through SI Ravinder Kumar Tyagi. Case be registered and further investigation be handed over to SI Rajpal Dabas, D-882, PIS No. 28860555 who has already reached at the

spot as per the direction of senior Officers who had already been informed about the apprehension and recovery of explosives, arms and ammunition from their possession. Date and time of offence. February 09, 2006 at 7.35 PM, place of occurrence; Outer ring road, Mukarba Chowk, near Inter State bus stand, Delhi. Date and time of sending the rukka: 09.02.2006 at 10.15 PM. Sd English SI Vinay Tyagi No. D-1334, PIS No. 28862091, Special Cell/NDR/OC, Lodhi Colony, New Delhi dated 09.02.2006."

4. Aggrieved by the action of the Delhi police, brother of the accused filed a petition in the High Court of Delhi stating the harrowing facts, the factum that both the accused were working as 'informers', and that they have been falsely implicated in the case and, *inter alia,* praying that the investigation in relation to FIR No.10 of 2006 be transferred to the CBI. This writ petition was filed on 25th February, 2006 upon which the Delhi High Court had issued notice to the respondents therein. Upon receiving the notice, Delhi Police filed its status report before the High Court reiterating the contents stated in the above FIR but conceding to the fact that the accused persons were working as 'informers' of the police. While issuing the notice, the High Court did not grant any stay of the investigation and/or the proceedings before the court of competent jurisdiction, despite the fact that a prayer to that effect had been made. The Special Cell of the Delhi Police, filed a chargesheet before the trial court on 6th May, 2006 when the matter was pending before the High Court. In the writ petition, it was stated to be a mala fide exercise of power. The High Court on 9th May, 2006 passed the following order:

"The Petitioner has filed this petition under Article 226 of the Constitution of India read with the Section 482 Cr.P.C. for issuance of Writ, Order or Direction in the nature of Mandamus to the Respondents to transfer the investigation of case FIR No.10/2006 dated 09.02.2006 of the Police

Station Special Cell, under Section 121/121-A/122/123/120-B IPC read with the Section 4/5 of Explosive Substance Act and Section 25 of Arms Act to an independent agency like CBI on the allegation that his brother Moarif Qamar @ Nawab was falsely implicated in a serious case like the present one on the basis of a totally cooked up story. The above named brother of the Petitioner was reported to be missing ever since 22.12.2005 and a complaint to that effect was lodged at PS Bhajanpura, Delhi. It appears that usual notices, as provided, were issued on order to search the brother of the Petitioner. Lastly, a notice was got published by SHO, Bhajanpura, Delhi in Delhi Hindustan Times in its edition dated 09.05.2006 which is precisely the date on which it is alleged that the brother of the Petitioner and another person were apprehended by the police when they were returning from Jammu & Kashmir by Jammu & Kashmir State Transport Roadways bus near Kingsway Camp, Mukraba Chowk and a Chinese made pistol, certain detonators and 2 Kg of RDX were recovered from the Petitioner's brother and 2 Kg of RDX were recovered from co-accused Mohd. Irshad Ali. The investigation leads the police to pinpoint the Petitioner being a member of terrorist organization, namely Al-Badar and consequently, after usual investigation, a charge sheet has been filed against both the accused persons.

On notice being issued to the Respondent/State. A status report stands filed by the Assistant Commissioner of Police, NDR/OC, Special Cell, Lodhi Colony, Delhi which has reiterated the allegations about the arrest of the Petitioner's brother and Mohd. Irshad Ali in the above circumstances, the report has, however sustained the allegation about a report in regard to the missing of the brother of the Petitioners having being lodged with the police as far as on 28.12.2005. The allegations about the

false implication of the Petitioner's brother are, however, controverted and denied.

I have heard learned counsel for the parties. Learned counsel for the Petitioner has invited the attention of the Court to various attendant circumstances around the time of the alleged arrest of the accused persons on 09.02.2006. The circumstances disclosed do cast a suspicion on the case of the prosecution in regard to the manner in which Mohd. Moarif Qamar @ Nawab and the other accused Mohd. Irshad Ali were apprehended by the officials of Special Cell and about the recovery of the contraband articles like explosive and detonators. The offences under Sections 121/121-A/122/123/120-B IPC read with the Section 4/5 of Explosive Substance Act and Section of 25 Arms Act are very grave offences and may lead to a very severe punishment, if the charges are established. Therefore, without commenting any further on the merits of the matter, this Court is of the considered opinion that it is a fit case where an inquiry by some independent agency is called for the allegations made in the present petition. Accordingly, the CBI, in the first instance, is called upon to undertake an inquiry into the matter and submit a report to this Court within four weeks.

List on 17th July, 2006.

Copy of the Order be forwarded to the Director, CBI for taking necessary action in the matter."

5. The CBI also filed its report before the High Court indicating therein that the alleged recoveries effected from the accused persons did not inspire confidence and further investigation was needed. After perusing the records, the High Court again on 4th August, 2008 passed the following order: -

"However, this relief cannot be claimed at this stage as if there was any error or misconduct or false implication of

the accused on the part of any police official or the investigating officer while registering the case and while the investigation of the case is yet to be ascertained by the trial court during the trial of the case. Therefore, this relief being premature cannot be granted."

6. After detailed investigation, the CBI filed the closure report on 11th November, 2008 stating that the accused persons were working as 'informers' of Special Cell of Delhi Police and Intelligence Bureau Officials and that it was a false case. After filing of the report by the CBI, the accused-respondent no.2, namely, Mohd. Muarif Qamar Ali, filed an application before the Trial Court in terms of Section 227 of the Code with a prayer that in view of the 'closure report' submitted by the CBI, he should be discharged. This application was opposed by the Special Cell, Delhi Police, who filed a detailed reply. The CBI, of course, stood by its report and submitted that it had no objection if the said accused was discharged. The learned Trial Court, in its order dated 13th February, 2009, opined that the CBI had concluded in its report that the manner of recovery and arrest of the accused persons from Mukarba Chowk did not inspire any confidence but the CBI had not discovered any fact pertaining to the recovery of the arms and ammunition, explosive substances and bus tickets etc. from the two accused persons.

7. Observing that the CBI had not investigated all the aspects of the allegations, the Court also noticed that in the order dated 4th August, 2008, the High Court noted that transfer of investigation from Special Cell to CBI had been directed, and further, filing of charge-sheet after completion of investigation, which was pending before the Court of competent jurisdiction had been directed. Upon noticing all these facts and pleas, the Court concluded, 'therefore, the prayer for acceptance of the closure report and discharge of the accused is premature. The same cannot be granted at this stage. With these observations, the contentions of the CBI, Special Cell and the accused persons stand disposed of.'

8. Vide the same order, the Court also observed, 'no definite conclusion can be drawn at this stage to ascertain the truthfulness of the version of two different agencies' and fixed the case for arguments on charge for 28th February, 2009.

9. The respondent no.2 herein, Maurif Qamar, filed a petition under Section 482 of the Code praying that the proceedings pending before the Court of Additional Sessions Judge, Delhi, pertaining to FIR No.10 of 2006, be quashed. This was registered as Criminal Miscellaneous Petition No.781 of 2009 and the application for stay was registered as Crl. Misc. Application No.286/2009. As already noticed, the Court had not granted any stay but had finally disposed of the petition vide its order dated 28th August, 2009. The High Court observed that once the report was filed by the CBI, that agency has to be treated as the investigating agency in the case and the closure report ought to have been considered by the trial court. It remanded the case to the trial court while passing the following order:

"12. In these circumstances, the impugned order dated 13.02.2009 dismissing the applications moved by the petitioners for discharging them is set aside. The case is remanded back to the Additional Sessions Judge to proceed further in the matter after hearing the parties on the basis of the closure report filed by the CBI dated 11.11.2008 and in accordance with the provisions contained under Section 173 and Section 190 of the Code of Criminal Procedure. In case he accepts the report, then the matter may come to an end, subject to his orders, if any, against the erring officers. However, if he feels that despite the closure report filed by the CBI, it is a case fit for proceeding further against the petitioners, he may pass appropriate orders uninfluenced dby (*sic*) what this Court has stated while disposing of this case. The only rider would be that while passing the orders the Additional Sessions Judge would not be influenced by the report of

the Sepcial (*sic*) Cell in this matter. Parties to appear before the Trial Judge on 14th September, 2009."

10. It is this order of the High Court which is the subject matter of the present appeals by special leave.

11. It would be appropriate for the Court to examine the relevant provisions and scheme of the Code in relation to filing of a report before the court of competent jurisdiction and the extent of its power to examine that report and pass appropriate orders. The criminal investigative machinery is set into motion by lodging of a First Information Report in relation to commission of a cognizable offence. Such report may be made orally, in writing or through any means by an officer in charge of a police station. Such officer is required to reduce the same into writing, read the same to the informant and wherever the person reporting is present, the same shall be signed by such person or the person receiving such information in accordance with the provisions of Section 154 of the Code. A police officer can conduct investigation in any congnizable case without the orders of the Magistrate. He shall conduct such investigation in accordance with the provisions of Chapter XIII, i.e., in accordance with Sections 177 to 189 of the Code. Where information as contemplated in law is received by an investigating officer and he has reasons to believe that an offence has been committed, which he is empowered to investigate, then he shall forthwith send a report of the same to the Magistrate and proceed to the spot to investigate the facts and circumstances of the case and take appropriate measures for discovery and arrest of the offender. Every report under Section 157 shall be submitted to the Magistrate in terms of Section 158 of the Code upon which the Magistrate may direct an investigation or may straight away proceed himself or depute some other magistrate subordinate to him to hold an inquiry and to dispose of the case in accordance with the provisions of the Code. It needs to be recorded here that the proceedings recorded by a police officer cannot be called into

question at any stage on the ground that he was not empowered to conduct such investigation. The provisions of Section 156(3) empower the Magistrate, who is competent to take cognizance in terms of Section 190, to order investigation as prescribed under Section 156(1) of the Code. Section 190 provides that subject to the provisions of Chapter XIV of the Code, any Magistrate of the first class and any magistrate of the second class specifically empowered in this behalf may take cognizance of any offence upon receipt of a complaint, facts of which constitute such offence, upon a police report of such facts or upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed. The Chief Judicial Magistrate is competent to empower any Magistrate of the second class to take cognizance in terms of Section 190. The competence to take cognizance, in a way, discloses the sources upon which the empowered Magistrate can take cognizance. After the investigation has been completed by the Investigating Officer and he has prepared a report without unnecessary delay in terms of Section 173 of the Code, he shall forward his report to a Magistrate who is empowered to take cognizance on a police report. The report so completed should satisfy the requirements stated under clauses (a) to (h) of sub-section (2) of Section 173 of the Code. Upon receipt of the report, the empowered Magistrate shall proceed further in accordance with law. The Investigating Officer has been vested with some definite powers in relation to the manner in which the report should be completed and it is required that all the documents on which the prosecution proposes to rely and the statements of witnesses recorded under Section 161 of the code accompany the report submitted before the Magistrate, unless some part thereof is excluded by the Investigating Officer in exercise of the powers vested in him under Section 173(6) of the Code. A very wide power is vested in the investigating agency to conduct further investigation after it has filed the report in terms of Section 173(2). The legislature has specifically used the expression 'nothing in this section shall be

deemed to preclude further investigation in respect of an offence after a report under Section 173(2) has been forwarded to the Magistrate', which unambiguously indicates the legislative intent that even after filing of a report before the court of competent jurisdiction, the Investigating Officer can still conduct further investigation and where, upon such investigation, the officer in charge of a police station gets further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the prescribed form. In other words, the investigating agency is competent to file a supplementary report to its primary report in terms of Section 173(8). The supplementary report has to be treated by the Court in continuation of the primary report and the same provisions of law, i.e., sub-section (2) to sub-section (6) of Section 173 shall apply when the Court deals with such report. Once the Court examines the records, applies its mind, duly complies with the requisite formalities of summoning the accused and, if present in court, upon ensuring that the copies of the requisite documents, as contemplated under Section 173(7), have been furnished to the accused, it would proceed to hear the case. After taking cognizance, the next step of definite significance is the duty of the Court to frame charge in terms of Section 228 of the Code unless the Court finds, upon consideration of the record of the case and the documents submitted therewith, that there exists no sufficient ground to proceed against the accused, in which case it shall discharge him for reasons to be recorded in terms of Section 227 of the Code. It may be noticed that the language of Section 228 opens with the words, 'if after such consideration and hearing as aforesaid, the Judge is of the opinion that there is ground for presuming that the accused has committed an offence', he may frame a charge and try him in terms of Section 228(1)(a) and if exclusively triable by the Court of Sessions, commit the same to the Court of Sessions in terms of Section 228(1)(b). Why the legislature has used the word 'presuming' is a matter which requires serious deliberation. It is a settled rule of interpretation that the legislature does not use any expression

purposelessly and without any object. Furthermore, in terms of doctrine of plain interpretation, every word should be given its ordinary meaning unless context to the contrary is specifically stipulated in the relevant provision. Framing of charge is certainly a matter of earnestness. It is not merely a formal step in the process of criminal inquiry and trial. On the contrary, it is a serious step as it is determinative to some extent, in the sense that either the accused is acquitted giving right to challenge to the complainant party, or the State itself, and if the charge is framed, the accused is called upon to face the complete trial which may prove prejudicial to him, if finally acquitted. These are the courses open to the Court at that stage. Thus, the word 'presuming' must be read *ejusdem generis* to the opinion that there is a ground. The ground must exist for forming the opinion that the accused had committed an offence. Such opinion has to be formed on the basis of the record of the case and the documents submitted therewith. To a limited extent, the plea of defence also has to be considered by the Court at this stage. For instance, if a plea of proceedings being barred under any other law is raised, upon such consideration, the Court has to form its opinion which in a way is tentative. The expression 'presuming' cannot be said to be superfluous in the language and ambit of Section 228 of the Code. This is to emphasize that the Court may believe that the accused had committed an offence, if its ingredients are satisfied with reference to the record before the Court. At this stage, we may refer to the judgment of this Court in the case of *Amit Kapur v. Ramesh Chander & Anr.* [JT 2012 (9) SC 329] wherein, the Court held as under :

> "The above-stated principles clearly show that inherent as well as revisional jurisdiction should be exercised cautiously. If the jurisdiction under Section 482 of the Code in relation to quashing of an FIR is circumscribed by the factum and caution afore-noticed, in that event, the revisional jurisdiction, particularly while dealing with framing of a charge, has to be even more limited.

Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the court is required to consider the 'record of the case' and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section exists, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a *sine qua non* for exercise of such jurisdiction. It may even be weaker than a *prima facie* case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code. It may also be noticed that the revisional jurisdiction exercised by the High Court is in a way final and no inter court remedy is available in such cases. Of course, it may be subject to jurisdiction of this court under Article 136 of the Constitution of India. Normally, a revisional jurisdiction should be exercised on a question of law. However, when factual appreciation is involved, then it must find place in the class of cases resulting in a perverse finding. Basically, the power is required to be exercised so that justice is done and there is no abuse of power by the court. Merely an apprehension or suspicion of the same would not be a sufficient ground for interference in such cases."

12. On analysis of the above discussion, it can safely be concluded that 'presuming' is an expression of relevancy and places some weightage on the consideration of the record before the Court. The prosecution's record, at this stage, has to be examined on the plea of demur. Presumption is of a very weak and mild nature. It would cover the cases where some lacuna has been left out and is capable of being supplied and proved during the course of the trial. For instance, it is not necessary that at that stage each ingredient of an offence should be linguistically reproduced in the report and backed with meticulous facts. Suffice would be substantial compliance to the requirements of the provisions.

13. Having noticed the provisions and relevant part of the scheme of the Code, now we must examine the powers of the Court to direct investigation. Investigation can be ordered in varied forms and at different stages. Right at the initial stage of receiving the FIR or a complaint, the Court can direct investigation in accordance with the provisions of Section 156(1) in exercise of its powers under Section 156(3) of the Code. Investigation can be of the following kinds:

(i) Initial Investigation.

(ii) Further Investigation.

(iii) Fresh or de novo or re-investigation.

14. The initial investigation is the one which the empowered police officer shall conduct in furtherance to registration of an FIR. Such investigation itself can lead to filing of a final report under Section 173(2) of the Code and shall take within its ambit the investigation which the empowered officer shall conduct in furtherance of an order for investigation passed by the court of competent jurisdiction in terms of Section 156(3) of the Code.

15. Further investigation' is where the Investigating Officer obtains further oral or documentary evidence after the final

report has been filed before the Court in terms of Section 173(8). This power is vested with the Executive. It is the continuation of a previous investigation and, therefore, is understood and described as a 'further investigation'. Scope of such investigation is restricted to the discovery of further oral and documentary evidence. Its purpose is to bring the true facts before the Court even if they are discovered at a subsequent stage to the primary investigation. It is commonly described as 'supplementary report'. 'Supplementary report' would be the correct expression as the subsequent investigation is meant and intended to supplement the primary investigation conducted by the empowered police officer. Another significant feature of further investigation is that it does not have the effect of wiping out directly or impliedly the initial investigation conducted by the investigating agency. This is a kind of continuation of the previous investigation. The basis is discovery of fresh evidence and in continuation of the same offence and chain of events relating to the same occurrence incidental thereto. In other words, it has to be understood in complete contradistinction to a 'reinvestigation', 'fresh' or '*de novo*' investigation.

16. However, in the case of a 'fresh investigation', 'reinvestigation' or '*de novo* investigation' there has to be a definite order of the court. The order of the Court unambiguously should state as to whether the previous investigation, for reasons to be recorded, is incapable of being acted upon. Neither the Investigating agency nor the Magistrate has any power to order or conduct 'fresh investigation'. This is primarily for the reason that it would be opposed to the scheme of the Code. It is essential that even an order of 'fresh'/'*de novo*' investigation passed by the higher judiciary should always be coupled with a specific direction as to the fate of the investigation already conducted. The cases where such direction can be issued are few and far between. This is based upon a fundamental principle of our criminal jurisprudence which is that it is the right of a suspect or an accused to have a just

and fair investigation and trial. This principle flows from the constitutional mandate contained in Articles 21 and 22 of the Constitution of India. Where the investigation *ex facie* is unfair, tainted, mala fide and smacks of foul play, the courts would set aside such an investigation and direct fresh or de novo investigation and, if necessary, even by another independent investigating agency. As already noticed, this is a power of wide plenitude and, therefore, has to be exercised sparingly. The principle of rarest of rare cases would squarely apply to such cases. Unless the unfairness of the investigation is such that it pricks the judicial conscience of the Court, the Court should be reluctant to interfere in such matters to the extent of quashing an investigation and directing a 'fresh investigation'. In the case of *Sidhartha Vashisht* v. *State (NCT of Delhi)* [(2010) 6 SCC 1], the Court stated that it is not only the responsibility of the investigating agency, but also that of the courts to ensure that investigation is fair and does not in any way hamper the freedom of an individual except in accordance with law. An equally enforceable canon of the criminal law is that high responsibility lies upon the investigating agency not to conduct an investigation in a tainted or unfair manner. The investigation should not *prima facie* be indicative of a biased mind and every effort should be made to bring the guilty to law as nobody stands above law *de hors* his position and influence in the society. The maxim *contra veritatem lex nunquam aliquid permittit* applies to exercise of powers by the courts while granting approval or declining to accept the report. In the case of *Gudalure M.J. Cherian & Ors.* v. *Union of India* & Ors. [(1992) 1 SCC 397], this Court stated the principle that in cases where charge-sheets have been filed after completion of investigation and request is made belatedly to reopen the investigation, such investigation being entrusted to a specialized agency would normally be declined by the court of competent jurisdiction but nevertheless in a given situation to do justice between the parties and to instil confidence in public mind, it may become necessary to pass such orders. Further, in the case of *R.S. Sodhi, Advocate* v. *State of U.P.* [1994 SCC

Supp. (1) 142], where allegations were made against a police officer, the Court ordered the investigation to be transferred to CBI with an intent to maintain credibility of investigation, public confidence and in the interest of justice. Ordinarily, the courts would not exercise such jurisdiction but the expression 'ordinarily' means normally and it is used where there can be an exception. It means in the large majority of cases but not invariably. 'Ordinarily' excludes extra-ordinary or special circumstances. In other words, if special circumstances exist, the court may exercise its jurisdiction to direct 'fresh investigation' and even transfer cases to courts of higher jurisdiction which may pass such directions.

17. Here, we will also have to examine the kind of reports that can be filed by an investigating agency under the scheme of the Code. Firstly, the FIR which the investigating agency is required to file before the Magistrate right at the threshold and within the time specified. Secondly, it may file a report in furtherance to a direction issued under Section 156(3) of the Code. Thirdly, it can also file a 'further report', as contemplated under Section 173(8). Finally, the investigating agency is required to file a 'final report' on the basis of which the Court shall proceed further to frame the charge and put the accused to trial or discharge him as envisaged by Section 227 of the Code.

18. Next question that comes up for consideration of this Court is whether the empowered Magistrate has the jurisdiction to direct 'further investigation' or 'fresh investigation'. As far as the latter is concerned, the law declared by this Court consistently is that the learned Magistrate has no jurisdiction to direct 'fresh' or *'de novo'* investigation. However, once the report is filed, the Magistrate has jurisdiction to accept the report or reject the same right at the threshold. Even after accepting the report, it has the jurisdiction to discharge the accused or frame the charge and put him to trial. But there are no provisions in the Code which empower the Magistrate to

disturb the status of an accused pending investigation or when report is, filed to wipe out the report and its effects in law. Reference in this regard can be made to *K. Chandrasekhar v. State of Kerala* [(1998) 5 SCC 223]; *Ramachandran v. R. Udhayakumar* [(2008) 5 SCC 413]*, Nirmal Singh Kahlon v State of Punjab & Ors.* [(2009) 1 SCC 441]; *Mithabhai Pashabhai Patel & Ors. v. State of Gujarat* [(2009) 6 SCC 332]; and *Babubhai v. State of Gujarat* [(2010) 12 SCC 254].

19. Now, we come to the former question, i.e., whether the Magistrate has jurisdiction under Section 173(8) to direct further investigation.

20. The power of the Court to pass an order for further investigation has been a matter of judicial concern for some time now. The courts have taken somewhat divergent but not diametrically opposite views in this regard. Such views can be reconciled and harmoniously applied without violation of the rule of precedence. In the case of *State of Punjab v. Central Bureau of Investigation* [(2011) 9 SCC 182], the Court noticed the distinction that exists between 'reinvestigation' and 'further investigation'. The Court also noticed the settled principle that the courts subordinate to the High Court do not have the statutory inherent powers as the High Court does under Section 482 of the Code and therefore, must exercise their jurisdiction within the four corners of the Code.

21. Referring to the provisions of Section 173 of the Code, the Court observed that the police has the power to conduct further investigation in terms of Section 173(8) of the Code but also opined that even the Trial Court can direct further investigation in contradistinction to fresh investigation, even where the report has been filed. It will be useful to refer to the following paragraphs of the judgment wherein the Court while referring to the case of *Mithabhai Pashabhai Patel v. State of Gujarat* (supra) held as under:

"*13*. It is, however, beyond any cavil that 'further

investigation' and 'reinvestigation' stand on different footing. It may be that in a given situation a superior court in exercise of its constitutional power, namely, under Articles 226 and 32 of the Constitution of India could direct a 'State' to get an offence investigated and/or further investigated by a different agency. Direction of a reinvestigation, however, being forbidden in law, no superior court would ordinarily issue such a direction. Pasayat, J. in *Ramachandran v. R. Udhayakumar (2008) 5 SCC 513 o*pined as under: (SCC p. 415, para 7)

> '7. At this juncture it would be necessary to take note of Section 173 of the Code. From a plain reading of the above section it is evident that even after completion of investigation under sub-section (2) of Section 173 of the Code, the police has right to further investigate under sub-section (8), but not fresh investigation or reinvestigation.'

A distinction, therefore, exists between a reinvestigation and further investigation.

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15. The investigating agency and/or a court exercise their jurisdiction conferred on them only in terms of the provisions of the Code. The courts subordinate to the High Court even do not have any inherent power under Section 482 of the Code of Criminal Procedure or otherwise. The precognizance jurisdiction to remand vested in the subordinate courts, therefore, must be exercised within the four corners of the Code."

22. In the case of *Minu Kumari & Anr. v. State of Bihar* & Ors. [(2006) 4 SCC 359], this Court explained the powers that are vested in a Magistrate upon filing of a report in terms of Section 173(2)(i) and the kind of order that the Court can pass. The Court held that when a report is filed before a

Magistrate, he may either (i) accept the report and take cognizance of the offences and issue process; or (ii) may disagree with the report and drop the proceedings; or (iii) may direct further investigation under Section 156(3) and require the police to make a further report.

23. This judgment, thus, clearly shows that the Court of Magistrate has a clear power to direct further investigation when a report is filed under Section 173(2) and may also exercise such powers with the aid of Section 156(3) of the Code. The lurking doubt, if any, that remained in giving wider interpretation to Section 173(8) was removed and controversy put to an end by the judgment of this Court in the case of *Hemant Dhasmana v. CBI*, [(2001) 7 SCC 536] where the Court held that although the said order does not, in specific terms, mention the power of the court to order further investigation, the power of the police to conduct further investigation envisaged therein can be triggered into motion at the instance of the court. When any such order is passed by the court, which has the jurisdiction to do so, then such order should not even be interfered with in exercise of a higher court's revisional jurisdiction. Such orders would normally be of an advantage to achieve the ends of justice. It was clarified, without ambiguity, that the magistrate, in exercise of powers under Section 173(8) of the Code can direct the CBI to further investigate the case and collect further evidence keeping in view the objections raised by the appellant to the investigation and the new report to be submitted by the Investigating Officer, would be governed by sub-Section (2) to sub-Section (6) of Section 173 of the Code. There is no occasion for the court to interpret Section 173(8) of the Code restrictively. After filing of the final report, the learned Magistrate can also take cognizance on the basis of the material placed on record by the investigating agency and it is permissible for him to direct further investigation. Conduct of proper and fair investigation is the hallmark of any criminal investigation.

24. In support of these principles reference can be made

to the judgments of this Court in the cases of *Union Public Service Commission v. S. Papaiah & Ors* [(1997) 7 SCC 614], *State of Orissa v. Mahima* [(2003) 5 SCALE 566], *Kishan Lal v. Dharmendra Bhanna & Anr.* [(2009) 7 SCC 685], *State of Maharashtra v. Sharat Chandra Vinayak Dongre* [(1995) 1 SCC 42].

25. We may also notice here that in the case of *S. Papaiah* (supra), the Magistrate had rejected an application for reinvestigation filed by the applicant primarily on the ground that it had no power to review the order passed earlier. This Court held that it was not a case of review of an order, but was a case of further investigation as contemplated under Section 173 of the Code. It permitted further investigation and directed the report to be filed.

26. Interestingly and more particularly for answering the question of legal academia that we are dealing with, it may be noticed that this Court, while pronouncing its judgment in the case of *Hemant Dhasmana v. CBI*, (supra) has specifically referred to the judgment of *S. Papaiah (supra)* and *Bhagwant Singh v. Commissioner of Police* & Anr. [(1985) 2 SCC 537]. While relying upon the three Judge Bench judgment of *Bhagwant Singh* (supra), which appears to be a foundational view for development of law in relation to Section 173 of the Code, the Court held that the Magistrate could pass an order for further investigation. The principal question in that case was whether the Magistrate could drop the proceedings after filing of a report under Section 173(2), without notice to the complainant, but in paragraph 4 of the judgment, the three Judge Bench dealt with the powers of the Magistrate as enshrined in Section 173 of the Code. Usefully, para 4 can be reproduced for ready reference:-

> "4. Now, when the report forwarded by the officer-in-charge of a police station to the Magistrate under sub-section (2)(i) of Section 173 comes up for consideration by the Magistrate, one of two different situations may arise. The

> report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may do one of three things: (1) he may accept the report and take cognizance of the offence and issue process or (2) he may disagree with the report and drop the proceeding or (3) he may direct further investigation under sub-section (3) of Section 156 and require the police to make a further report. The report may on the other hand state that, in the opinion of the police, no offence appears to have been committed and where such a report has been made, the Magistrate again has an option to adopt one of three courses: (1) he may accept the report and drop the proceeding or (2) he may disagree with the report and taking the view that there is sufficient ground for proceeding further, take cognizance of the offence and issue process or (3) he may direct further investigation to be made by the police under sub-section (3) of Section 156. Where, in either of these two situations, the Magistrate decides to take cognizance of the offence and to issue process, the informant is not prejudicially affected nor is the injured or in case of death, any relative of the deceased aggrieved, because cognizance of the offence is taken by the Magistrate and it is decided by the Magistrate that the case shall proceed. But if the Magistrate decides that there is no sufficient ground for proceeding further and drops the proceeding or takes the view that though there is sufficient ground for proceeding against some, there is no sufficient ground for proceeding against others mentioned in the first information report, the informant would certainly be prejudiced because the first information report lodged by him would have failed of its purpose, wholly or in part. Moreover, when the interest of the informant in prompt and effective action being taken on the first information report lodged by him is clearly recognised by the provisions contained in sub-section (2) of Section 154, sub-section (2) of Section 157 and sub-section (2)(ii) of Section 173, it must be presumed that the

informant would equally be interested in seeing that the Magistrate takes cognizance of the offence and issues process, because that would be culmination of the first information report lodged by him. There can. therefore, be no doubt that when, on a consideration of the report made by the officer-in-charge of a police station under sub-section (2)(i) of Section 173, the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his submissions to persuade the Magistrate to take cognizance of the offence and issue process. We are accordingly of the view that in a case where the Magistrate to whom a report is forwarded under sub-section (2)(i) of Section 173 decides not to take cognizance of the offence and to drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the first information report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report. It was urged before us on behalf of the respondents that if in such a case notice is required to be given to the informant, it might result in unnecessary delay on account of the difficulty of effecting service of the notice on the informant. But we do not think this can be regarded as a valid objection against the view we are taking, because in any case the action taken by the police on the first information report has to be communicated to the informant and a copy of the report has to be supplied to him under sub-section (2)(i) of Section 173 and if that be so, we do not see any reason why it should be difficult to serve notice of the consideration of the report on the informant. Moreover, in any event, the difficulty of service of notice on the informant cannot possibly provide any justification for depriving the informant of the opportunity of being heard at the time when the report is considered by the Magistrate."

27. In some judgments of this Court, a view has been advanced, (amongst others in the case of *Reeta Nag v State of West Bengal & Ors.* [(2009) 9 SCC 129] *Ram Naresh Prasad v. State of Jharkhand and Others* [(2009) 11 SCC 299] and *Randhir Singh Rana v. State (Delhi Administration)* [(1997) 1 SCC 361]), that a Magistrate cannot *suo moto* direct further investigation under Section 173(8) of the Code or direct re-investigation into a case on account of the bar contained in Section 167(2) of the Code, and that a Magistrate could direct filing of a charge sheet where the police submits a report that no case had been made out for sending up an accused for trial. The gist of the view taken in these cases is that a Magistrate cannot direct reinvestigation and cannot *suo moto* direct further investigation.

28. However, having given our considered thought to the principles stated in these judgments, we are of the view that the Magistrate before whom a report under Section 173(2) of the Code is filed, is empowered in law to direct 'further investigation' and require the police to submit a further or a supplementary report. A three Judge Bench of this Court in the case of *Bhagwant Singh* (supra) has, in no uncertain terms, stated that principle, as afore-noticed.

29. The contrary view taken by the Court in the cases of *Reeta Nag* (supra) and *Randhir Singh* (supra) do not consider the view of this Court expressed in *Bhagwant Singh* (supra). The decision of the Court in *Bhagwant Singh* (supra) in regard to the issue in hand cannot be termed as an obiter. The ambit and scope of the power of a magistrate in terms of Section 173 of the Code was squarely debated before that Court and the three Judge Bench concluded as afore-noticed. Similar views having been taken by different Benches of this Court while following *Bhagwant Singh* (supra), are thus squarely in line with the doctrine of precedence. To some extent, the view expressed in *Reeta Nag* (supra), *Ram Naresh* (supra) and *Randhir Singh* (supra), besides being different on facts, would have to be examined in light of the principle of *stare decisis.*

30. Having analysed the provisions of the Code and the various judgments as afore-indicated, we would state the following conclusions in regard to the powers of a magistrate in terms of Section 173(2) read with Section 173(8) and Section 156(3) of the Code:

1. The Magistrate has no power to direct 'reinvestigation' or 'fresh investigation' (*de novo*) in the case initiated on the basis of a police report.

2. A Magistrate has the power to direct 'further investigation' after filing of a police report in terms of Section 173(6) of the Code.

3. The view expressed in (2) above is in conformity with the principle of law stated in *Bhagwant Singh's* case (supra) by a three Judge Bench and thus in conformity with the doctrine of precedence.

4. Neither the scheme of the Code nor any specific provision therein bars exercise of such jurisdiction by the Magistrate. The language of Section 173(2) cannot be construed so restrictively as to deprive the Magistrate of such powers particularly in face of the provisions of Section 156(3) and the language of Section 173(8) itself. In fact, such power would have to be read into the language of Section 173(8).

5. The Code is a procedural document, thus, it must receive a construction which would advance the cause of justice and legislative object sought to be achieved. It does not stand to reason that the legislature provided power of further investigation to the police even after filing a report, but intended to curtail the power of the Court to the extent that even where the facts of the case and the ends of justice demand, the Court can still not direct the

investigating agency to conduct further investigation which it could do on its own.

6. It has been a procedure of proprietary that the police has to seek permission of the Court to continue 'further investigation' and file supplementary chargesheet. This approach has been approved by this Court in a number of judgments. This as such would support the view that we are taking in the present case.

31. Having discussed the scope of power of the Magistrate under Section 173 of the Code, now we have to examine the kind of reports that are contemplated under the provisions of the Code and/or as per the judgments of this Court. The first and the foremost document that reaches the jurisdiction of the Magistrate is the First Information Report. Then, upon completion of the investigation, the police are required to file a report in terms of Section 173(2) of the Code. It will be appropriate to term this report as a primary report, as it is the very foundation of the case of the prosecution before the Court. It is the record of the case and the documents annexed thereto, which are considered by the Court and then the Court of the Magistrate is expected to exercise any of the three options afore-noticed. Out of the stated options with the Court, the jurisdiction it would exercise has to be in strict consonance with the settled principles of law. The power of the magistrate to direct 'further investigation' is a significant power which has to be exercised sparingly, in exceptional cases and to achieve the ends of justice. To provide fair, proper and unquestionable investigation is the obligation of the investigating agency and the Court in its supervisory capacity is required to ensure the same. Further investigation conducted under the orders of the Court, including that of the Magistrate or by the police of its own accord and, for valid reasons, would lead to the filing of a supplementary report. Such supplementary report shall be dealt with as part of the primary report. This is clear from the fact

that the provisions of Sections 173(3) to 173(6) would be applicable to such reports in terms of Section 173(8) of the Code.

32. Both these reports have to be read conjointly and it is the cumulative effect of the reports and the documents annexed thereto to which the Court would be expected to apply its mind to determine whether there exist grounds to presume that the accused has committed the offence. If the answer is in the negative, on the basis of these reports, the Court shall discharge an accused in compliance with the provisions of Section 227 of the Code.

33. At this stage, we may also state another well-settled canon of criminal jurisprudence that the superior courts have the jurisdiction under Section 482 of the Code or even Article 226 of the Constitution of India to direct 'further investigation', 'fresh' or '*de novo*' and even 'reinvestigation'. 'Fresh', '*de novo*', and 'reinvestigation' are synonymous expressions and their result in law would be the same. The superior courts are even vested with the power of transferring investigation from one agency to another, provided the ends of justice so demand such action. Of course, it is also a settled principle that this power has to be exercised by the superior courts very sparingly and with great circumspection.

34. We have deliberated at some length on the issue that the powers of the High Court under Section 482 of the Code do not control or limit, directly or impliedly, the width of the power of Magistrate under Section 228 of the Code. Wherever a charge sheet has been submitted to the Court, even this Court ordinarily would not reopen the investigation, especially by entrusting the same to a specialised agency. It can safely be stated and concluded that in an appropriate case, when the court feels that the investigation by the police authorities is not in the proper direction and that in order to do complete justice and where the facts of the case demand, it is always open to the Court to hand over the investigation to a specialised

agency. These principles have been reiterated with approval in the judgments of this Court in the case of *Disha v. State of Gujarat & Ors.* [(2011) 13 SCC 337]. *Vineet Narain & Ors. v. Union of India & Anr*.[(1998) 1 SCC 226], *Union of India & Ors. v. Sushil Kumar Modi & Ors.* [1996 (6) SCC 500] and *Rubabbuddin Sheikh v. State of Gujarat & Ors.* [(2010) 2 SCC 200].

35. The power to order/direct 'reinvestigation' or '*de novo'* investigation falls in the domain of higher courts, that too in exceptional cases. If one examines the provisions of the Code, there is no specific provision for cancellation of the reports, except that the investigating agency can file a closure report (where according to the investigating agency, no offence is made out). Even such a report is subject to acceptance by the learned Magistrate who, in his wisdom, may or may not accept such a report. For valid reasons, the Court may, by declining to accept such a report, direct 'further investigation', or even on the basis of the record of the case and the documents annexed thereto, summon the accused.

36. The Code does not contain any provision which deals with the court competent to direct 'fresh investigation', the situation in which such investigation can be conducted, if at all, and finally the manner in which the report so obtained shall be dealt with. The superior courts can direct conduct of a 'fresh'/ '*de novo'* investigation, but unless it specifically directs that the report already prepared or the investigation so far conducted will not form part of the record of the case, such report would be deemed to be part of the record. Once it is part of the record, the learned Magistrate has no jurisdiction to exclude the same from the record of the case. In other words, but for a specific order by the superior court, the reports, whether a primary report or a report upon 'further investigation' or a report upon 'fresh investigation', shall have to be construed and read conjointly. Where there is a specific order made by the court for reasons like the investigation being entirely unfair, tainted,

undesirable or being based upon no truth, the court would have to specifically direct that the investigation or proceedings so conducted shall stand cancelled and will not form part of the record for consideration by the Court of competent jurisdiction.

37. The scheme of Section 173 of the Code even deals with the scheme of exclusion of documents or statements submitted to the Court. In this regard, one can make a reference to the provisions of Section 173(6) of the Code, which empowers the investigating agency to make a request to the Court to exclude that part of the statement or record and from providing the copies thereof to the accused, which are not essential in the interest of justice, and where it will be inexpedient in the public interest to furnish such statement. The framers of the law, in their wisdom, have specifically provided a limited mode of exclusion, the criteria being no injustice to be caused to the accused and greater public interest being served. This itself is indicative of the need for a fair and proper investigation by the concerned agency. What ultimately is the aim or significance of the expression 'fair and proper investigation' in criminal jurisprudence? It has a twin purpose. Firstly, the investigation must be unbiased, honest, just and in accordance with law. Secondly, the entire emphasis on a fair investigation has to be to bring out the truth of the case before the court of competent jurisdiction. Once these twin paradigms of fair investigation are satisfied, there will be the least requirement for the court of law to interfere with the investigation, much less quash the same, or transfer it to another agency. Bringing out the truth by fair and investigative means in accordance with law would essentially repel the very basis of an unfair, tainted investigation or cases of false implication. Thus, it is inevitable for a court of law to pass a specific order as to the fate of the investigation, which in its opinion is unfair, tainted and in violation of the settled principles of investigative canons.

38. Now, we may examine another significant aspect which

is how the provisions of Section 173(8) have been understood and applied by the courts and investigating agencies. It is true that though there is no specific requirement in the provisions of Section 173(8) of the Code to conduct 'further investigation' or file supplementary report with the leave of the Court, the investigating agencies have not only understood but also adopted it as a legal practice to seek permission of the courts to conduct 'further investigation' and file 'supplementary report' with the leave of the court. The courts, in some of the decisions, have also taken a similar view. The requirement of seeking prior leave of the Court to conduct 'further investigation' and/or to file a 'supplementary report' will have to be read into, and is a necessary implication of the provisions of Section 173(8) of the Code. The doctrine of *contemporanea expositio* will fully come to the aid of such interpretation as the matters which are understood and implemented for a long time, and such practice that is supported by law should be accepted as part of the interpretative process.

39. Such a view can be supported from two different points of view. Firstly, through the doctrine of precedence, as afore-noticed, since quite often the courts have taken such a view, and, secondly, the investigating agencies which have also so understood and applied the principle. The matters which are understood and implemented as a legal practice and are not opposed to the basic rule of law would be good practice and such interpretation would be permissible with the aid of doctrine of *contemporanea expositio*. Even otherwise, to seek such leave of the court would meet the ends of justice and also provide adequate safeguard against a suspect/accused.

40. We have already noticed that there is no specific embargo upon the power of the learned Magistrate to direct 'further investigation' on presentation of a report in terms of Section 173(2) of the Code. Any other approach or interpretation would be in contradiction to the very language of Section 173(8) and the scheme of the Code for giving

precedence to proper administration of criminal justice. The settled principles of criminal jurisprudence would support such approach, particularly when in terms of Section 190 of the Code, the Magistrate is the competent authority to take cognizance of an offence. It is the Magistrate who has to decide whether on the basis of the record and documents produced, an offence is made out or not, and if made out, what course of law should be adopted in relation to committal of the case to the court of competent jurisdiction or to proceed with the trial himself. In other words, it is the judicial conscience of the Magistrate which has to be satisfied with reference to the record and the documents placed before him by the investigating agency, in coming to the appropriate conclusion in consonance with the principles of law. It will be a travesty of justice, if the court cannot be permitted to direct 'further investigation' to clear its doubt and to order the investigating agency to further substantiate its charge sheet. The satisfaction of the learned Magistrate is a condition precedent to commencement of further proceedings before the court of competent jurisdiction. Whether the Magistrate should direct 'further investigation' or not is again a matter which will depend upon the facts of a given case. The learned Magistrate or the higher court of competent jurisdiction would direct 'further investigation' or 'reinvestigation' as the case may be, on the facts of a given case. Where the Magistrate can only direct further investigation, the courts of higher jurisdiction can direct further, re-investigation or even investigation *de novo* depending on the facts of a given case. It will be the specific order of the court that would determine the nature of investigation. In this regard, we may refer to the observations made by this court in the case of *Sivanmoorthy and Others v. State represented by Inspector of Police* [(2010) 12 SCC 29]. In light of the above discussion, we answer the questions formulated at the opening of this judgment as follows:

Answer to Question No. 1

The court of competent jurisdiction is duty bound to

consider all reports, entire records and documents submitted therewith by the Investigating Agency as its report in terms of Section 173(2) of the Code. This Rule is subject to only the following exceptions;

(a) Where a specific order has been passed by the learned Magistrate at the request of the prosecution limited to exclude any document or statement or any part thereof;

(b) Where an order is passed by the higher courts in exercise of its extra-ordinary or inherent jurisdiction directing that any of the reports i.e. primary report, supplementary report or the report submitted on 'fresh investigation' or 're-investigation' or any part of it be excluded, struck off the court record and be treated as *non est*.

Answer to Question No. 2

No investigating agency is empowered to conduct a 'fresh', '*de novo*' or 're-investigation' in relation to the offence for which it has already filed a report in terms of Section 173(2) of the Code. It is only upon the orders of the higher courts empowered to pass such orders that aforesaid investigation can be conducted, in which event the higher courts will have to pass a specific order with regard to the fate of the investigation already conducted and the report so filed before the court of the learned magistrate.

41. Having answered the questions of law as afore-stated, we revert to the facts of the case in hand. As already noticed, the petitioner had filed the writ petition before the High Court that the investigation of FIR No. 10/2006 dated 9th February, 2006 be transferred to CBI or any other independent investigating agency providing protection to the petitioners, directing initiation of appropriate action against the erring police officers who have registered the case against the

petitioner and such other orders that the court may deem fit and proper in the facts and circumstances of the case. This petition was filed under Article 226 of the Constitution read with Section 482 of the Code on 25th February, 2006. The High Court granted no order either staying the further investigation by the agency, or the proceedings before the court of competent jurisdiction. The Delhi Police itself filed a status report before the High Court on 4th April, 2006 and the Special Cell of Delhi Police filed the charge sheet before the trial court on 6th May, 2006. After perusing the status report submitted to the High Court, the High Court vide its Order dated 9th May, 2006 had noticed that the circumstances of the case had cast a suspicion on the case of the prosecution, in regard to the manner in which the accused were apprehended and recoveries alleged to have been made from them of articles like explosives and detonators. After noticing this, the Court directed that without commenting on the merits of the matter, it was of the opinion that this was a case where inquiry by some independent agency is called for, and directed the CBI to undertake an inquiry into the matter and submit its report within four weeks. Obviously, it would have been brought to the notice of the High Court that the Delhi Police had filed a report before the trial court. The status report had also been placed before the High Court itself. Still, the High Court, in its wisdom, did not consider it appropriate to pass any directions staying proceedings before the court of competent jurisdiction. Despite pendency before the High Court for a substantial period of time, the CBI took considerable time to conduct its preliminary inquiry and it is only on 4th July, 2007 that the CBI submitted its preliminary inquiry report before the court. After perusing the report, the Court directed, as per the request of the CBI, to conduct in depth investigation of the case.

42. In the order dated 24th October, 2007, the High Court noticed that despite the fact that the CBI had taken considerable time for completing its investigation, it had still not done so. Noticing that the investigation was handed over to

the CBI on 9th May, 2006 and despite extensions it had not submitted its report the Court granted to the CBI four weeks' time from the date of the order to submit its findings in respect of the allegations made by the accused in the complaint and directed the matter to come up on 28th November, 2007. The significant aspect which needs to be noticed is that the Court specifically noticed in this order that 'the trial of the case is not proceeding, further hoping that CBI shall file supplementary report or supplementary material before the trial court and the accused gets an opportunity of case being formally investigated. However, the pace at which the investigation is done by the CBI shows that CBI may take years together for getting the records….'

43. This order clearly shows that the High Court contemplated submission of a supplementary report, which means report in continuation to the report already submitted under Section 173(2) of the Code by the Delhi Police.

44. On 28th November, 2007, the case came up for hearing before the High Court. Then CBI filed its closure report making a request that both the accused be discharged. The case came up for hearing before the High Court on 4th August, 2008, when the Court noticed that CBI had filed a report in the sealed cover and the Court had perused it. Herein, the Court noticed the entire facts in great detail. The High Court disposed of the writ petition and while noticing the earlier order dated 4th July, 2007 wherein the accused persons had assured the court that they would not move bail application before the trial court, till CBI investigation was completed, permitted the applicants to move bail applications as well.

45. The application for discharge filed by the accused persons on the strength of the closure report filed by the CBI was rejected by the trial court vide its order dated 13th February, 2009 on the ground that it had to examine the entire record including the report filed by the Delhi Police under Section 173(2) of the Code. The High Court, however, took

the contrary view and stated that it was only the closure report filed by the CBI which could be taken into consideration, and then the matter shall proceed in accordance with law. In this manner, the writ petition was finally disposed of, directing the parties to appear before the trial court on 14th September, 2009. The High Court had relied upon the judgment of this Court in the case of *K. Chandrasekhar v. State of Kerala and Others* (supra) to say that once investigation stands transferred to CBI, it is that agency only which has to proceed with the investigation and not the Special Cell of the Delhi Police.

46. We are unable to accord approval to the view taken by the High Court. The judgment in the case of K. *Chandrasekhar* (supra), firstly does not state any proposition of law. It is a judgment on peculiar facts of that case. Secondly, it has no application to the present case. In that case, the investigation by the police was pending when the investigation was ordered to be transferred to the CBI. There the Court had directed that further investigation had to be continued by the CBI and not the Special Cell of the Delhi Police.

47. In the present case, report in terms of Section 173(2) had already been filed by the Special Cell of the Delhi Police even before the investigation was handed over to CBI to conduct preliminary inquiry. Furthermore, the final investigation on the basis of the preliminary report submitted by the CBI had also not been handed over to CBI at that stage.

48. Once a Report under Section 173(2) of the Code has been filed, it can only be cancelled, proceeded further or case closed by the court of competent jurisdiction and that too in accordance with law. Neither the Police nor a specialised investigating agency has any right to cancel the said Report. Furthermore, in the present case, the High Court had passed no order or direction staying further investigation by the Delhi Police or proceedings before the court of competent jurisdiction.

49. On the contrary, the court had noticed explicitly in its order that it was a case of supplementary or further investigation and filing of a 'supplementary report'.

50. Once the Court has taken this view, there is no question of treating the first report as being withdrawn, cancelled or capable of being excluded from the records by the implication. In fact, except by a specific order of a higher court competent to make said orders, the previous as well as supplementary report shall form part of the record which the trial court is expected to consider for arriving at any appropriate conclusion, in accordance with law. It is also interesting to note that the CBI itself understood the order of the court and conducted only 'further investigation' as is evident from the status report filed by the CBI before the High Court on 28th November, 2007.

51. In our considered view, the trial court has to consider the entire record, including both the Delhi Police Report filed under Section 173(2) of the Code as well as the Closure Report filed by the CBI and the documents filed along with these reports.

52. It appears, the trial court may have three options, firstly, it may accept the application of accused for discharge. Secondly, it may direct that the trial may proceed further in accordance with law and thirdly, if it is dissatisfied on any important aspect of investigation already conducted and in its considered opinion, it is just, proper and necessary in the interest of justice to direct 'further investigation', it may do so.

53. *Ergo*, for the reasons recorded above, we modify the order of the High Court impugned in the present appeal to the above extent and direct the trial court to proceed with the case further in accordance with law. The appeals are partially allowed.

B.B.B. Appeals partly allowed.

SANDESH ALIAS SAINATH KAILASH ABHANG
v.
STATE OF MAHARASHTRA
(Criminal Appeal No. 1973 of 2011)

DECEMBER 13, 2012

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

Penal Code, 1860 – ss. 302, 307, 394 and 376 (e) – Robbery with murder, attempt to cause death, causing hurt and committing rape of pregnant woman – Injured eye-witness – Extra-judicial confession – Conviction by courts below and death sentence – On appeal, accused not challenging the conviction, but seeking to commute the death sentence – Held: The evidence established the prosecution case beyond reasonable doubt – The accused committed cold-blooded murder and his conduct was that of a brutal person – Therefore, his conviction is confirmed – However, the courts below failed to consider the state of mind of the accused at the relevant time, in its correct perspective, his capacity to realize the consequences of crime and lack of intent to commit murder – Accused was under influence of alcohol at the relevant time –The manner in which he assaulted reflects the conduct of an abnormal person – There is also no evidence to show that he was a hardened criminal and there was no possibility of his being reformed – His case does not fall in the category of the rarest of the rare case – Death sentence commuted to rigorous imprisonment for life – The life imprisonment shall be for life and sentences to run consecutively.

Sentence/Sentencing – Death sentence – Award of – Principles to be followed – Held: It is not only crime and its various facets which is foundation for formation of special reasons as contemplated u/s. 354(3) Cr.P.C. for imposing

death sentence, but the criminal, his background, his mental condition at the relevant time, manner of commission of crime, motive and brutality are also to be examined – Doctrine of rehabilitation and doctrine of prudence are also the guiding principles – Code of Criminal Procedure, 1973 – s. 354 (3).

Doctrines – 'Doctrine of rehabilitation' and 'Doctrine of prudence' – In the context of award of death sentence – Applicability.

The appellant-accused was prosecuted u/ss. 302, 307, 397, 394 and 376 (e) IPC, u/s. 25 of Arms Act and u/s. 135 of Bombay Police Act. The prosecution case was that he entered the house of PW2 and the deceased in the guise of a mechanic, looted the valuables of the house, assaulted them. He inflicted 21 injuries on the old woman which resulted in her death. He inflicted 19 injuries on PW2 (who was 5 months pregnant) and also committed rape on her. He made extra-judicial confession to PW-13.

Trial court convicted him under provisions of IPC for which he was charged. The court finding the case falling in the category of the rarest of rare cases, awarded death sentence alongwith other sentences. High Court confirmed the conviction as well as the sentence awarded by the trial court.

In appeal to this court, appellant stated that he did not wish to challenge the conviction, and contended that his case did not fall in the category of the rarest of rare cases and hence death sentence was not correct.

Partly allowing the appeal, the Court

HELD: 1. The prosecution evidence, particularly the statements of PW1, PW2, PW3, PW4, PW7, PW8 and PW13 clearly establish that the accused had entered the house

of the deceased and PW2, with an intention to commit robbery and was smelling of alcohol. However, he committed the crime in a very brutal manner. He did not heed to the request of PW2 to take away all the ornaments and money that were available in their house and to spare the life of both of them. According to the prosecution evidence, he did not accede to that request and even after taking the gold kept on inflicting injuries upon the deceased as well as PW2. The worst assault of the accused was that he asked PW2 to remove her clothes and committed rape on her while she was five months pregnant. Ultimately, he gave the last fatal blow with the *kukri* (the weapon he was carrying) on the neck of the deceased resulting in her immediate death. PW2 displayed wisdom and bravery and received the injuries on her back. She resisted the attack to the extent it was possible for her in order to survive and protect the child in her womb from any harm. The appellant committed a cold-blooded murder and his conduct was that of a brutal person. According to the statement of PW13, he had murdered both the ladies, which shows that he came out of the house thinking that both, the deceased and PW2, had died. To her good fortune, PW2 survived and was able to establish the case of the prosecution beyond reasonable doubt. [Paras 12 and 13] [1061-E-H; 1062-A-C]

2.1 It is neither possible nor permissible to define or lay down any straightjacket formula which can universally be applied to all cases requiring Court's determination in relation to imposition of death penalty. The Court, however, should, *inter alia*, consider the following points. First of all, the Court has to keep in mind that the prosecution has been able to prove its case beyond reasonable doubt and the accused is guilty of the offence where prescribed punishment is that of death. Secondly, the Court has to examine the cumulative effect of the prosecution evidence and the

stand of the accused. This would include discussion on the manner in which the crime was committed, the intent and motive of the accused, situation and mental condition of the accused at the relevant time, attendant circumstances relating to the commission of offence and the possibility of the accused being reformed if permitted to join the mainstream society. As a corollary to this, the Court would have to determine whether the accused would be a menace or an irreformable anti-social element to the society. [Paras 16 and 17] [1063-F-H; 1064-A-B]

2.2 Consideration of these aspects should automatically result in recording of special reasons where the Court is of the opinion that penalty of death should be imposed which is in line with the provisions of Section 354(3) Cr.P.C., which places a mandate upon the Court to apply its judicious mind and record 'special reasons' for imposing death penalty. It has been settled by this Court that with the legislative changes, the principle 'death is the rule and life an exception', where it was so provided under the Code of Criminal Procedure, has shifted to 'life is the rule and death an exception'. It is only when exceptional penalty of death is sought to be imposed by the Court that the Court is expected to record special reasons, satisfying the above criteria. [Para 18] [1064-C-E]

2.3 It is not only the crime and its various facets which are the foundation for formation of special reasons as contemplated under Section 354(3) Cr.P.C. for imposing death penalty, but it is also the criminal, his background, the manner in which the crime was committed and his mental condition at the relevant time, the motive of the offence and brutality with which the crime was committed are also to be examined. The doctrine of rehabilitation and doctrine of prudence are the other two guiding principles for proper exercise of judicial discretion. [Para 21] [1065-F-H]

2.4 The Trial Court has recorded reasons for awarding the sentence of death to the accused. These reasons elucidate how brutally the offence was committed and that the accused treated the victims with utmost disregard, both physically and mentally. However, the trial court as well as the High Court has not considered, in its correct perspective, the state of mind of the accused at the relevant time, his capacity to realize the consequences of the crime he was committing and the lack of intent on his part to commit the murder. The accused had not entered the house of PW2 with the intention to kill either of them. In fact, and indisputably, he entered the house of the deceased with the mind of committing robbery which he committed by taking away the gold ornaments, cell phone and money etc. However, in this process, he not only repeatedly injured the deceased and PW2, but also committed rape on PW2. [Para 19 and 20] [1064-F-H; 1065-A-B]

2.5 One very vital factor which has not been given any significance by the Courts in the impugned judgments is that the accused was smelling of alcohol. According to PW2, he smelled of alcohol and his eyes were red. Both these factors show that the accused might have been drunk and he might not exactly be aware of the consequences of his acts. This view finds support from the fact that if the accused had intended to kill deceased and PW2, it was not expected of him to inflict 21 and 19 injures on their bodies respectively. He could have simply given an injury on the vital parts of their body and put them to death. His conduct in inflicting large number of injuries and even amputating the fingers of the deceased clearly reflects the conduct of an abnormal person. Absence of normal behaviour even during the commission of the crime is a relevant consideration. It is evident from the evidence on record that the accused was not in a balanced state of mind and

in fact had no control over his mind. He was unable to decipher the consequences of his crime and the result that is likely to flow from such commission. In the facts and circumstances of the case, the Court cannot ignore such an abnormal behaviour of the accused. [Para 21] [1065-B-F]

2.6 In the present case the prosecution had led no evidence to show that the appellant was a hardened criminal and there was no possibility of his being reformed. There is also no evidence to show that during the time when he was in jail, his conduct was unworthy of any concession. It is a heinous and brutal crime that the accused has committed, but other relevant considerations outweigh it for the Court to state that the present case is one that of rarest of rare cases. The appeal is partially allowed and the death sentence is commuted to that of rigorous imprisonment for life. The life imprisonment shall be for life and the sentences shall run consecutively. [Paras 24 and 25] [1066-E-H]

Rameshbhai Chandubhai Rathod v. State of Gujarat **(2011) 2 SCC764: 2011 (1) SCR 829 ;** *Amit v. State of Uttar Pradesh* **(2012) 4SCC 107;** *Sebastian @ Chevithiyan v. State of Kerala* **(2010) 1 SCC 58 – relied on.**

Mohd. Chaman v. State (NCT of Delhi) **(2001) 2 SCC 28;** *RajeshKumar v. State through Government of NCT Delhi* **(2011) 13 SCC706;** *Rajendra Prahladrao Wasnik v. State of Maharasthra* **(2012) 4 SCC 37;** *Jagmohan singh v. State of U.P.* **(1973) 1 SCC 20: 1973 (2) SCR 541;** *Sangeet and Anr. v. State of Haryana* **2012 (11) SCALE 140 – referred to.**

Case Law Reference:

2011 (1) SCR 829	**Relied on**	**Para 12**
(2001) 2 SCC 28	**Referred to**	**Para 13**

(2010) 1 SCC 58	**Relied on**	**Para 13**
(2011) 13 SCC 706	**Referred to**	**Para 13**
2011 (1) SCR 829	**Referred to**	**Para 13**
(2012) 4 SCC 37	**Referred to**	**Para 14**
1973 (2) SCR 541	**Referred to**	**Para 15**
2012 (11) SCALE140	**Referred to**	**Para 15**

CRIMINAL APPEELLATE JURISDICTION : Criminal Appeal No. 1973 of 2011.

From the Judgment & Order dated 23/24/25.03.2011 of the High Court of Judicature of Bombay in Crl. Confirmation Case No. 1 of 2010 with Criminal Appeal No. 7 of 2011.

Mithilesh Kumar Singh, Taru Verma for the Appellant.

Sanjay V. Kharde, P. Surshe, Asha Gopalan Nair for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The present appeal is directed against the judgment of conviction and order of sentence passed by a Division Bench of the High Court of Judicature at Bombay dated 23rd, 24th and 25th March, 2011 awarding death penalty to the present appellant.

2. The learned counsel appearing for the appellant, the sole accused, at the very outset stated that the appellant does not wish to challenge the order of conviction but is only contending that the present case does not fall under the category of 'rarest of the rare' case where penalty of death could be imposed upon the accused. Thus, the controversy in the present appeal before this Court falls within a narrow compass.

3. In order to examine the sustainability of the submission raised on behalf of the appellant, it is necessary for the Court to refer in brief to the case of the prosecution and the evidence on record.

4. The complaint was lodged by Sumitra Ramesh Birajdar, PW1, maternal aunt of PW2, who was resident of Flat No.D-202, Purple Castle Society, Bibwewadi, Pune. She stated that deceased Shalini Uddahaurao Jadhav was her close relative. PW2 and her husband Jaydeep Patil, PW8, along with the deceased (their grandmother) were living in the same building since 31st August, 2007. Jaydeep Patil, PW8 was serving in the ICICI Bank. The incident took place on 10th September, 2007 when the complainant was at her house. At about 9.45 a.m., the deceased had come to her house while she was going to temple. The deceased was at the house of the complainant till about 11.30 a.m. when she left saying that she had to arrange her baggage as she wanted to go to Pandharpur. Both the complainant and PW2 were at their respective flats. At about 3.30 p.m., PW2 gave a call through the window to the complainant addressing as '*mami mami*'. Hearing the sound, the complainant sent her maid servant Chingu to see as to why PW2 was calling for her. The maid servant went to the gallery of her flat and told the complainant that she saw that blood was smeared on the face of PW2. Immediately the complainant rushed to the flat of PW2, which was on the 3rd floor and noticed that the door was bolted from outside. She opened the door from outside and PW2 opened the door from inside. PW2 was seen completely naked and there was blood all over her body. The complainant helped PW2 to wear the clothes to cover herself up. Thereafter, the complainant went inside the bed room, she saw the deceased, mother-in-law of PW2, lying in a pool of blood. The wrist of her left hand and four fingers of her right hand were mercilessly amputated. Her neck had also been slit. Blood was lying everywhere in the flat. The complainant, without any loss of time,

gave a call to Jaydeep Patil, PW8, on his mobile and narrated the condition of the house. She also gave a call to her husband. Within 15 to 20 minutes, PW8 reached the house. He shifted his wife, PW2 in a car. They proceeded towards Bharati Vidyapeeth Hospital. On the way, PW2 disclosed to the complainant that at about 2.00 to 2.15 p.m. one young boy came to her flat. The door was opened by her mother-in-law, the deceased. The young boy said that he was a mechanic and was sent by *sahib* (Jaydeep Patil) to repair the car on which PW2 told him that their car was not out of order and asked the young boy to go back. When she tried to contact her husband on mobile phone, the said young boy snatched away the mobile from her. He closed the door of the flat from inside. Thereupon the accused started assaulting both, PW2 and her mother-in-law, the deceased with a sickle like weapon. They tried to resist his act. At that time, he inflicted blows on the hands of the deceased by the weapon after which she fell down. Further, the case of the prosecution is that the said young man assaulted the deceased a number of times and while she was on the ground and the accused demanded the ornaments on the person of the deceased. He also snatched the *Mangalsutra* from PW2 and her gold chain but did not stop the assault.

5. PW2 was in her 5th month of pregnancy and, therefore, tried her best to avoid any injury on her stomach and, in fact, suffered all the injuries on her back. The accused further demanded for jewellery and cash that was lying in the house, which probably was his main object. PW2 threw the purse containing gold ornaments in front of him. He collected them but at this stage when the deceased made some movement on the floor, he gave her another fatal blow on the neck which ultimately resulted in her death. When he demanded more cash and jewellery, PW2 even offered him to search the entire house and take away what he wanted and requested him to spare them. Upon this, the accused became more aggressive and asked PW2 to remove her clothes and committed rape on her under the threat of further assault. Even thereafter, he kept

inflicting blows on PW2. He then went to the bathroom, cleaned himself and fled from the flat and bolted the door from outside. PW2 crawled to the bedroom and from there she screamed for her *mami* (PW1), the complainant. PW2, according to her statement, moved with great difficulty to unbolt the door from inside when the complainant and her maid servant had come.

6. The complainant called up PW8. Police was also informed and it reached the spot. When PW2 was taken to Bharti Vidyapeeth Hospital, they advised to refer her to Ruby Hall Clinic and, thus, PW2 was shifted to that clinic at about 5.30 p.m., where she was operated upon immediately and was in the ICU upto 18th September, 2007 and she was discharged on 28th September, 2007.

7. Having received the information from PW1, the complainant, Police had commenced its investigation. The Police brought the dog squad as well as photographer, PW11, to the place of offence. On 11th September, 2007, the police even went to get information from PW2 in the hospital. On the basis of the description given by her, PW12, Girish Anant Charwad, had prepared the sketch of the accused which was widely circulated including publication in the local newspapers. PW16, Ashok Shelke, the Inspector from the Crime Branch got an information that the suspect was residing at upper Indira Nagar area. When the Police party went there and made inquiries, the suspect was not traced. The Police traced the native place of the accused, Awasari Khurd in Ambegaon Taluka and found that his name was Sandesh Kailas Abhang. In furtherance to the information received, the accused was arrested from his house in Awasari Khurd Village and was taken into custody.

8. The inquest panchnama of the body of the deceased, Shalini Jadhav, was drawn as Exhibit 45 on 10th September, 2007. The post mortem report, Exhibit 40, was prepared and signed by PW7, Dr. Milind Sharad Wable. After the arrest of the accused, recovery of the articles, viz., the gold ornaments,

mobile phone, clothes of the accused as well as the weapon used, was effected. The articles recovered were sent for chemical analysis and report thereof is filed on record. The Investigating Officer, after recording the statement of witnesses and collecting other evidence, filed the charge-sheet, Exhibit 4, before the Court of competent jurisdiction. The accused was charged with the offences punishable under Sections 302, 307, 397, 394, 376(e) of the Indian Penal Code, 1860 (for short, the 'IPC'), Section 25 of the Arms Act and Section 135 of the Bombay Police Act.

9. The prosecution examined as many as 18 witnesses. It may be noticed at this stage that the Trial Court has dealt with the extra-judicial confession made by the accused to his friend, Rajendra Baban Sawant, PW13, at great length and found that his statement Exhibit 59 recorded under Section 164 of the Code of Criminal Procedure, 1973 (for short, the 'Code') fully corroborated the case of the prosecution. However, there was no reason for PW13 to make any false statement or for the Trial Court to disbelieve the same. The Trial Court by a very detailed judgment held the accused guilty for offences punishable under Sections 302, 307, 394, 397 and 376(e) IPC. It heard the accused on the quantum of sentence as well as referred to the judgment of this Court in the case of *Bachan Singh* v. *State of Punjab* [(1980) 2 SCC 684]**.** After analysing the principles enunciated in that case, the Trial Court came to the conclusion that the case fell in the category of the rarest of rare cases and awarded the punishment as follows :

"1) Accused Sandesh alias Sainath Kailas Abhang is found guilty for the offence punishable under Sections 302, 307, 376(e), 394, 397 of Indian Penal Code.

2) Accused is convicted for offence punishable under Section 302 of Indian Penal Code and he is sentenced to death. Accused shall be hanged by neck till he is dead. Death sentence shall not be executed unless it is confirmed by the Hon'ble High Court.

3) Accused is convicted for offence punishable under Section 307 of Indian Penal Code and he is sentenced to suffer R.I. for 10 years and to pay a fine of Rs.5000/- in default to suffer R.I. for six months.

4) Accused is convicted for offence punishable under Section 376(e) of Indian Penal Code and he is sentenced to suffer imprisonment for life and to pay a fine of Rs.5000/- in default to suffer R.I. for six months.

5) Accused is convicted for offence punishable under Section 394 read with Section 397 of Indian Penal Code and he is sentenced to suffer imprisonment for life and to pay a fine of Rs.5000/- in default to suffer R.I. for six months.

6) Accused is acquitted for offence punishable under Section 135 of Bombay Police Act and under Section 25 of Arms Act.

7) All the Jail sentences to run concurrently.

8) Accused is in jail since 19.09.2007. He is entitled for set off.

9) The seized gold ornaments and mobile handset be returned to PW after the period of appeal will be over.

10) Remaining articles being valueless be destroyed after the period of appeal will be over.

11) Record and proceedings be sent immediately to the Hon'ble High Court for confirmation of the death sentence."

10. The appellant challenged the correctness of the judgment of conviction and order of sentence before the High Court by filing a Regular Criminal Appeal being Criminal Appeal No.7 of 2011. Along with this, the Criminal Confirmation Case No.1 of 2010 for confirmation or otherwise of death sentence was listed before the High Court. The High Court by a detailed judgment confirmed the death sentence as well as dismissed the appeal filed by the accused, giving rise to filing of the present appeal.

11. As already noticed, we are only concerned with the question, whether imposition of death penalty is justified in the facts of the present case or not. Though in view of the statement made by the learned counsel appearing for the appellant, there is hardly any occasion for us to discuss the prosecution evidence in any greater detail, still it is necessary for the Court to examine the intent of the accused, the manner in which the crime was committed, the impact of such crime upon the society and finally the possibility of the accused being reformed.

12. The prosecution evidence, particularly the statements of PW1, PW2, PW3, PW4, PW7, PW8 and PW13 clearly establish that the accused had entered the house of the deceased and PW2 with an intention to commit robbery and was smelling of alcohol. However, he committed the crime in a very brutal manner. He did not heed to the request of PW2 to take away all the ornaments and money that were available in their house and to spare the life of both of them. According to the prosecution evidence, he did not accede to that request and even after taking the gold kept on inflicting injuries upon the deceased as well as PW2. The worst assault of the accused was that he asked PW2 to remove her clothes and committed rape on her while she was five months pregnant. Ultimately, he gave the last fatal blow with the *kukri* (the weapon he was carrying) on the neck of the deceased resulting in her immediate death. PW2 displayed wisdom and bravery and received the injuries on her back. She resisted the attack to

the extent it was possible for her in order to survive and protect the child in her womb from any harm.

13. The appellant committed a cold blooded murder and his conduct was that of a brutal person. According to the statement of PW13, Rajendra Sawant, he had murdered both the ladies which shows that he came out of the house thinking that both, the deceased and PW2, had died. To her good fortune, PW2 survived and was able to establish the case of the prosecution beyond reasonable doubt. The learned counsel appearing for the appellant argued that the accused was under the influence of liquor and was unmindful of the consequences of his crime. He did not commit the crime with any premeditation, was arrested nine days after the date of occurrence, is a young person of 23 years of age are the mitigating circumstances, and that certainly the present case does not fall in the category of a rarest of rare case. He also submitted that the prosecution has led no evidence to show that the deceased is incapable of being reformed. In support of his contention, he has relied upon various judgments of this Court in the cases of *Mohd. Chaman v. State (NCT of Delhi)* [(2001) 2 SCC 28]; *Sebastian @ Chevithiyan v. State of Kerala* [(2010) 1 SCC 58]; *Rameshbhai Chandubhai Rathod v. State of Gujarat* [(2011) 2 SCC 764]; *Rajesh Kumar v. State through Government of NCT Delhi* [(2011) 13 SCC 706]; and *Amit v. State of Uttar Pradesh* [(2012) 4 SCC 107].

14. On the contrary, the contention on behalf of the State is that it was a brutal murder of an innocent lady and is a case where direct evidence (eye-witness – PW2) has clearly stated the barbaric manner in which the offence was committed. The accused showed no respect for human life as he inflicted 21 injuries upon the deceased and 19 injuries upon PW2. He assaulted two helpless ladies and that too for a small gain. The counsel for the State placed reliance on the judgment of this Court in the case of *Rajendra Prahladrao Wasnik v. State of Maharasthra* [(2012) 4 SCC 37].

15. First and foremost, we must notice the authoritative statement by a Constitution Bench of this Court in the case of *Bachan Singh* (supra), where the Court discussed the entire law in relation to sentencing with a definite reference to the imposition of death penalty and took a somewhat divergent view than was taken in the case of *Jagmohan Singh v. State of U.P.* [(1973) 1 SCC 20]. Keeping in view the change in legislative policy and various pronouncements of this Court, the Constitution Bench made a shift in approach from an entirely crime based approach to an approach that focused on both, the crime and the criminal. Some reservations were expressed by the Bench in regard to the opinion expressed in the case of *Jagmohan* (supra). The Courts, within the ambit of Section 354(3) of the Code of Criminal Procedure, were recording reasons with reference to mitigating and aggravating circumstances. However, a Bench of this Court in the case of *Sangeet & Anr. v. State of Haryana* [2012 (11) SCALE 140] took a view that such approach needed a fresh look, in view of the principles stated in the case of *Bachan Singh* (supra).

16. The paradigm shift in the criminal jurisprudence would not substantially alter the substance of the approach since ingredients relating to a criminal as well as the attendant circumstances of a crime will have to be considered in all events. The Court would have to consider each case on its own merits. It is neither possible nor permissible to define or lay down any straightjacket formula which can universally be applied to all cases requiring Court's determination in relation to imposition of death penalty. The Court, however, should, *inter alia*, consider the following points.

17. First of all, the Court has to keep in mind that the prosecution has been able to prove its case beyond reasonable doubt and the accused is guilty of the offence where prescribed punishment is that of death. Secondly, the Court has to examine the cumulative effect of the prosecution evidence and the stand of the accused. This would include discussion on the manner

in which the crime was committed, the intent and motive of the accused, situation and mental condition of the accused at the relevant time, attendant circumstances relating to the commission of offence and the possibility of the accused being reformed if permitted to join the mainstream society. As a corollary to this the Court would have to determine whether the accused would be a menace or an irreformable anti-social element to the society.

18. Consideration of these aspects should automatically result in recording of special reasons where the Court is of the opinion that penalty of death should be imposed which is in line with the provisions of Section 354(3) which places a mandate upon the Court to apply its judicious mind and record 'special reasons' for imposing death penalty. It has been settled by this Court that with the legislative changes, the principle 'death is the rule and life an exception', where it was so provided under the Code of Criminal Procedure, has shifted to 'life is the rule and death an exception'. It is only when exceptional penalty of death is sought to be imposed by the Court that the Court is expected to record special reasons, satisfying the above criteria.

19. The Trial Court has recorded reasons for awarding the sentence of death to the accused. These reasons elucidate how brutally the offence was committed and that the accused treated the victims with utmost disregard, both physically and mentally. Rape of a pregnant lady by the accused was totally inhuman and unwarranted. The learned counsel for the appellant has not been able to dispute these reasons or the fact that they are matters of serious concern.

20. However, the Trial Court as well as the High Court has not considered, in its correct perspective, the state of mind of the accused at the relevant time, his capacity to realize the consequences of the crime he was committing and the lack of intent on his part to commit the murder. The accused had not entered the house of PW2 with the intention to kill either of them.

In fact, and indisputably, he entered the house of the deceased with the mind of committing robbery which he committed by taking away the gold ornaments, cell phone and money etc. However, in this process, he not only repeatedly injured the deceased and PW2, but also committed rape on PW2.

21. One very vital factor which has not been given any significance by the Courts in the impugned judgments is that the accused was smelling of alcohol. According to PW2, he smelled of alcohol and his eyes were red. Both these factors show that the accused may have been drunk and he may not exactly be aware of the consequences of his acts. This view finds support from the fact that if the accused had intended to kill deceased and PW2, it was not expected of him to inflict 21 and 19 injures on their bodies respectively. He could have simply given an injury on the vital parts of their body and put them to death. His conduct in inflicting large number of injuries and even amputating the fingers of the deceased clearly reflects the conduct of an abnormal person. Absence of normal behaviour even during the commission of the crime is a relevant consideration. It is evident from the evidence on record that the accused was not in a balanced state of mind and in fact had no control over his mind. He was unable to decipher the consequences of his crime and the result that is likely to flow from such commission. In the facts and circumstances of the case, the Court cannot ignore such an abnormal behaviour of the accused. As already noticed, it is not only the crime and its various facets which are the foundation for formation of special reasons as contemplated under Section 354(3) of Cr.P.C. for imposing death penalty but it is also the criminal, his background, the manner in which the crime was committed and his mental condition at the relevant time, the motive of the offence and brutality with which the crime was committed are also to be examined. The doctrine of rehabilitation and doctrine of prudence are the other two guiding principles for proper exercise of judicial discretion.

22. Now, we may refer to some cases that have been

relied upon by the learned counsel appearing for the appellant.

23. In the case of *Rameshbhai Chandubhai Rathod* (supra), the Court while dealing with a case of rape and murder of a child by the watchman, commuted the death sentence to that of imprisonment for life, directing it to be of full life on the ground that it did not fall in the category of rarest of rare cases, because the accused was young person of 27 years and there was possibility of his rehabilitation. Even in the case of *Amit* (supra), this Court after taking into consideration the fact that there was a possibility of the accused being reformed and he not being involved in similar crimes earlier, commuted the death sentence to life imprisonment in a case of kidnapping, rape, commission of unnatural offence, murder and even causing disappearance of evidence. Similar approach was also adopted by this Court in the case of *Sebastian* (supra).

24. We have already noticed that it is not possible to lay down as a principle of law as to in which cases the death penalty should or should not be imposed. The above judgments are on their own facts, but one aspect that certainly is stated in these judgments is the possibility of the accused being reformed, he being young and having no criminal involvement in similar crimes are relevant considerations. In the present case the prosecution had led no evidence to show that the appellant was a hardened criminal and there was no possibility of his being reformed. There is also no evidence to show that during the time when he was in jail, his conduct was unworthy of any concession. It is a heinous and brutal crime that the accused has committed, but other relevant considerations outweigh it for the Court to state that the present case is not one of the rarest of rare cases.

25. For the reasons afore-stated, we partially allow the appeal of the appellant and commute the death sentence to that of rigorous imprisonment for life. The life imprisonment shall be for life and the sentences shall run consecutively.

K.K.T. Appeal partly allowed.

SAHABUDDIN & ANR.
v.
STATE OF ASSAM
(Criminal Appeal No. 629 of 2010)

DECEMBER 13, 2012

[SWATANTER KUMAR AND GYAN SUDHA MISRA, JJ.]

Penal Code, 1860 – s. 302/34 – Murder – Of a woman – By her husband and his brother – Circumstantial evidence – Deceased refusing to go to her matrimonial home before the incident – Her death caused in the matrimonial house – Various injuries on the person of the deceased – Witnesses to the injuries – Post mortem report and inquest report corroborating the prosecution case – Defence taking plea of alibi – Conviction by trial court and High Court – On appeal, held: The prosecution has established various circumstances which complete the chain of events pointing towards the guilt of the accused – The statements of PWs were reliable and trustworthy, as they fully corroborated other documentary and ocular evidence – The contradiction in the evidence of PWs not material – The evidence of hostile witnesses would not carry any weight in the face of evidence of PWs 3 to 7 – Plea of alibi a falsehood – Conviction upheld.

Criminal Trial – If the plea of alibi is disbelieved and there is absence of explanation u/s. 313 Cr.P.C., Court is entitled to draw adverse inference against the accused – Code of Criminal Procedure, 1973 – s. 313.

Investigation – Conduct of Investigating Officer to misdirect the evidence and to withhold the material evidence from the Court – Doctor who conducted postmortem, made his evidence totally vague, uncertain and indefinite – Direction to State to take disciplinary action against the officers.

Appellant-accused alongwith another accused (his brother) was prosecuted for having killed his wife. The prosecution case was that a couple of months prior to the date of the incident, when the deceased had come to her parents' house, she expressed her unwillingness to go back to her husband's house apprehending that her husband and brother-in-law would kill her. However, she came to her husband's house. On the day of the incident, brother-in-law of the deceased informed PW7 (uncle of the deceased) that the deceased died after falling down in the kitchen. PW7 informed this to PW3 (mother of the deceased). PW3 suspecting that it was not a natural death, lodged an FIR. During trial, PWs 8 and 9 (the neighbours of the accused) turned hostile. The accused took the plea of alibi and in its support, produced three witnesses. Trial court, disbelieving the defence case, convicted both the accused u/s. 302/34 IPC. Trial Court also observed that the Medical Officer, who had conducted post mortem, needed to be censured as his report was found to be perfunctory in nature. High Court confirmed the judgment of trial court.

In appeal to this Court, appellants contended that the prosecution did not establish the case beyond reasonable doubt; that PWs 3 to PW7 were not reliable as they were interested witnesses by the virtue of being related to the deceased; that the statements of PWs were contradictory and that PWs 8 and 9 being hostile were not reliable.

Dismissing the appeal, the Court

HELD: 1.1 This is a case of circumstantial evidence, as there is no eye- witness to the occurrence which has been produced by the prosecution. The prosecution has been able to establish various circumstances which complete the chain of events and such chain of events undoubtedly point towards the guilt of the accused

persons. These circumstances are: the victim coming to her parental home and declining to go back to her matrimonial home, she being persuaded to go to her matrimonial home by her parents and within a few days thereafter, she dies at her in-laws place. Further that she had various injuries on her lower abdomen and that her neck and face were congested and swollen. The post mortem report completely corroborates the statements of PWs. The inquest report, also fully substantiates the case of the prosecution. Besides this, PW3 had categorically stated that her daughter was not suffering from epilepsy or any other disease and that she died as a result of torture inflicted on her by the accused persons. [Paras 10 and 22] [1076-E; 1084-B-E]

1.2 The post mortem report, clearly corroborates the statement of five witnesses, PW3, PW4, PW5, PW6 and PW7 and there is no reason for the Court to cast a doubt upon their statement. All these witnesses are related to the deceased. Merely because they are all relatives of the deceased, will not by itself cause any prejudice to the case of the prosecution. In such events, it is not the outsiders who would come to the rescue and would stand by the victim/deceased and their family, but it is the members of their family who would go to witness such an unfortunate incident. An interested witness is the one who is desirous of falsely implicating the accused with an intention of ensuring their conviction. Merely being a relative would not make the statement of such witness equivalent to that of an interested witness. The statement of a related witness can safely be relied upon by the Court, as long as it is trustworthy, truthful and duly corroborated by other prosecution evidence. The statements of PWs were reliable and trustworthy, as they were fully corroborated by other prosecution, documentary and ocular evidence. [Paras 15, 16 and 17] [1079-F-H; 1080-A-C; 1082-F]

Gajoo v. State of Uttarakhand **JT 2012 (9) SC 10;** *State of A.P. v. S.Rayappa and Ors.* **(2006) 4 SCC 512 – relied on.**

1.3 Every variation or immaterial contradiction cannot provide advantage to the accused. In the instant case, PW3 had mentioned that she came to know about the death of her daughter at about 9.30 p.m., however, according to PW6, it was about 8 or 9 0'clock when she was informed of the death of her sister. This would hardly be a contradiction. In the facts and circumstances of the present case, variation of 45 minutes or an hour in giving the time of incident will not be considered fatal. It is a settled principle of law that while appreciating the evidence, the Court must examine the evidence in its entirety upon reading the statement of a witness as a whole, and if the Court finds the statement to be truthful and worthy of credence, then every variation or discrepancy particularly which is immaterial and does not affect the root of the case of the prosecution case would be of no consequences. [Paras 18 and 19] [1082-H; 1083-A, C-E]

State represented by Inspector of Police v. Saravanan and Anr. **(2008) 17 SCC 587: 2008 (14) SCR 405 – relied on.**

1.4 PW8 and PW9 are neighbours of the accused. They affirmed the death of the deceased but gave different versions as to the place and the manner in which she died. The statements of such witnesses would hardly carry any weight in the face of the statements of PW3 to PW7. The possibility of their turning hostile by virtue of them being neighbours of the accused cannot be ruled out. [Para 21] [1083-H; 1084-A-B]

1.5 The deceased died in the house of the appellants and therefore, it was expected of the appellants to furnish some explanation in their statement under Section 313 CrPC as to the exact cause of her death. Except barely

taking the plea of *alibi*, accused persons chose not to bring the truth before the Court i.e. the circumstances leading to the death of the deceased. [Para 23] [1084-G-H; 1085-A]

1.6 There is no merit in the plea of *alibi* as it is just an excuse which has been put forward by the accused persons to escape the liability in law. There is a complete contradiction in the material facts of the statement of DW1, DW2 and DW3. According to the statements of DWs none of the family members were present on the spot, is strange in the light of the fact that the deceased was so ill that she died after a short while due to her illness. If none of the accused, whom these witnesses knew were present, then it is not only doubtful but even surprising as to how they came in contact with the deceased at the relevant time. The falsity of the evidence of the defence is writ large in the present case. The conduct of the accused was unnatural and the statement of these witnesses untrustworthy. The plea of *alibi* is nothing but a falsehood. [Para 24] [1085-B-E]

1.7 Once, the Court disbelieves the plea of *alibi* and the accused does not give any explanation in his statement under Section 313 CrPC, the Court is entitled to draw adverse inference against the accused. [Para 25] 1085-F]

Jitender Kumar v. State of Haryana **(2012) 6 SCC 204 – relied on.**

2.1 The Investigating Officer has conducted investigation in a suspicious manner and did not even care to send the viscera to the laboratory for its appropriate examination. PW11 has stated that viscera could not be examined by the laboratory as it was not sent in time. There is a deliberate attempt on the part of the Investigating Officer to misdirect the evidence and to withhold the material evidence from the Court. [Para 27] [1085-F]

2.2 PW1, the doctor who conducted the post mortem of the corpse of the deceased was expected to categorically state the cause of death in which he miserably failed. He is a doctor who is expected to perform a specialized job. He made his evidence totally vague, uncertain and indefinite. Given the expertise and knowledge possessed by a doctor PW1, was expected to state the cause of death with certainty or the most probable cause of death in the least. The doctor has also failed to discharge his professional obligations in terms of the professional standards expected of him. He has attempted to misdirect the evidence before the Court and has intentionally made it so vague that in place of aiding the ends of justice, he has attempted to help the accused. [Paras 28 and 29] [1087-B-D, F]

2.3 The competent authority ought to have taken some action on the basis of the observations made by the trial court in its judgment under appeal. The Director General of Police, and Director General of Health Services, of the State are directed to take disciplinary action against PW1 and PW11, whether they are in service or have since retired. If not in service, action shall be taken against them for deduction/stoppage of pension in accordance with the service rules. The plea of limitation, if any, under the relevant rules would not operate, as the departmental inquiry shall be conducted in furtherance to the order of this Court. [Paras 26 and 31] [1086-G; 1092-E-F]

Gajoo v. State of Uttarakhand **JT 2012 (9) SC 10 – relied on.**

Case Law Reference:

JT 2012 (9) SC 10	**Relied on**	**Paras 16 and 30**
2008 (14) SCR 405	**Relied on**	**Para 19**

(2012) 6 SCC 204 Relied on Para 25

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 629 of 2010.

From the Judgment & Order dated 27.11.2008 of the High Court of Gauhati at Assam in Criminal No. 91 of 2005.

Nagendra Kumar Sahoo for the Appellants.

Navnit Kumar, Corporate Law Group for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. It is the case of the prosecution that the accused Sahabuddin was married to one Sajna Begum, the deceased on 17th May, 2001, and they were staying together. She was three months' pregnant. During her last visit to her parental home, she wailed and was not willing to go back to her husband's house, stating that her husband and her brother-in-law would kill her if their demands of dowry were not met. However, the wish of her parents prevailed and she was sent back to her matrimonial home. After lapse of barely a couple of months i.e. on 9th September, 2001, approximately four months after her marriage, at about 10 p.m., one Sarifuddin, the elder brother-in-law of Sajna Begum, informed her uncle, Taibur Rahman, PW7 that she fell down in the kitchen due to dizziness. Ten minutes later, Sarifuddin came back and informed them that Sajana Begum fell down and froth was coming out of her mouth and thereafter she died. PW7 informed the mother of the deceased, Abejan Bibi, PW3, about the death of her daughter, Sajna Begum. When they reached the place of occurrence, they saw that their daughter was lying dead. Suspecting that it was not a natural death and that there had been some foul play on the part of the accused persons i.e. the husband and the brother-in-law of the deceased, PW3, lodged an FIR.

2. The FIR, Ext. 3, was registered under Section 304(B)

of the Indian Penal Code, 1860 (for short "IPC"). However, the Court of competent jurisdiction on the basis of the police report and upon hearing both the parties found that a *prima facie* case under Section 302/34 IPC was made out against the accused Sahabuddin and Sarifuddin. They were charged with the same offence and the case was put to trial. The Investigating Officer, Someshwar Boro, PW11, took over the investigation, examined a number of witnesses and seized the dead body from the place in question. The body of the deceased was subjected to post mortem. On 10th September, 2001, Dr. Swapan Kumar Sen, PW1 in the post mortem report, Ext. 1 stated that injuries on the body of the deceased were ante-mortem and that there were multiple bruises on the lower abdomen. Also, the neck was swollen and face was congested and swollen. Although, the cause of death could not be ascertained, the visceras were preserved to be sent to the Forensic Science Laboratory, Guwahati, for forensic and chemical analysis. PW2, an Executive Magistrate, who had conducted inquest on the body of the deceased noticed that the hands of the deceased were close fisted and saliva was coming out of her mouth along with a little quantity of foam. Black spots were found on her belly and some spots were also noticed on her back. Ext. 2 is the inquest report.

3. The mother of the deceased, Abejan Bibi, PW3 was another material witness and according to her, assault marks could be seen all over the body of the deceased and that her neck was swollen. PW3 also stated that she saw black marks on the left side of the abdomen of her deceased daughter. Thus, on being suspicious that her daughter had been killed, PW3 lodged the FIR. PW4 who had accompanied PW3, stated PW3 to be her aunt and the statement of PW 4 was quite similar to that of PW3. PW7, Taibur Rahman was the uncle of the deceased, Sajna Begum who had first been informed of her demise by her brother in law, Sarifuddin.

4. However, PW8 and PW9 were the prosecution

witnesses who did not fully support the case of the prosecution and were thus declared hostile by the prosecution. Both these witnesses were the neighbours of the accused persons. Accused in their statements under Section 313 of the Code of Criminal Procedure (for short "the CrPC") denied all the allegations and opted to lead defence. The accused persons had examined as many as three witnesses, who were primarily produced to establish the plea of *alibi,* affirming that the accused were not present in the house, when the incident took place.

5. Disbelieving the defence put forth by the accused, the Trial Court held both the accused guilty of the offence punishable under Section 302 read with Section 34 IPC and having found them guilty, awarded them life imprisonment and a fine of Rs. 5000/- and in default to undergo simple imprisonment for six months.

6. At this stage, we may also notice that the Trial Court had observed that PW1, Dr. Swapan Kumar Sen, the medical officer needs to be censured as his report was found to be perfunctory in nature.

7. Challenging the legality and correctness of the judgment of the Trial Court, the accused persons preferred an appeal before the High Court. The High Court vide its judgment dated 27th November, 2008 dismissed the appeal, confirming the finding of guilt and order of sentence passed by the Trial Court, giving rise to the filing of the present appeal.

8. The learned counsel appearing for the appellants has raised the following contentions while impugning the judgment under appeal:-

1. The story of the prosecution is improbable and prosecution has not been able to establish its case beyond reasonable doubt.

2. PW3 to PW7 are all interested witnesses. By virtue of them being the relatives of the deceased, these witnesses wanted to falsely implicate the accused persons. Hence, their statements cannot be relied upon and in any case, there are contradictions in the statements of these witnesses. Thus, the accused is entitled to the benefit of doubt.

3. PW8 and PW9 did not support the case of the prosecution. The Court should have returned a finding in favour of the accused by appreciating the statements of DW1, DW2 and DW3, in its correct perspective and examining them in light of the statements of the PW8 and PW9.

9. We are unable to find any merit in the contentions raised on behalf of the appellants, which we propose to discuss together as the Court has to refer to the same evidence for appreciation of the contentions raised on behalf of both the appellants. Thus, it will be appropriate to discuss the pleas together.

10. This is a case of circumstantial evidence as there is no eye witness to the occurrence which has been produced by the prosecution.

11. Let us examine the various circumstances by which the prosecution has attempted to establish the guilt of the accused beyond reasonable doubt. PW3 is the mother of the deceased who had been informed by PW7, the uncle of the deceased about her death. PW5 and PW7 are the uncles of the deceased. PW4 is the cousin sister and PW6 is the sister of the deceased. These persons had accompanied PW3 to the house of the accused, when they got the news of death of the deceased.

12. It has been specifically stated by these witnesses that there were marks on the body of the deceased, her neck was

congested and swollen and so was the face. The statement of these witnesses and particularly of PW3, finds due corroboration with the post mortem report prepared by PW1 and, therefore, it will be useful to refer to the entire statement of this witness.

"On 10/9/2001 I was at Karimganj Civil hospital as Senior M & H.O. On that day at 3-30 p.m. I held post mortem examination on the dead body of Sajna Begum aged 18 years, a female Muslim, from Durlabpur under Patharkandi P.S. on police requisition, being identified by Head Constable Rabindra Deb and Md. Khairuddin, a relation of the deceased and found as :-

External Appearance

An average built female aged about 18 years whose rigor mortis was absent, eyes closed, mouth half open, froth in nostrils present which was whitish. Multiple bruises on the lower abdomen. Neck was swollen. Face was congested & swollen.

Cranium & Spinal Canal

All organs pale

Thorax

Heart was pale & chambers contained blood. Vessels contained blood. All other organs were pale.

Abdomen

Stomach & its contents congested and contained ricy food materials. Large intestine etc – pale & empty. Other organs were pale.

Organs of generation etc – pale. Uterus was 3 months pregnancy.

More details

Injuries were ante mortem.

Visaras also preserved for forensic and clinical analysis through FSL, Guwahati.

(1) Stomach and its contents.

(2) Part of heart, lung, liver, spleen, kidney and rib.

Opinion

As the actual cause of death could not be ascertained the visceras preserved for forensic & chemical analysis to FSL, Guwahati.

Ext. 1 is the Report, Ext. 1(1) is my signature.

Bruises and swollen face being congested may be due to some physical assault. Black spots detected by the Executive Magistrate at the time of preparing his inquest report corresponds to bruises on the lower abdomen as described by my in my p.m. report.

XXXXXXXXXXXXXX

I was not present at the time of holding inquest by the Magistrate.

Bruise resembles to black spot. Normally after death, no black spot is noticed on a dead person. Black spots may be caused due to poisoning or suffocation.

Bruise may be caused due to dashing against piece of bamboo, bamboo fencing etc.

Pale I mean bloodless and it may happen in normal death also.

Definite cause of death could not be detected.

Symptoms as described above may happen due to epilepsy."

13. As is evident from the statement of PW1, the deceased was three months pregnant. He specifically made a note of the fact that her neck was swollen, her face was congested and swollen and there were multiple bruises on her lower abdomen. According to this witness, the actual cause of death could not be ascertained, but he stated that the presence of bruises on the body of the deceased and her face being swollen and congested may be due to some physical assault. In his cross-examination, he stated that the black spots may be caused due to poisoning or suffocation and also that symptoms described above may also occur due to epilepsy.

14. Certainly, the doctor did not give a concrete opinion as to the cause of death. The report of the chemical analyst and the report of the Forensic Science Laboratory were not placed on record so that the Court could at least come to a definite conclusion on the basis of scientific analysis. FSL Report was not sent, no report was obtained and, in fact according to PW11, the viscera could not be examined by the laboratory as it was not sent in time. It is evident that the investigation conducted by the Investigating Officer, PW11 and the post mortem examination by the doctor was improper in its very nature. Thus, the remarks made by the Trial Court in this behalf are fully justified.

15. Reverting to the evidence, the post mortem report, Ext. 1 clearly corroborates the statement of five witnesses, PW3, PW4, PW5, PW6 and PW7 and there is no reason for the Court to cast a doubt upon their statement. All these witnesses are related to the deceased. Merely because they are all relatives of the deceased will not by itself cause any prejudice to the case of the prosecution. In such events, it is not the outsiders who would come to the rescue and would stand by the victim/deceased and their family, but it is the members of

their family who would go to witness such an unfortunate incident.

16. An interested witness is the one who is desirous of falsely implicating the accused with an intention of ensuring their conviction. Merely being a relative would not make the statement of such witness equivalent to that of an interested witness. The statement of a related witness can safely be relied upon by the Court, as long as it is trustworthy, truthful and duly corroborated by other prosecution evidence. At this stage, we may refer to the judgment of this Court in the case of *Gajoo v. State of Uttarakhand* [JT 2012 (9) SC 10], where the Court while referring to various previous judgments of this Court, held as under:-

> We are not impressed with this argument. The appreciation of evidence of such related witnesses has been discussed by this Court in its various judgments. In the case of *Dalip Singh v. State of Punjab* [(1954 SCR 145], while rejecting the argument that witnesses who are close-relatives of the victim should not be relied upon, the Court held as under:-
>
> > "26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping

generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

Similar view was taken by this Court in the case of *State of A.P. v. S. Rayappa and Others* [(2006) 4 SCC 512]. The court observed that it is now almost a fashion that public is reluctant to appear and depose before the court especially in criminal cases and the cases for that reason itself are dragged for years and years. The Court also stated the principle that, "by now, it is a well-established principle of law that testimony of a witness otherwise inspiring confidence cannot be discarded on the ground that he being a relation of the deceased is an interested witness. A close relative who is a very natural witness cannot be termed as interested witness. The term interested postulates that the person concerned must have some direct interest in seeing the accused person being convicted somehow or the other either because of animosity or some other reasons."

This Court has also taken the view that related witness does not necessarily mean or is equivalent to an interested witness. A witness may be called interested only when he or she derives some benefit from the result of litigation; in the decree in a civil case, or in seeing an accused person punished. {Ref. *State of Uttar Pradesh v. Kishanpal and Others* [(2008) 16 SCC 73]}

In the case of *Darya Singh & Ors. v. State of Punjab* [AIR 1965 SC 328], the Court held as under:-

"6....On principle, however, it is difficult to accept the plea that if a witness is shown to be a relative of the deceased and it is also shown that he shared

the hostility of the victim towards the assailant, his evidence can never be accepted unless it is corroborated on material particulars."

Once, the presence of PW2 and PW3 is shown to be natural, then to doubt their statement would not be a correct approach in law. It has unequivocally come on record through various witnesses including PW4 that there was a '*Satyanarayan Katha'* at the house of Chetu Ram which was attended by various villagers. It was on their way back at midnight when PW2 and PW3 had seen the occurrence in dark with the help of the torches that they were carrying. The mere fact that PW2 happens to be related to PW1 and to the deceased, would not result in doubting the statement of these witnesses which otherwise have credence, are reliable and are duly corroborated by other evidence. In such cases, it is only the members of the family who come forward to depose. Once it is established that their depositions do not suffer from material contradictions, are trustworthy and in consonance with the above-stated principles, the Court would not be justified in overlooking such valuable piece of evidence.

17. In light of the above principles and the evidence noticed supra, we have no doubt in our mind that the statements of PWs were reliable and trustworthy, as they were fully corroborated by other prosecution, documentary and ocular evidence. The learned counsel appearing for the appellants contended that there are material variations and contradictions in the statement of PW3 and PW6 respectively with regard to the time of incident as well as death of the deceased. Therefore, neither these witnesses can be relied upon nor can prosecution be said to have proved its case beyond reasonable doubt. Such a submission can only be noticed to be rejected.

18. PW3 had mentioned that she came to know about the death of her daughter at about 9.30 p.m., however, according to PW6, it was about 8 or 9 o'clock when she was informed of

the death of her sister. This would hardly be a contradiction. It is a plausible fact that there could be some variations in the statements of witnesses with respect to a particular incident. Thus, in the facts and circumstances of the present case, a mere variation in time is not a material contradiction. It was the uncle of the deceased, PW7, who had been informed by the co-accused, the brother-in-law of the deceased, firstly about the sickness of the deceased and then about her death.

19. Every variation or immaterial contradiction cannot provide advantage to the accused. In the facts and circumstances of the present case, variation of 45 minutes or an hour in giving the time of incident will not be considered fatal. It is a settled principle of law that while appreciating the evidence, the Court must examine the evidence in its entirety upon reading the statement of a witness as a whole, and if the Court finds the statement to be truthful and worthy of credence, then every variation or discrepancy particularly which is immaterial and does not affect the root of the case of the prosecution case would be of no consequences. Reference in this regard can be made to *State represented by Inspector of Police v. Saravanan and Anr.* [(2008) 17 SCC 587].

20. Next, it was contended that PW8 and PW9 had not supported the case of the prosecution and, therefore, the accused should be entitled to benefit of doubt. PW8 had stated that just before the sunset, the deceased fell down while she was fetching water from the river. She got up and ran like a mad man. According to him, the deceased was caught by evil spirits and was an epileptic. PW9, narrated that he heard cries while he was working in the paddy field and when he went to the house of the accused, he saw the deceased struggling for life. He met the mother-in-law of the deceased and stated that none else was present there. According to him, the deceased died of epilepsy.

21. We may notice that both these witnesses are neighbours of the accused and the same has also been

confirmed by them. They affirmed the death of the deceased but gave different versions as to the place and the manner in which she died. The statements of such witnesses would hardly carry any weight in face of statements of PW3 to PW7. The possibility of their turning hostile by virtue of them being neighbours of the accused cannot be ruled out.

22. The prosecution has been able to establish various circumstances which complete the chain of events and such chain of events undoubtedly point towards the guilt of the accused persons. These circumstances are; the victim coming to her parental home and declining to go back to her matrimonial home, she being persuaded to go to her matrimonial home by her parents and within a few days thereafter, she dies at her in laws place. Further that she had various injuries on her lower abdomen and that her neck and face were congested and swollen. The post mortem report completely corroborates the statements of PWs. Ext. 2, the inquest report, also fully substantiates the case of the prosecution. Besides this, PW3 had categorically stated that her daughter was not suffering from epilepsy or any other disease and that she died as a result of torture inflicted on her by the accused persons. In the cross-examination, two suggestions were put forth to her, one that the deceased died of epilepsy and secondly, that supernatural powers had seized her and that she could not be cured by Imam and thus, died, both of which were denied by her. In any case, this contradiction in the stand taken by the defence itself point towards the untruthfulness and falsity of the defence.

23. If she was sick, as affirmed by her in laws, then why was she not taken to any doctor or a hospital by the accused persons. She admittedly did not die of any heart attack or haemorrhage. She died in the house of the appellants and therefore, it was expected of the appellants to furnish some explanation in their statement under Section 313 CrPC as to the exact cause of her death. Unfortunately, except barely

taking the plea of *alibi*, accused persons chose not to bring the truth before the Court i.e. the circumstances leading to the death of the deceased.

24. The plea of *alibi* was taken by the appellants and was sought to be proved by the statement of defence witnesses, DW1, DW2 and DW3 respectively. These witnesses have rightly been disbelieved by the Trial Court as well as by the High Court. We also find no merit in the plea of *alibi* as it is just an excuse which has been put forward by the accused persons to escape the liability in law. There is a complete contradiction in the material facts of the statement of DW1, DW2 and DW3. According to the statements of DWs that none of the family members were present on the spot is strange in light of the fact that the deceased was so ill that she died after a short while due to her illness. If none of the accused, whom these witnesses knew were present, then it is not only doubtful but even surprising as to how they came in contact with the deceased at the relevant time. The falsity of the evidence of the defence is writ large in the present case. For these reasons, we find the conduct of the accused unnatural and the statement of these witnesses untrustworthy. The plea of *alibi* is nothing but a falsehood.

25. Once, the Court disbelieves the plea of *alibi* and the accused does not give any explanation in his statement under Section 313 CrPC, the Court is entitled to draw adverse inference against the accused. At this stage, we may refer to the judgment of this Court in the case of *Jitender Kumar v. State of Haryana* [(2012) 6 SCC 204], where the Court while disbelieving the plea of alibi had drawn an adverse inference and said that this fact would support the case of the prosecution.

> "51. The accused in the present appeal had also taken the plea of *alibi* in addition to the defence that they were living in a village far away from the place of occurrence. This plea of *alibi* was found to be without any substance by the Trial Court and was further concurrently found to be without

> any merit by the High Court also. In order to establish the plea of *alibi* these accused had examined various witnesses. Some documents had also been adduced to show that the accused Pawan Kumar and Sunil Kumar had gone to New Subzi Mandi near the booth of DW-1 and they had taken mushroom for sale and had paid the charges to the market committee, etc. Referring to all these documents, the trial court held that none of these documents reflected the presence of either of these accused at that place. On the contrary the entire plea of *alibi* falls to the ground in view of the statements of PW-10 and PW-11. The statements of these witnesses have been accepted by the Courts below and also the fact that they have no reason to falsely implicate the accused persons. Once, PW-10 and PW-11 are believed and their statements are found to be trustworthy, as rightly dealt with by the Courts below, then the plea of *abili* raised by the accused loses its significance. The burden of establishing the plea of *alibi* lay upon the appellants and the appellants have failed to bring on record any such evidence which would, even by reasonable probability, establish their plea of *alibi.* The plea of *alibi* in fact is required to be proved with certainty so as to completely exclude the possibility of the presence of the accused at the place of occurrence and in the house which was the home of their relatives. {Ref. *Shaikh Sattar* v. *State of Maharashtra* [(2010) 8 SCC 430]}."

26. For the reasons afore-stated, we find no merit in the contentions raised on behalf of the appellants. Before we part with this file, we cannot help but to observe that the competent authority ought to have taken some action on the basis of the observations made by the Trial Court in its judgment under appeal.

27. The Investigating Officer has conducted investigation in a suspicious manner and did not even care to send the

viscera to the laboratory for its appropriate examination. As already noticed, in his statement, PW11 has stated that viscera could not be examined by the laboratory as it was not sent in time. There is a deliberate attempt on the part of the Investigating Officer to misdirect the evidence and to withhold the material evidence from the Court.

28. Similarly, PW1, the doctor who conducted the post mortem of the corpse of the deceased was expected to categorically state the cause of death in which he miserably failed. He is a doctor who is expected to perform a specialized job. His evidence is of great concern and is normally relied upon by the Courts. For reasons best known to him, he made his evidence totally vague, uncertain and indefinite. Given the expertise and knowledge possessed by a doctor PW1, was expected to state the cause of death with certainty or the most probable cause of death in the least. According to PW1, the black spots noticed on the deceased may be because of poisoning or it could be because of suffocation, although he also mentioned in his report that the symptoms described above may occur due to epilepsy. It is not possible to imagine that there would be no distinction whatsoever, if such injuries were inflicted by assault or suffocation or be the result of an epileptic attack.

29. In our considered view, the doctor has also failed to discharge his professional obligations in terms of the professional standards expected of him. He has attempted to misdirect the evidence before the Court and has intentionally made it so vague that in place of aiding the ends of justice, he has attempted to help the accused.

30. In our considered view, action should be taken against both these witnesses. Before we pass any direction in this regard, we may refer to the judgment of this Court in *Gajoo* (*supra*), where the Court had directed an action against such kind of evidence and witnesses;

"In regard to the defective investigation, this Court in the case of *Dayal Singh and Others. v. State of Uttaranchal* [Criminal Appeal 529 of 2010, decided on 3rd August, 2012] while dealing with the cases of omissions and commissions by the investigating officer, and duty of the Court in such cases held as under:-

> "22. Now, we may advert to the duty of the Court in such cases. In the case of *Sathi Prasad v. The State of U.P.* [(1972) 3 SCC 613], this Court stated that it is well settled that if the police records become suspect and investigation perfunctory, it becomes the duty of the Court to see if the evidence given in Court should be relied upon and such lapses ignored. Noticing the possibility of investigation being designedly defective, this Court in the case of *Dhanaj Singh @ Shera & Ors. v. State of Punjab* [(2004) 3 SCC 654], held, "in the case of a defective investigation the Court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective."
>
> (Emphasis supplied)

23. Dealing with the cases of omission and commission, the Court in the case of *Paras Yadav v. State of Bihar* [AIR 1999 SC 644], enunciated the principle, in conformity with the previous judgments, that if the lapse or omission is committed by the investigating agency, negligently or otherwise, the prosecution evidence is required to be examined *de hors* such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand in the way of evaluating the evidence by the courts, otherwise the designed mischief

would be perpetuated and justice would be denied to the complainant party. In the case of *Zahira Habibullah Sheikh & Anr. Vs. State of Gujarat & Ors*. [(2006) 3 SCC 374], the Court noticed the importance of the role of witnesses in a criminal trial. The importance and primacy of the quality of trial process can be observed from the words of *Bentham,* who states that witnesses are the eyes and ears of justice. The Court issued a caution that in such situations, there is a greater responsibility of the court on the one hand and on the other the courts must seriously deal with persons who are involved in creating designed investigation. The Court held that legislative measures to emphasize prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in proceedings before the Courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair, as noted above, to the needs of the society. On the contrary, efforts should be to ensure fair trial where the accused and the prosecution both get a fair deal. Public interest in proper administration of justice must be given as much importance if not more, as the interest of the individual accused. The courts have a vital role to play. (Emphasis supplied)

24. With the passage of time, the law also developed and the dictum of the Court emphasized that in a criminal case, the fate of proceedings cannot always be left entirely in the hands of the parties. Crime is a public wrong, in breach and violation of public rights and duties, which affects the community as a whole and is harmful to the society in general.

27. In *Ram Bali v. State of Uttar Pradesh* [(2004) 10 SCC 598], the judgment in *Karnel Singh v. State of M.P.* [(1995)

5 SCC 518] was reiterated and this Court had observed that 'in case of defective investigation the court has to be circumspect while evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigation officer if the investigation is designedly defective'.

28. Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. Then alone can law and order be maintained. The Courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the judge. During the course of the trial, the learned Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the Court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not sub-served. For truly attaining this object of a 'fair trial', the Court should leave no stone unturned to do justice and protect the interest of the society as well.

29. This brings us to an ancillary issue as to how the Court would appreciate the evidence in such cases. The possibility of some variations in the exhibits, medical and ocular evidence cannot be ruled out. But it is not that every minor variation or inconsistency would tilt the balance of justice in favour the accused. Of course, where contradictions and variations are of a serious nature, which apparently or impliedly are destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused. The Courts,

normally, look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution. In *Kamaljit Singh* v. *State of Punjab* [2004 Cri.LJ 28], the Court, while dealing with discrepancies between ocular and medical evidence, held, "It is trite law that minor variations between medical evidence and ocular evidence do not take away the primacy of the latter. Unless medical evidence in its term goes so far as to completely rule out all possibilities whatsoever of injuries taking place in the manner stated by the eyewitnesses, the testimony of the eyewitnesses cannot be thrown out."

30. Where the eye witness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by examining the terms of science, so that the court, although not an expert, may form its own judgment on those materials after giving due regard to the expert's opinion, because once the expert opinion is accepted, it is not the opinion of the medical officer but that of the Court. {Plz. See *Madan Gopal Kakad* v. *Naval Dubey & Anr.* [(1992) 2 SCR 921: (1992) 3 SCC 204]}."

"The present case, when examined in light of the above principles, makes it clear that the defect in the investigation or omission on the part of the investigation officer cannot prove to be of any advantage to the accused. No doubt the investigating officer ought to have obtained serologist's report both in respect of Ext. 2 and Ext. 5 and matched it with the blood group of the deceased. This is a definite lapse on the part of the investigating officer which cannot

be overlooked by the Court, despite the fact that it finds no merit in the contention of the accused.

For the reasons afore-recorded, we dismiss this appeal being without any merit. However, we direct the Director General of Police, Uttarakhand to take disciplinary action against Sub-Inspector, Brahma Singh, PW6, whether he is in service or has since retired, for such serious lapse in conducting investigation.

The Director General of Police shall take a disciplinary action against the said officer and if he has since retired, the action shall be taken with regard to deduction/stoppage of his pension in accordance with the service rules. The ground of limitation, if stated in the relevant rules, will not operate as the inquiry is being conducted under the direction of this Court."

31. In view of the above settled position of law, we hereby direct the Director General of Police, State of Assam and Director General of Health Services, State of Assam to take disciplinary action against PW1 and PW11, whether they are in service or have since retired. If not in service, action shall be taken against them for deduction/stoppage of pension in accordance with the service rules. However, the plea of limitation, if any under the relevant rules would not operate, as the departmental inquiry shall be conducted in furtherance to the order of this Court.

32. The appeal is dismissed, however with the above directions.

K.K.T. Appeal dismissed.

COURT ON ITS OWN MOTION
v.
UNION OF INDIA & ORS.
Suo Motu Writ Petition (C) No. 284 of 2012

DECEMBER 13, 2012

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

Constitution of India, 1950:

Arts. 19(1)(d), 21, 25, 32 and 48A – Suo motu action by Supreme Court – Taking note of press reports regarding poor arrangements and number of deaths occurred during the yatra to the holy cave of Amarnathji – Constitution of a Special High Powered Committee (SHPC) by the Court – The report of SHPC making recommendations on the issues of health, environment, registration, access control and security, track conditions and other public amenities – Held: It is the obligation of the State to provide safety, health care, means to freely move and to profess the religion in the manner within the limitations of law – There were lack of basic amenities and healthcare to the yatris – Thus the rights of yatris u/Art. 21 were violated – The report of SHPC recommending various steps, development programmes are accepted – In addition specific directions given by the Court.

Art. 21 and 48A – Right to life – Dimensions of – Held: Right to life is a right to live with dignity, safety and in a clean environment – Expression 'life' in Article 21 does not connote mere animal existence or continued drudgery through life, but includes right to livelihood, better standard of living, hygienic conditions in the workplace and leisure – The expanded connotation of life would mean the tradition and cultural heritage of the persons concerned – The concept of inter-generational equity is also an integral part of Art. 21 – The State is obliged to ensure meaningful fulfillment of such right

– State is required to draw a careful balance between providing security, without violating fundamental human dignity – A greater obligation is on the State to protect and improve the environment in terms of Art. 48A – State should ensure protection of environment on the one hand and also undertake necessary development with due regard to the fundamental rights and values – Universal Declaration of Human Rights – Article 25(2).

Art. 32 – Power under – Scope of – Held: There is clear mandate of law to Supreme Court to protect the fundamental rights of the citizens – The limitation of acceptability to justice will not come in the way of the Court to extend its powers to ensure due regard and enforcement of the fundamental rights – The absence of law and a vacuum or lacunae in law can always be supplied by judicial dictum – In cases, where there is no infringement of a specific legislation or even where no legislation is in place, but are purely cases of infringement of fundamental rights and their violation, the directives of the Court are needed to protect them – Constitutional powers cannot in any way be controlled by any statutory provision.

Doctrines/Principles – Doctrine of sustainable development and precautionary principle – Applicability of – Held: The doctrine/principle are applicable to the cases where development is necessary, but not at the cost of environment.

Taking note of the press reports as regards poor arrangements and number of deaths that occurred during the yatra to the holy cave of Amarnathji in the year 2012, the Supreme Court took suo motu action and issued notice to the Union of India, State of Jammu and Kashmir and the Chairman/President of the Amarnathji Shrine Board. After hearing the parties, noticing lack of public amenities, facilities, health care and particularly the high rate of mortality and the need to take immediate and effective steps to remedy the same, the Court constituted a Special High Powered Committee (SHPC). The SHPC

submitted its report making recommendations on the issues of health, environment, registration, access control and security, track conditions and other public amenities. The recommendations were accepted by all the parties.

Disposing of the petition, the Court

HELD: 1.1. Article 19(1)(d) of the Constitution of India gives a citizen the right to move freely throughout the territory of India. This right, like any other fundamental freedom is neither absolute in terms nor is free from restrictions. Article 19(5) subjects this right to imposition of reasonable restrictions which the State by law may enact. Such restriction has to be in the interest of general public or for the protection of interest of any Scheduled Tribe besides being reasonable and within its legislative competence. [Para 9] [1114-F-H]

1.2. Article 25 of the Constitution deals with the Right to Freedom of religion, subject to public order, morality, health and other provisions stated in Part III of the Constitution. All persons are equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion. Again this right is subject to reasonable restrictions within the ambit of Article 25(2) of the Constitution. [Para 9] [1114-H; 1115-A-B]

1.3. The scheme under the Constitution unambiguously enshrines in itself the right of a citizen to life under Article 21 of the Constitution. The right to life is a right to live with dignity, safety and in a clean environment. The ambit of Article 21 of the Constitution has been expanded by judicial pronouncements consistently. The judgments have accepted such right and placed a clear obligation on the part of the State to ensure meaningful fulfillment of such right. Article 21 of the Constitution, with the development of law has

attained wide dimensions, which are in the larger public interest. [Para 9] [1114-E-F]

1.4. The expression 'life' enshrined in Article 21 of the Constitution does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to livelihood, better standard of living, hygienic conditions in the workplace and leisure. The right to life with human dignity encompasses within its fold, some of the finer facets of human civilization which makes life worth living. The expanded connotation of life would mean the tradition and cultural heritage of the persons concerned. [Para 11] [1116-D-F]

Consumer Education and Research Centre v. Union of India **(1995) 3 SCC 42 : 1995 (1) SCR 626;** *C.E.S.C. Ltd. v. Subhash Chandra Bose* **(1992) 1 SCC 441 : 1991 (2) Suppl. SCR 267 – relied on.**

1.5. The socio-economic justice for people, is the very spirit of the preamble of the Constitution. 'Interest of general public' is a comprehensive expression comprising several issues which affect public welfare, public convenience, public order, health, morality, safety etc., all intended to achieve the socio-economic justice for people. [Para 10] [1115-F-G]

1.6. Article 25(2) of the Universal Declaration of Human Rights ensures right to standard of adequate living for health and well-being of an individual including housing and medical care and the right to security in the event of sickness, disability etc. [Para 11] [1116-D]

1.7. Security to citizens by the State is also a very sensitive issue. The State has to draw a careful balance between providing security, without violating fundamental human dignity. The primary task of the State is to provide security to all citizens without violating

human dignity. Powers conferred upon the statutory authorities have to be, perforce, admitted. Nonetheless, the very essence of constitutionalism is also that no organ of the State may arrogate to itself powers beyond what is specified in the Constitution. [Para 12] [1117-B-D]

In Re: Ramlila Maidan Incident **(2012) 5 SCC 1:2012 (4) SCR 971- relied on.**

1.8. The rights of yatris, to the holy shrine of Amarnath, enshrined under Article 21 of the Constitution, are being violated. There is admittedly lack of basic amenities and healthcare. The walking tracks are not only deficient but are also not safe for the pedestrians. The management and arrangements for the yatris at the glacier and near the Holy Shrine are pathetic. Keeping in mind the number of yatris who come to pay their homage at the Holy Shrine every year, the management suffers from basic infirmity, discrepancies, inefficiency and ill-planning. The Government of India, State of Jammu and Kashmir and the Shrine Board are under a constitutional obligation to provide free movement, protection and health care facilities along with basic amenities and proper tracks to be used by the yatris. [Para 9] [1115-C-E]

1.9. There is still a greater obligation upon the Centre, State and the Shrine Board in terms of Article 48A of the Constitution, where it is required to protect and improve the environment. Where it is the bounden duty of the State to protect the rights of the citizen in discharge of its constitutional obligation in the larger public interest, there the law also casts a duty upon the State to ensure due protection to the forests and environment of the country. The concept of inter-generational equity has been treated to be an integral part of Article 21 of the Constitution. The Courts have applied this doctrine of sustainable development and precautionary principle to

the cases where development is necessary, but certainly not at the cost of environment. The Courts are expected to drive a balance between the two. The onerous duty lies upon the State to ensure protection of environment and forests on the one hand as well as to undertake necessary development with due regard to the fundamental rights and values. The appropriate balance between different activities of the State is the very foundation of the socio-economic security and proper enjoyment of the right to life. [Paras 11, 14 and 15] [1116-C; 1117-H; 1118-A-B-D]

Bhim Singh v. Union of India **(2010) 5 SCC 538:2010 (6) SCR 218 –relied on.**

1.10. In the present case, all the parties are ad idem on the issue that much is required to be done. The report of the SHPC has accepted the existence of lack of facilities, non-availability of proper health care, need for proper management, providing of proper passage/ walking tracks and finally the basic amenities. The report proceeds on the basis that much is required to be done by the State and the Shrine Board. The State and the Shrine Board under the umbrella of the Union of India have to act in tandem, with great co-operation, co-ordination and objectivity so as to ensure protection of rights on the one hand and discharge of its obligations on the other. Steps are required to be taken including development of the area but with due regard to the environmental and forest issues. [Paras 16 and 17] [1118-E-G; 1119-B-C]

2.1. There is a clear mandate of law for this Court to protect the fundamental rights of the citizens. Infringements of rights would certainly invite the Court's assistance. The limitation of acceptability to justice will not come in the way of the Court to extend its powers to ensure due regard and enforcement of the fundamental rights. The absence of statutory law occupying the field

formulating effective measures to check breach of rights is the true scope of proper administration of justice. It is the duty of the Executive to secure the vacuum, if any, by executive orders because its field is coterminous with that of the Legislature and where there is inaction even by the Executive, for whatever reason, the Judiciary must step in, in pursuance of its constitutional obligation to provide solution in any case till the time the Legislature addresses the issue. The courts have taken precaution not to pass orders even within the ambit of Article 142 of the Constitution that would amount to supplanting substantive law but at the same time these constitutional powers cannot in any way be controlled by any statutory provision. The absence of law and a vacuum or lacunae in law can always be supplied by judicial dictum. In some cases, where the jurisdiction is invoked to protect the fundamental rights and their enjoyment within the limitation of law, the Court has even stepped in to pass orders which may have the colour of legislation, till an appropriate legislation is put in place. The directions of the Court could be relatable to a particular lis between the parties and even could be of a generic nature where the facts of the case called for. There can be cases where there is no infringement of a specific legislation or even where no legislation is in place but are purely cases of infringement of fundamental rights and their violation. The directives are needed to protect them and to ensure that the State discharges its obligation of protecting the rights of the people as well as the environment. The deficiencies in the aforementioned fields are not deficiencies simplicitor but have far reaching consequences of violating the fundamental protections and rights of the people at large. It is the obligation of the State to provide safety, health care, means to freely move and to profess the religion in the manner as they desire insofar as it is within the limitations of law. [Para 29] [1142-D-H; 1143-A-D]

M.C. Mehta v. Union of India **(1987) 1 SCC 395:1987(1) SCR 819 ;** *Vishaka v. State of Rajasthan* **(1997) 6 SCC 241:1997 (3) Suppl. SCR 404 ;** *Vineet Narain v. Union of India* **(1998) 1 SCC 226 :1997 (6) Suppl. SCR 595 ;** *University of Kerala v. Council of Principals of Colleges, Kerala and Ors.* **(2010) 1 SCC 353 : 2009 (15) SCR 800 – relied on.**

2.2. Certainly some development projects would have to be undertaken but without infringing on the protection to the forests or the environment. These are ecologically and climatically sensitive areas. It must be ensured that development does not impinge upon the purity of the environment beyond restricted and permissible limits. The doctrine of sustainable development and precautionary principle would be the guiding factors for the courts to pass such directions. The Expert Committee Report recommended the various steps, development programmes and precautions that could be undertaken by the Government and the Shrine Board to the advantage of all stakeholders, particularly the pilgrims. Thus, the directions, this Court contemplates to issue under this order, are in conformity with these legal maxims and are likely to cause no practical issues. It is apparently the constitutional obligation of this Court to issue specific directions in addition or which are to be read mutatis mutandis to the Report of the SHPC dated 6th September, 2012. The report shall be complementary to the directions of the Court and not in derogation thereof. [Paras 30, 31 and 23] [1137-D; 1143-E-H; 1144-A-B]

2.3. All the recommendations contained in the report shall be implemented under two different heads, i.e., 'short-term measures' and 'long-term measures'. This categorization shall be made by the Sub-Committee consisting of Chief Secretary of the State of Jammu and Kashmir; Secretary, Home, State of Jammu and Kashmir;

and CEO of the Amarnathji Shrine Board. [Para 31 – sub Para 3] [1144-D-F]

2.4. Steps in relation to health care, improvement of walking tracks, providing of pre-fabricated toilets, tents, pre-fabricated walking path/mats, construction of STPs and providing of one way tracks shall be treated as short-term measures. [Para 31 – sub Para 4] [1144-F-G]

2.5. The Sub-Committee constituted under this order shall be at liberty to consult or obtain opinion of any expert body, as it may deem fit and proper, in the facts and circumstances. [Para 31 – sub Para 20] [1148-B-C]

6. All the directions and the recommendations made in the report of the SHPC should be carried out by all concerned without demur or protest and expeditiously. Any officer of any State, irrespective of his position in the State hierarchy shall personally be held liable and proceeded against, in the event of default and/or violation of the directions/ recommendations of the SHPC. [Para 31–sub Para 21] [1148-C-E]

2.7 The Sub-Committee would be personally liable for compliance of the order of the Court. Liberty is granted to this Sub-Committee to seek clarification, if any, at any time. The Sub-Committee is also given liberty to bring to the notice of this Court if any authority/officer/the Government fails to render the required help or take desired action and/or is instrumental in violating the orders and directions of the Court. [Para 31 – sub Paras 22 and 23] [1148-F-H; 1149-A]

Case Law Reference:

1995 (1) SCR 626	**relied on**	**Para 5**
1991 (2) Suppl. SCR 267	**relied on**	**Para 8**
2012 (4) SCR 971	**relied on**	**Para 9**
2010 (6) SCR 218	**relied on**	**Para 10**
1987(1) SCR 819	**relied on**	**Para 15**
1997 (3) Suppl. SCR 404	**relied on**	**Para 15**
1997 (6) Suppl. SCR 595	**relied on**	**Para 15**
2009 (15) SCR 800	**relied on**	**Para 15**

CIVIL ORIGINAL JURISDICTION : Suo-Motu Writ Petition (Civil) No. 284 of 2012.

Under Article 32 of the Constitution of India.

By Courts Motion for Petitioner.

M.I. Qadri, AG, Siddhartha Luthra, ASG, Mukul Gupta, Upinder K. Jalali, M.N. Krishnamani, Gaurav Pachnanda, AAG, Ranjana Narayan, Devina Sehgal, Rajat Mathur, T.A. Khan, B. Krishna Prasad, S.N. Terdal, Sunil Fernandes, Vernika Tomar, Rahul Sharma, Raghav Chadha, Insha Mir, Mishra Saurabh, Rani Chhabra, D. Bharat Kumar, Rajeev Singh, V. Pattabhiram, Saqyooj Mohan Das, Kritika Sharma, Rekha Palli, A.V. Palli, Anupam Raina for the appearing parties.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Taking notice of the persistent press reports dealing with the poor arrangements and number of deaths that occurred during the yatra in the year 2012 to the holy cave of Amarnathji, the Court took suo motu action and issued notice to the Union of India, State of Jammu and Kashmir and the Chairman/President of the Amarnathji Shrine Board vide its order dated 13th July, 2012. It will be appropriate to reproduce the said order at this stage itself:-

> "Today's 'The Times of India' and 'Hindustan Times' reports 67 deaths of pilgrims mostly because of the cardiac arrests as well for other reasons. As per these reports, this has happened in 17 days. Last year 105 persons died during the 45 days' yatra. Thus, this year it appears to be

on the rise. In our considered view, the pilgrims have a constitutional right under Articles 21 and 19(1)(d) to move freely throughout the territory of India, free of fear, with dignity and safety and to ensure enforcement of such right is the primary obligation of the State and the Central Governments.

Where it is a matter of common knowledge that the yatra to the 'Holy Cave of Amarnath' is an occasion of privilege and pride for a devotee, there it is also a matter of great concern for the Government of India, the Government of the State of Jammu & Kashmir and the Amarnath Shrine Board. Some of the events that have been widely reported in the newspapers compel us to take a judicial notice of the lack of necessary facilities, essential amenities and the risk to the lives of the yatris, en route and around the "Holy Cave of Amarnath".

On 3rdJuly, 2012, it was reported in the Hindustan Times, Delhi Edition, that two more pilgrims died of cardiac arrest on Sunday, taking the toll to 22. Both the pilgrims were stated to be in their mid-thirties. One pilgrim was on her way to the holy shrine while the other was returning to Pahalgam Base Camp (Names : Ms. Anita Chourasia and Sadhu Ram). The same daily on 2nd of July, 2012 had reported that there were deaths of five more devotees as a result of cardiac arrest at the Pahalgam and Baltal Base Camps. These were the deaths reported to have occurred between 25thJune, 2012 to 2ndJuly, 2012 on the twin tracks of Baltal in Ganderbal and Pahalgam in Amarnath. This daily also reported that nearly 1.20 lakh pilgrims had so far paid obeisance to the shivalingam at the holy cave. This newspaper also showed the path and the weather conditions to which the yatris to the Holy Cave were exposed and the amenities that were available at the glacier.

The Times of India, New Delhi Edition on 29thJune,

2012 had reported that there was an unidentified body of 55-year old pilgrim which was recovered along the Pehalgam cave route in Anantnag district.

Similarly, on 28th June, 2012, the Hindustan Times, while referring that the Management had directed increase of security at the yatri base camps to maintain proper schedule, had reported that the death toll within the first three days of the commencement of the yatra was six. The same newspaper dated 27thJune, 2012 had shown a photograph of the passage that more than 18000 pilgrims had visited the holy cave, which is at the height of 3,880 metres, in three days. It showed one of the passages leading to the holy cave. From this picture itself, it is clear and even otherwise it is a matter of common knowledge that the path leading to the holy cave is not only very small but is even unprotected. The photographs also show that hardly any amenities are available for the yatris in and around the holy cave, though thousands of people who throng the holy cave have to wait for hours and days for having the darshan. It has also been published in other papers that in the initial days of the yatra, one person had died because of the fall from the height as there was no support or protection on the path leading to the holy cave. The path somewhere is stated to be even less than six feet and does not have any grill or protection (like pagdandi), which could prevent the people walking on these constricted paths/passages from falling. All the palkis, horses and even the yatris walking on foot, travel on the same path at the same time, thus causing complete jams on the already tapered paths leading to the holy cave.

With the passage of time, the things have hardly improved. We may refer to what was the situation was in the year 2011, as per the newspaper reports of the relevant/concerned year.

The Indian Express while reporting the

commencement of the yatra in its newspaper dated 29th June, 2011 reported that nearly 2.5 lakh pilgrims had registered themselves for the annual pilgrimage with the Amarnath Shrine Board till the aforesaid date and 2000 pilgrims had already left the State of Jammu for the yatra. It also reported a very unfortunate incident where a person named Rajinder Singh, aged 55 years, resident of Jaipur had died due to cardiac arrest at Baltal base camp in Ganderbal district of Kashmir.

Again on 1st July, 2011, the same paper reported that a group of men and women, young, elderly and children with their backpacks walked up the winding steep gradient of the road to the cave shrine. In this report reference was made to the statement of the public that there were no vehicles and it was very difficult for the pilgrims to travel and walk such long distances. From Baltal route, 13,000 pilgrims left while 9000 pilgrims left from Chandanwari for darshan to the holy cave.

With the increase in the number of pilgrims coupled with the poor management, it appears that there was a sharp increase in the casualty rate. In the Indian Express dated 6thJuly, 2011, it was reported that 18 yatris had died within a week of the commencement of the journey. This included elderly people as well as young victims. One Mr. Vikram Rathore, who died, was only aged 25 years. It appeared from this report that constraints on the availability of medical aid and medical examination is writ large.

The same newspaper on 8thJuly, 2011 reported that three more pilgrims died during the yatra raising the toll to 27. Even a constable namely Inderjeet Singh posted with 28 Battalion, Central Reserve Police Force (for short 'CRPF'), Srinagar, died of heart attack while returning from the cave. Another person aged about 54 years hailing from Gujarat also died of cardiac arrest at Sangam top much ahead of the shrine. Still another detailed article appeared

in the Times of India dated 18th July, 2011 detailing the lack of facilities, referring to the rush of the pilgrims at the base points as well as at the holy cave. A pilgrim from Guwahati stated: "Half-an-hour after starting out for the shrine from Panchtarni, which is a place 6 km from the holy cave, we were trapped in a jam for close to two hours. There was not an inch of space on the path. There was pushing and shoving as yatris got restless. A sudden movement or a horse or commotion in a section of the crowd could have caused a big stampede". Referring to the statement of an officer, the report stated that the pilgrims had to be regulated from the base camps and there was very little that the members of the Forces could do at the narrow pathways or the holy cave to control the situation. Nearly 22,000 pilgrims visited the shrine daily while the limit, as per the administration itself, was reported to be 3,400 per day only. It is again a matter of great regret that obviously because of lack of proper aid and amenities, the death toll had gone upto 85 on 21st July, 2011, as was reported in "The Hindu" of the even date.

All these reports clearly showed disregard to the human life. Lack of facilities at the shrine and on the paths leading to the shrine is evident from all the aforestated articles and the photographs published therein. This Court has repeatedly held that in terms of Article 21 of the Constitution of India, a person has a right to live with dignity and not be subjected to inhuman treatment, particularly in such places where large number of people are bound to visit because of their faith. It can also be hardly disputed that huge revenue is generated as a result of visit of large number of pilgrims to the Holy Cave. The Amarnath Shrine Board receives huge amount of money not only by way of offerings but also from the charges/fee it takes from the pony-owners, palkiwallahs as well as the helicopter services available between Baltal and Panchtarni.

It is also evident that there is a complete lack of adequate essential amenities and facilities for the yatris who come to pay their tribute at the 'Holy Cave at Amarnath'. Lack of medical facilities and limitations of the officers/officials of the Forces are some other facets which need to be considered by the concerned authorities.

It also appears to be a very sensitive place from the environmental point of view and in terms of the provisions of the Environment Act, 1986 and the constitutional obligation placed upon the concerned authorities, it is expected that proper measures be taken to prevent such high death rate, controlling pollution and providing the requisite facilities and improving the services required for successful completion of such yatras.

It is expected of a Government and the concerned authorities to devote more attention and provide appropriate amenities and facilities to protect the life of the individuals, the environment as well as ensure to make the yatra effective and successful, preferably without any human casualty. The authorities cannot shirk from their responsibility of providing minimum essential facilities including medical assistance, roads and other necessary infrastructure. Visit of lacks of people to the State of Jammu & Kashmir generates revenue for the State, in fact, for the residents of that State and add to the need for better tourism facilities. The authorities are also expected to better equip the Forces posted at the holy cave, base points and en route to the holy cave.

It is a settled canon of constitutional law that the doctrine of sustainable development also forms part of Article 21 of the Constitution. The 'precautionary principle' and the 'pollutor-pays principle' flow from the core value in Article 21. The Supreme Court in its judicial dictum in the case of *Glanrock Estate Pvt. Ltd. vs. State of Tamil Nadu* (2010) 10 SCC 96 has held "forests in India are an important part of the environment. They constitute a national asset and intergenerational equity is also part of the Article 21 of the Constitution and cautioned that if deforestation takes place rampantly, then intergenerational equity would stand violated.

Right to life is enshrined under Article 21 of the Constitution which embodies in itself the right to live with dignity. The State is not only expected but is under a constitutional command to treat every citizen with human dignity and ensure equal treatment to all. In our considered view and as demonstrated by these newspaper reports, inhuman, unsafe and undesirable conditions are prevailing at the base camps and en route to the holy cave. The yatris do have a right and the State is under constitutional obligation to provide safe passages, proper medical aid, appropriate arrangement and at least some shelter to the thousands of yatris visiting the holy cave every day. They are also expected to equip the forces deployed with appropriate equipments facilities and the authorities should ensure that no untoward incident occurs at the holy places. In our view, the following questions arise for consideration of the Court: -

1. Whether there exists proper medical facilities to prevent human casualties. Further to provide emergency medical aid in the event of these yatris falling sick because of cardiac and other related problems.?

2. What steps are being taken and have been taken to protect the environment in that area?

3. What essential amenities have been provided at the base camps and en route to the holy cave keeping in view that lakhs of people are visiting the shrine every day.

4. What measures are being taken and methods being adopted for collection and disposal of the waste including domestic and human waste generated by the yatrisen route and around the holy cave?

5. What are the facilities and equipments available, particularly for protecting or treating conditions such as dyspnoea, cardiac arrest and other heart related problems.

6. What is the cause for such high casualty rate and whether there exists the required medical equipments to ensure that in future such casualties can be avoided?

7. What measures and means are available with the authorities on ground for handling such huge crowd and why seven times the requisite number of people coming to visit the cave per day are being permitted and if so, whether there is requisite infrastructure at the site for handling such huge crowd?

The time intervening the previous and the current year clearly demonstrates that the authorities have not taken any effective and appropriate measures for protecting the life of thousands of devotees who visit the holy cave during this limited period, despite the print media repeatedly bringing this to the notice of all concerned. Thus, within the constitutional mandate of Article 21, this Court would have no option but to pass appropriate directions.

All these aspects need to be taken care of by the concerned authorities certainly with greater emphasis and they cannot escape their obligation to provide minimum essential facilities including roads as an approach to the holy cave. They are expected to equip their Forces posted

in an around the cave so as to have complete human dignity for the persons working there as well as for the pilgrims coming to the holy cave. They are also expected to make appropriate arrangements for darshans at the holy cave so as to avoid health hazards and injuries, provide proper paths and one-way system passages to the pilgrims to the Holy Cave. Therefore, taking suo motu notice of the articles which are placed below and to appropriately deal with this serious subject, answer the above questions and evolve solutions within the framework of law, we require the following to appear and answer before this Court:

1. Union of India, through its Secretary.

2. Ministry of Environment and Forests, through its Secretary

3. State of Jammu and Kashmir, through its Chief Secretary.

4. Chairman/President of the Amarnathji Shrine Board.

Issue notice, returnable within a week. Dasti."

2. The notice was served upon the concerned respondents. The respondents filed their respective replies by way of affidavits on record. Vide order dated 20th July, 2012, when the petition was called on for hearing, the Court, after hearing the counsel appearing for the parties at some length, while noticing the lack of public amenities, facilities, health care and particularly the high rate of mortality and the need to take immediate and effective steps to remedy the same, constituted a Special High Powered Committee (for short 'SHPC'). This SHPC consisted of representatives from different Ministries of the Union of India, Chief Secretary and other officers of the State of Jammu and Kashmir, Director Generals of the Border

Security Force and the Border Roads Organizations etc. The SHPC was expected to visit the site and make its recommendations in the form of a Report to the Court inter alia, on the following points: -

"1. Construction of proper passages, wide enough and with due support on both sides, for the traffic of pedestrian yatris, or horses and by palkis from Panchtarni to the Holy Cave.

2. Providing one-way passage with separate tracks, one for pedestrians and other for horses, carriages and palkis near the Shrine.

3. Providing of health check-up facilities on both the passages from baltal and Panchtarni to the Holy Cave.

4. Providing of proper public amenities and facilities on way and at the lower end of the glaciers near the Holy Cave.

5. All such other steps which are required to be taken for preventing unfortunate deaths of the yatris, going on yatra, to the Holy Cave.

6. Deployment of more forces and to provide better conditions of service for the members of the forces, posted on way and at the Holy Cave.

7. Environmental Impact Assessment.

8. The manner and methods to be adopted to attain the above, with least damage or interference with the environment of the entire zone right from Baltal to the Holy Cave from different routes.

9. Deployment of more medical teams, at regular distance on all the passages leading to the Holy Cave.

10. Registration of yatris at Jammu, Srinagar, Baltal and Panchtarni.

11. It should also consider the possibility of limited number of yatris being released from Srinagar to Baltal to ensure better management, hygiene, healthcare and betterment of the yatris, who stay there overnight.

12. Medical examination at the time of registration and on way."

3. Thereafter, in the order dated 23rd July, 2012, the Court also noticed that within three days the mortality rate had gone up from 84 to 97 which was a matter of great worry for all concerned.

4. The report of the SHPC was submitted along with the affidavit dated 6th September, 2012, sworn by Sh. Madhav Lal, Chief Secretary to the Government of Jammu and Kashmir. This report made its recommendations under eight different heads.

5. Besides dealing with the issues of health, environment, registration, access control & security, track conditions and other public amenities, the Report stated its recommendations under the head 'Summary of Recommendations'.

6. The counsel appearing for the parties, including for the State of Jammu and Kashmir and the Shrine Board, submitted before the Court that by and large, the recommendations of the SHPC were acceptable. In fact, they even assured the compliance of the recommendations, subject to statutory clearance from the different authorities. The Court noticed that the recommendations of the SHPC could be divided into two different classes: Short-term perspective and Long-term perspective. Short-time perspective involved the steps which the Government and the Shrine Board were to proceed to take forthwith and which required immediate attention of all the stakeholders. Long-term perspective included steps where the

larger element of planning was involved and their compliance was likely to take some time. In that very order, the Court had directed immediate compliance of certain works at Baltal and surrounding areas. They related to sewage system (STP) at Baltal and widening of passage from Baltal to the holy shrine. The Chief Secretary of the State of Jammu and Kashmir and the Shrine Board were directed to take appropriate steps for planning of matters relating to medical facilities, registration and other ancillary works including deployment of force and one way passage at the Shrine during the next yatra.

7. Vide his letter dated 4th December, 2012, the Ministry of Environment and Forests, Government of India, informed the Additional Solicitor General that the affidavit of the State of Jammu and Kashmir had been perused in compliance with the orders of this Court and that the environmental issues had been correctly reflected therein, in accordance with the final report prepared by the SHPC and the Ministry was in agreement with the contents of the affidavit. Similarly, the Ministry of Health and Family Welfare, Government of India, vide its letter dated 3rd December, 2012 had also informed the Additional Solicitor General that a meeting was held by the Union Health Secretary with the Government of Jammu and Kashmir and the Chief Executive Officer of the Shrine Board to decide the further course of action on health issues in terms of the report of the SHPC. The issues also related to the States and the Union Territories, identifying the institutions for medical certification and augmenting manpower to support the efforts of the State Government. Inter alia, the points for attention were stated as follows:

> "(i) Identify Chief Medical Officer/Medical Superintendent/ Block Medical Officer/other Government doctors authorized by the State Government for issuance of compulsory health certificate.
>
> (ii) Provide list of private medical institutions authorized by the State Governments to issue compulsory health certificate and
>
> (iii) Make available services of Specialists and General Duty Medical Officers to supplement the efforts of the Govt. of Jammu & Kashmir."

8. From the above narration it is clear that the Union of India, its various Ministries, the State of Jammu and Kashmir and the Amarnathji Shrine Board were ad idem in regard to the contents and implementation of the report submitted by the SHPC. During the course of hearing of the petition, applications for intervention were filed, which have also been considered. The interveners and all other stake holders were heard at great length. During the course of hearing, certain further suggestions were made, which were found to be useful and in general public interest.

9. The scheme under the Indian Constitution unambiguously enshrines in itself the right of a citizen to life under Article 21 of the Constitution. The right to life is a right to live with dignity, safety and in a clean environment. The ambit of Article 21 of the Constitution has been expanded by judicial pronouncements consistently. The judgments have accepted such right and placed a clear obligation on the part of the State to ensure meaningful fulfillment of such right. Article 21 of the Constitution, with the development of law has attained wide dimensions, which are in the larger public interest. Furthermore, Article 19(1)(d) gives a citizen the right to move freely throughout the territory of India. This right, of course, like any other right is not absolute in terms or free of restrictions. This right, of course, like any other fundamental freedom is neither absolute in terms nor is free from restrictions. Article 19(5) subjects this right to imposition of reasonable restrictions which the State by law may enact. Such restriction has to be in the interest of general public or for the protection of interest of any Scheduled Tribe besides being reasonable and within its legislative competence. Article 25 deals with the Right to

Freedom of Religion, subject to public order, morality, health and other provisions stated in Part III. All persons are equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion. Of course, again this right is subject to reasonable restrictions within the ambit of Article 25(2) of the Constitution. In light of these three Articles, now we have to examine which rights of the citizens are being violated and what is the scope of the present proceedings before the court and what directions, if any, the court can issue within the four corners of law. It has undoubtedly and indisputably come on record that the rights of yatris to the holy shrine enshrined under Article 21 of the Constitution of India, are being violated. There is admittedly lack of basic amenities and healthcare. The walking tracks are not only deficient but are also not safe for the pedestrians. The management and arrangements for the yatris at the glacier and near the Holy Shrine are, to say the least, pathetic. Keeping in mind the number of yatris who come to pay their homage at the Holy Shrine every year, the management suffers from basic infirmity, discrepancies, inefficiency and ill-planning. The Government of India, State of Jammu and Kashmir and the Shrine Board are under a constitutional obligation to provide free movement, protection and health care facilities along with basic amenities and proper tracks to be used by the yatris.

10. Now, we may examine the dimensions of the rights protected under Article 21 of the Constitution of India. The socio-economic justice for people is the very spirit of the preamble of our Constitution. 'Interest of general public' is a comprehensive expression comprising several issues which affect public welfare, public convenience, public order, health, morality, safety etc., all intended to achieve the socio-economic justice for people. In the case of Consumer Education and Research Centre v. Union of India (1995) 3 SCC 42, this Court while noticing Article 1 of the Universal Declaration of Human Rights, 1948 (for short 'UDHR') asserted that human sensitivity and moral responsibility of every State is that "all human beings

are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." The Court also observed "the jurisprudence of personhood or philosophy of the right to life envisaged under Article 21, enlarges its sweep to encompass human personality in its full blossom with invigorated health which is a wealth to the workman to earn his livelihood, to sustain the dignity of person and to live a life with dignity and equality."

11. Not only this, there is still a greater obligation upon the Centre, State and the Shrine Board in terms of Article 48A of the Constitution where it is required to protect and improve the environment. Article 25(2) of the UDHR ensures right to standard of adequate living for health and well-being of an individual including housing and medical care and the right to security in the event of sickness, disability etc. The expression 'life' enshrined in Article 21 of the Constitution does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to livelihood, better standard of living, hygienic conditions in the workplace and leisure. The right to life with human dignity encompasses within its fold, some of the finer facets of human civilization which makes life worth living. The expanded connotation of life would mean the tradition and cultural heritage of the persons concerned. In the case of *Consumer Education & Research Centre* (supra), the Court discussing the case of *C.E.S.C. Ltd. v. Subhash Chandra Bose* [(1992) 1 SCC 441] stated with approval that in that case the Court had considered the gamut of operational efficacy of human rights and constitutional rights, the right to medical aid and health and held the right to social justice as a fundamental right. The Court further stated that the facilities for medical care and health to prevent sickness, ensure stable manpower for economic development and generate devotion to duty and dedication to give the workers' best performance, physically as well as mentally. The Court particularly, while referring to the workmen made reference to

Articles 21, 39(e), 41, 43 and 48-A of the Constitution of India to substantiate that social security, just and humane conditions of work and leisure to workmen are part of his meaningful right to life.

12. Security to citizens by the State is also a very sensitive issue. The State has to draw a careful balance between providing security, without violating fundamental human dignity. In the case of In Re : Ramlila Maidan Incident (2012) 5 SCC 1, the Court observed "the primary task of the State is to provide security to all citizens without violating human dignity. Powers conferred upon the statutory authorities have to be, perforce, admitted. Nonetheless, the very essence of constitutionalism is also that no organ of the State may arrogate to itself powers beyond what is specified in the Constitution."

13. In *Bhim Singh v. Union of India* (2010) 5 SCC 538, while referring to the obligations of the State and its functions, the Court held:

> "53….it is also settled by this Court that in interpreting the Constitution, due regard has to be given to the Directive Principles which has been recorded as the soul of the Constitution in the context of India being the welfare State. It is the function of the State to secure to its citizens "social, economic and political justice", to preserve "liberty of thought, expression, belief, faith and worship" and to ensure "equality of status and of opportunity" and "the dignity of the individuals" and the "unity of the nation". This is what the Preamble of our Constitution says and that is what which is elaborated in the two vital chapters of the Constitution on Fundamental Rights and Directive Principles of the State Policy."

14. Where it is the bounden duty of the State to protect the above rights of the citizen in discharge of its constitutional obligation in the larger public interest, there the law also casts a duty upon the State to ensure due protection to the forests

and environment of the country. Forests in India are an important part of the environment. They constitute a national asset. We may, at this stage, refer to the concept of inter-generational equity, which has been treated to be an integral part of Article 21 of the Constitution of India. The Courts have applied this doctrine of sustainable development and precautionary principle to the cases where development is necessary, but certainly not at the cost of environment. The Courts are expected to drive a balance between the two. In other words, the onerous duty lies upon the State to ensure protection of environment and forests on the one hand as well as to undertake necessary development with due regard to the fundamental rights and values.

15. From the analysis of the above, it is clear that the appropriate balance between different activities of the State is the very foundation of the socio-economic security and proper enjoyment of the right to life.

16. In the present case, as already noticed, there is hardly any dispute. In fact, all the parties are ad idem on the issue that much is required to be done before the State can claim that it has discharged its constitutional obligation in the larger public interest. In fact, the report of the SHPC has accepted the existence of lack of facilities, non-availability of proper health care, need for proper management, providing of proper passage/walking tracks and finally the basic amenities. The report proceeds on the basis that much is required to be done by the State and the Shrine Board. The State and the Shrine Board under the umbrella of the Union of India has to act in tandem, with great cooperation, coordination and objectivity so as to ensure protection of rights on the one hand and discharge of its obligations on the other.?

17. With the passage of time and passing of each yearly yatra, the pilgrims' mortality rate has increased. Greater difficulties are faced by the pilgrims in relation to health care, public amenities and sanitation arrangements. Besides this,

dire need exists for improvement of the walking tracks to the Shrine and proper management of separate one-way routes for horses and palkis as one unit and pedestrians as the other unit. With the passage of time, the number of yatris has increased. In the recent yatra held in the year 2012, nearly 18,000 pilgrims have paid their homage at the Shrine. It is a very complex issue comprising various facets. Steps are required to be taken including development of the area but with due regard to the environmental and forest issues. The SHPC had held various meetings, deliberated on various aspects and problems and after considerable deliberation and efforts, have submitted the report dated 6thSeptember, 2012. Under Chapter IX of this report, the SHPC has submitted the summary of recommendations. These recommendations read as under :

"SUMMARY OF RECOMMENDATIONS

9.1 Through its various Orders, the Hon'ble Supreme Court has referred to several issues connected with the Amarnathji Yatra and directed the SHPC to make recommendations in regard thereto. While the SHPC's recommendations, issue-wise, are summarized in the paragraphs below, these may be read in conjunction with the context, observations and rationale discussed in detail in Chapters 1- 8.

9.2 HEATH ISSUES

9.2.1 The following issues were required to be examined by the SHPC:

a) Providing of health check-up facilities on both the passages from Baltal and Panchtarni to the Holy Cave.

b) All such other steps which are required to be taken for preventing unfortunate deaths of the yatris, going on yatra to the Holy Cave.

c) Deployment of more medical teams, at regular distance on all the passages leading to the Holy Cave.

9.2.2 The SHPC has made the following recommendations vis-avis the issues listed above:

9.2.3 The SHPC endorses the requirement of every Yatri furnishing a Health Certificate while seeking Registration for the pilgrimage. It also considers it necessary that the format of the Compulsory Health Fitness Certificate should be revised to specifically reflect the existing ailments from which applicant-Yatri may be suffering.

9.2.4 An Expert Medical Committee (three Medical Specialists to be nominated by Union Health Ministry and one Medical Specialist to be nominated by the Government of Jammu and Kashmir) should review the format of the existing Compulsory Health Certificate and suggest suitable modifications therein, as required. State Health Secretary shall serve as the Convener of this Committee which will also prescribe a check-list for issue of the Certificate and its standard format.

9.2.5 There is need to reconsider the authority competent to issue the Compulsory Heath Certificate, which is currently being done by any Registered Medical Practitioner. The same should now be issued by the Chief Medical Officer/ Medical Superintendent I Block Medical Officer/ Government Doctors authorized by the concerned State Government Health authorities. State Governments and Union Health Ministry will also provide lists of reputed Private Medical Institutions, located in areas within their respective jurisdictions, which may be authorised to issue Health Fitness Certificates. CEO, SASB, shall compile State-wise lists of such authorized institutions and arrange to provide the widest possible publicity to such lists through all possible means.

9.2.6 The medical facilities should be rationally dispersed and relocated on the basis of critical assessments. A Committee comprising the State Secretary Health, CEO SASB, Director Health Services (Kashmir) and one senior officer each from Army, BSF, CRPF and ITBP should review the existing locations of all Medical Aid Centres (MACs) and rationalize the location of MACs and, wherever necessary, increasing the number of MACs to ensure that these are located at regular intervals/ distances from each other and not in a cluster. Well equipped and staffed MACs should be set up at Sangam and in Holy Camp Lower Camp area. ITBP (which has considerable experience of organizing medical aid for Mansrovar Yatra) should be asked to set up at least two MACs in the lower Holy Cave and Sheshnag areas. They could perhaps set up more MACs in subsequent years.

9.2.7 There is need for establishing a well organised MAC, along with adequate number of Rescue Volunteers, in the Lower Cave and Sangam Top areas and also at other locations like Kalimata Top, Railpathri, Nagakoti, Wavbal etc.

9.2.8 Keeping in view that a fair percentage of pilgrims prefer Indian Systems of Medicine (ISM), an increased number of ISM medical camps could be provided at suitable locations along both the routes.

9.2.9 The Union Health Ministry and the States (particularly those from where a relatively larger number of pilgrims arrive) should be moved to provide the services of Specialist doctors, as well as GDMOs, to supplement the efforts of the State Government.

9.2.10 The Union Health Ministry should facilitate timely arrangements for appropriate training in High Altitude Sickness Management being provided to doctors and

paramedics of the J&K Health Department who are to be deployed on Yatra duty.

9.2.11 The Union Health Ministry should enable experienced Specialists to advise the State Health authorities regarding the medicines, medical equipments etc. which should be provided in MACs located in the high altitude areas. The Union Health Ministry should also supplement the efforts of the State to provide the required equipments/medicines, particularly in regard to the provision of portable Hyperbaric Chambers for on-the-spot decompression of sick Yatris at identified Medical camps.

9.2.12 The possibility of providing special insulated tents or Prefabricated Huts or completing the pucca structures to house medical facilities therein should be timely explored and the needful done by the State Health Department with the required support, as needed, from the Union Health Ministry.

9.2.13 The MACs at Holy Cave, Sangam, Panjtarni, Sheshnag and Poshpathri should be housed in larger tents/ structures in which temperatures at 25-26 degrees can be maintained for effective patient care. The State Health Department should procure suitable tents/ prefabricated huts for this purpose.

9.2.14 A Committee comprising CEO, SASB (Convenor), one High Altitude Medicine Specialist (to be nominated by the Union Health Ministry) and one Medical Specialist (to be nominated by the State Health Department) will prepare an appropriate food menu which shall be adhered to by the Langar Organizations. All other food items/ junk food should be banned and not allowed to be served on the Yatra route.

9.2.15 The SASB should make the Yatris better aware of the challenges and the medical problems they are likely

to face when they embark on an arduous trek and devise a suitable communication strategy in this regard. The support of the Union Information and Broadcasting Ministry should be sought for creating enhanced awareness among the pilgrims through airing and screening of Documentaries, Public Interest Messages (of both short and long duration) on AIR and Doordarshan National and Regional Channels and besides, through private radio/TV channels.

9.2.16 The SASB should publish pamphlets in other regional languages, in addition to Hindi and English, since a good number of pilgrims hail from States which have different languages. It would be useful for the SASB to also arrange broadcast of public interest messages in regional languages through television, radio and print media.

9.2.17 More Mountain Rescue Teams (MRTs) should be deployed at identified points along both the Yatra routes, in future pilgrimages. J&K Police should deploy about 6 MRTs in the Yatra area in the next three years and Union Ministry of Home Affairs should provide the necessary resources/ support for arranging specialised training and the latest equipments for the MRTs.

9.2.18 Principal Secretary, Home, J&K, will convene a meeting of all Security Forces, at least two months before the Yatra, to prepare a detailed SoP for the immediate evacuation of ill/injured pilgrims, with the help of the resources available with State Disaster Management Authority, Air Force and SASB. This meeting should also explore the possibility of providing the facility of air ambulance to evacuate critically ill/injured persons who need to be shifted most immediately.

9.2.19 CEO SASB could explore involving identified NGOs I private players to provide the required assistance to unattended sick I injured pilgrims, at both the Base Camps.

This would relieve the personnel at the MACs who can then devote better attention to the other sick patients.

9.2.20 The SASB should examine the possibility of the Indian Red Cross Society'being involved in enlarging awareness and sensitization of pilgrims. Some of their volunteers could also be engaged for rendering useful health related services.

9.3 ENVIRONMENTAL ISSUES

9.3.1 The following issues were required to be examined by the SHPC

(a) Providing of proper public amenities and facilities on way and at the lower end of the glaciers near the Holy Cave.

(b) Environmental Impact Assessment

(c) The manner and methods to be adopted to attain the above, with least damage or interference with the environment of entire zone right from Baltal to the Holy Cave from different routes.

9.3.2 The SHPC makes the following recommendations vis-a-vis the issues listed above:

9.3.3 While recognising that the SASB has been cognizant of-the vital need to protect the integrity of the environment and has undertaken several measures in this regard, the SHPC notes that it is essential to strengthen these measures through environmental impact assessments and studies being undertaken at regular intervals, on different aspects of the Yatra, to examine, inter-alia, the impact of the flow of several lakh pilgrims, sanitation and solid waste management, quality and availability of water etc. The SHPC also reiterates that statutory Environmental Impact Assessment shall be conducted whenever so mandated.

9.3.4 Keeping in view the low temperature which prevails in the Yatra area and the need to maintain adequate distances from the nearest water bodies, to avoid any contamination of the waters, CEO, SASB, would need to consult experts to identify the most appropriate technological designs and solutions for the functioning of an optimal number of toilets in the Holy Cave area. CEO, SASB may also explore the possibility of using bio-digester based toilets developed by DRDO for Army camps in the high altitude areas. As tourist arrivals have also been increasing progressively, it would be profitable if Secretary Tourism, Secretary PHE and CEO, SASB coordinate efforts to identify the best available technology options. Such a collective approach would also contribute towards the required investments being cost effective.

9.3.5 The SHPC is of the opinion that the STPs at the Baltal and Nunwan Base Camps need to be technically evaluated and, upgraded as required. In this context, the SHPC was informed about the implementation of the "Recommendations of the Study on the Technical Evaluation of the STPs" which was conducted (in August 2012) by scientists from Centre for Science and Environment (CSE), New Delhi, at the instance of SASB. This study recommends, interalia, that the existing capacity of the STPs should be enhanced to improve the retention time of the waste disposal system and to ensure effective treatment of waste.

9.3.6 The SHPC also recommends the need to find an urgent appropriate solution for the treatment of the Langar waste, which is high on grease and biological material.

9.3.7 The SHPC recommends that the State Public Health Engineering Department should provide the infrastructure to ensure regular water supply at suitable identified locations, wherever feasible, on the route of the Yatra Camps to enable SASB to set up toilet facilities for the

convenience of Yatris. CEO SASB would need to ensure that all toilets have waste disposal systems and are duly covered under SASB's Sanitation Contract, so that the facilities are maintained in a hygienic and environmentally safe manner. It would be useful to increase the number of toilet facilities which service the Langars located along the Yatra route.

9.3.8 To counter the ever increasing use of plastic in the Yatra area, the SHPC recommends the following:

a) The State Government should direct the concerned law enforcement agency(ies) to take all required steps, on a time bound basis, to enforce the current statutory ban on the use of plastic.

b) SASB should progressively arrange facilities for drinking water filters being set up at Camps and Langar sites to discourage the use of water bottles in the Yatra area. The aim should be to provide a viable alternative to plastic water bottles in due course. The SASB could also consider introducing a "deposit amount" scheme under which the deposit is returnable when the beverage bottle is brought back to the disposal site.

c) Pictorial signage (in place of the existing signage in Hindi and English) should be used at all prominent places. This would be helpful in also educating the Yatris about the need to keep the Yatra area free from plastic materials.

d) The SASB should suitably revise the existing Terms and Conditions of the permissions given to LangarOrganisations to ensure that that no plastic material is used for serving food and beverages to the Yatris. There should be adequate monitoring of the implementation of these conditions and all

cases of non-adherence must be penalised severely.

9.3.9 All biological waste should be disposed off in compost pits, which should be built in the Langar areas. The LangarOrganisations must be made fully responsible for ensuring the segregation and safe disposal of wastes. Further, no Langar site should be cleared without the availability of mandatory facilities for waste segregation and disposal. SASB should establish a suitable monitoring mechanism in this regard. The Terms and Conditions of the permission given to theLangarOrganisations must be revised to include the aforesaid conditions as also a provision for the imposition of stringent penalties in the case of any default.

9.3.10 The SHPC suggests that an increased number of garbage bins, with pictorial signage for segregating bio-degradable waste from non bio-degradable ones, would further reduce littering in the Yatra area.

9.3.11 The concerned District Administrations must identify the sites and create this infrastructure expeditiously as per the Municipal Solid Waste Rules, in consultation with the SPCB. This infrastructure is vital, not only for the Yatra, but also for the growing number of tourists and other business visitors in the larger area.

9.3.12 It must be ensured that after the dismantling of Yatra Camps and Langers, consequent to the conclusion of the Yatra, all solid waste is collected and properly disposed off by the relevant authorities. CEO, SASB, should in consultation with SPCB, put in place an appropriate monitoring mechanism in this regard.

9.3.13 The State R&B Department should urgently upgrade the road from RangaMorh to Domail so that it is able to withstand the very heavy traffic during the Yatra

period and the problem of dust and mud is controlled.

9.3.14 The SPCB should conduct analytical studies every year to monitor the quality of water in Lidder and Sindh rivers and share the findings, along with actionable suggestions, with SASB and the State Government. The SPCB also needs to early upgrade its own testing facilities.

9.4 REGISTRATION, ACCESS CONTROL & SECURITY

9.4.1 The following issues were required to be examined by the SHPC

a) Registration of yatris at Jammu, Srinagar, Baltal and Panchtarni.

b) It should also consider the possibility of limited number of yatris being released from Srinagar to Baltal to ensure better management, hygiene, healthcare and betterment of the yatris, who stay their overnight.

c) Medical examination at the time of registration and on way.

d) It should be examined by SHPC in its meeting if a transparent device made of glass, fiber or any other material, which is scientifically permissible, be placed at the Cave where iron grills have been fixed as of now. The iron grills serve no required purpose. Firstly, - it obstructs the view of the yatris during darshan and secondly, they are not safe and even pass the human heat which results in early melting of the Shivalingam.

9.4.2 The SHPC makes the following recommendations vis-a-vis the issues listed above:

9.4.3. The SASB will continue to determine, from year to year, the maximum number of pilgrims to be allowed to embark on the tracks, after taking into consideration the weather condition and forecasts, track conditions, infrastructure available in the enroute Camps and at the Holy Cave (which would include the handling capacity at the Shrine), other required facilities etc. Once the required decisions have been communicated by the CEO, SASB, the Police shall ensure that the number of pilgrims who are allowed to cross over the Access Control Gates possess valid Yatra Permits for that date and route.

9.4.4 CEO, SASB, should arrange the widest possible publicity of all registration related matters, particularly in the States from where larger numbers of pilgrims arrive. Further, Public Interest Messages would also need to be broadcast through radio, television and print media, particularly in the regional languages.

9.4.5 On-Spot registration of pilgrims at Srinagar and Base Camps of Baltal and Nunwan should be discouraged. A pilgrim seeking advance registration, in his home State, provides a useful opportunity to educate him about the difficulties involved in the journey, health related precautions, Do's and Don'ts, basic minimum clothing I accessories required etc. Further, the period after registration and before commencement of the Yatra would enable the pilgrim to prepare himself suitably to proceed on a difficult pilgrimage.

9.4.6 As in the case of advance registrations, On-Spot registrations should also specify a specific date and route for the applicant to commence his journey. The pilgrim may be allowed to commence his Yatra on the same day only if the number of pilgrims registered for that particular date is below the registration ceiling prescribed by the SASB.

9.4.7 There should be strict compliance of allowing only

those pilgrims who possess valid Yatra Permits for that date and route to cross the Control Gates. To facilitate the Police personnel deployed at the Access Control Gates in determining whether the Yatri possesses a valid Yatra Permit for the given date and route the SASB may adopt colour coding of Yatra permits i.e. the Yatra Permit would be of a given colour for each day of the week.

9.4.8 Effective enforcement at the Access Control Gates would be crucial for securing satisfactory Yatra management. The District Magistrate and the District Police will be responsible for enforcing effective Access Control.

9.4.9 The pilgrims should be released in batches, reasonably spread out over a specified period in the day, to avoid any congestion on the tracks. The SHPC also suggests that SASB may consider indicating the "reporting time" on the Yatra Permits, along with the date and route of the pilgrimage.

9.4.10 The SHPC recommends that the J&K Police and Central Armed Police Forces should enlarge the provision of basic requirements like tents, bedding, toilets etc. to their personnel deployed on Yatra duty, in order to provide them better working conditions.

9.4.11 Regarding the matter related to provision of a transparent device made of glass, fiber etc, the SHPC is of the considered opinion that the SASB is the right forum to decide any issue related to the preservation of the Ice Lingam in the Shrine and taking all required steps for providing satisfactory Darshans.

9.5 TRACK CONDITIONS

9.5.1 The following issues were required to be examined by the SHPC

a) Construction of proper passages, wide enough and with due support on both sides, for the traffic of pedestrian yatris, on horses and by palkis from Panchtarni to the Holy Cave.

b) Providing of one-way passage with separate tracks, one for pedestrians and other for horses, carriages and palkis near the Shrine.

c) The manner and methods to be adopted to attain the, above, with least damage or interference with the environment of entire zone right from Baltal to the Holy Cave from different routes.

9.5.2 The SHPC makes the following recommendations vis-a-vis the issues listed above:

9.5.3 Keeping in view the need to provide safe and smooth passage to the Yatris, particularly during the peak Yatra period, when there is acute congestion on the tracks due to simultaneous movement of pedestrian Yatris and those on ponies/ palkis in the limited space that is available, and also keeping in view the environmental concerns, the Committee recommends that the following works should be approved and taken up for implementation on a fast track basis:

- Improvement of critical stretches of the existing track from Baltal to Holy Cave as per the preliminary details presented in Annex. - 4, to be implemented by the State PWD, with the assistance, as may be required, from other organizations such as Border Roads Organisation (which can mobilise in the area quickly).

- Provision of one-way passage with separate tracks, one for the pedestrians and other for the horses/ palkis, near the shrine to be implemented by the Pahalgam Development Authority.

- Improvement of existing track from Panjtarni to Holy Cave as per the preliminary details presented in Annex. - 4 to be implemented by the Pahalgam Development Authority.

- Proposal of Pahalgam Development Authority to improve the track from Chandanwari Base Camp to Panjtarni.

9.5.4 While it would have been an ideal situation if it were possible to complete the upgradation works before the commencement of the Yatra 2013, the SHPC is conscious of the fact that a two month working period would be available in the current year, after which the entire area would be snow bound/inaccessible. Furthermore, in 2013 also, very little time would be available for carrying out works after the snows melt around mid to end June, and till the time the Yatra commences. It is also to be kept in view that, at some places, areas under forests, wildlife sanctuaries or eco-sensitive zones may be involved, and clearances under relevant protection/conservation laws may be required, which may also take time. The SHPC, therefore, recommends early implementation of these works with as much as possible progress during the current working season and before the commencement of next Yatra (2013) and ensuring that these are completed before the working season of 2013 is over. The State Government should provide the required funds for the above listed four works. Wherever clearances are required under the related Environment laws, the matter should be processed on a time bound basis by all concerned authorities, to ensure the completion of all the aforesaid works before the end of October, 2013.

9.6 OTHER PUBLIC AMENITIES

9.6.1 For Yatra 2012, Temporary Transit Camps had been set up for the overnight stay of Yatris at Qazigund and Mir

Bazar (Anantnag District) and at Manigam and Yangoora (Ganderbal District). If these facilities are placed on a firm footing and suitably upgraded, they can be profitably utilised to meet the growing demands of tourism, and for other suitable purposes, before and after the annual Yatra. The SHPC recommends that all required facilities, viz. shelter, toilets, water, power supply, etc should be provided at the aforesaid and other Transit Camps before commencement of Yatra 2013.

9.6.2 The Department of Telecommunications should be moved to take all necessary steps for providing inter-connectivity in the Yatra area so that the Yatris having non-BSNL mobile connections do not face any difficulty during Yatra 2013.

9.6.3 For Yatra 2013, the number of Automatic Weather Stations should be augmented to cover Chandanwari, Pahalgam and Baltal and a Doppler Radar should be set up at IMD Campus, Srinagar, on urgent basis as this facility will be able to provide accurate weather forecasts round the year in the entire Valley.

9.6.4 The State Government has provided funds to the State Public Health Engineering Department for laying underground water supply lines at Baltal Base Camp. This work should be completed before the commencement of Yatra 2013.

9.6.5 The State Animal Husbandry Department should register only an, assessed number of ponies to ensure against overcrowding on the tracks. Likewise, the Labour Department should assess the number of Palkis/Dandis to be allowed to operate on the tracks, route-wise, every year.

9.6.6 While noting the useful arrangements which are being assisted/ provided by the various concerned State

Government Departments for the smooth conduct of the annual Yatra, the SHPC is of the view that the Yatra requirements require to be reviewed from time to time. In this context, the SHPC notes that the High Level Committee (HLC), which is convened by CEO, SASB, and chaired by State Principal Secretary Home, has served a useful purpose in 2012 and recommends that the HLC should continue to function, to overview the problems of future Yatras, with similar or modified terms of reference, as may be necessary. The HLC should prepare an Annual Action Plan, immediately after the Yatra is over, which clearly indicates the gap to be filled, the implementing agency, requirement of funds and the time frame for implementation. The SHPC also recommends that all the recommendations made by this HLC in 2011 be fully implemented before the commencement of Yatra 2013.

9.6.7 A Committee to be chaired by the concerned District Magistrate should be set up to grant permissions for the setting up of tents and shops at each Camp location, taking into account the overall availability of space, the number of tents/shops which are required to be set up, ensuring that the tents, beddings etc are of the specified quality/standard."

18. The learned counsel appearing for the parties have made submissions and suggestions, while taking the above report to be the very foundation of their submissions. In other words, attempts were made before the Court to improve upon the recommendations in order to make them more effective. One of the points, on which submissions were made before the Court related to improvement of medical facilities. Firstly, it was suggested that each State in the country should identify the medical institutions/hospitals, run by or under the control of the State Governments, to issue 'health certificates' upon examining the persons who are desirous of going for yatra to the Holy Cave in the future. Secondly, it was suggested that specified

medical officers of these hospitals should be required to give the said health certificates. Lastly, the States, particularly the neighbouring States like, Haryana, Punjab, Himachal Pradesh, Rajasthan and Uttar Pradesh, should be requested to send teams of doctors on temporary duty to the State of Jammu & Kashmir to be posted at Srinagar, Baltal or en route to the Holy Shrine. It will be desirable that such team of doctors be acclimatized before being deputed to the higher altitudes. It is suggested that they ought not to be posted at very high altitudes. Deployment of the medical teams at Panchatarni, Baltal and Srinagar and enroute to the Shrine shall serve the interest of health care and public interest. We make it clear that deployment of medical teams en route should be at regular distances, with a gap not exceeding two kilometres. There shall be greater number of doctors from the State of Jammu and Kashmir that should be deployed at and around the holy Shrine and they shall be provided with complete equipment, medicines and all other infrastructure to ensure rendering of proper medical assistance to the people who suffer from any health issue at that point. These issues, to some extent, have been discussed in the report of the SHPC. However, we are only clarifying their final aspects.

19. The passages or the walking tracks, besides being widened require rough surface so as to prevent slipping and falling of the pilgrims. It is conceded before us that presently the width of the track is very less to accommodate palkis, horses and pilgrims moving at the same time. More often than not, jams are noticed which spread over furlongs. The uncertainty of weather, exposes the pilgrims, particularly, the pedestrians, to rain, chilly winds and sudden fluctuations in temperature and thus they fall ill. Due to high altitude, many of them also suffer from hypoxia. Thus, there has to be a regular width of the track which in any case should not be less than 12 feet and may be wider than that if so recommended by the Committee concerned. These tracks should duly provide protection or any other support towards the open sides. It may

by iron grills, supporting walls etc. as may be considered appropriate by the Committee. This may include realignment of the passage, construction of retaining wall/railing. We must not be understood to have ordered directly or indirectly, construction of any motorable mettled road in place of walking tracks. However, we hasten to clarify that it is not only improvement of the road at critical portions but the entire track needs to be improved, particularly from Panchtarni to the Holy Cave.

20. STPs are intended to be constructed at various places, particularly at Baltal. We were informed that the clearance from various departments is awaited. However, the learned Advocate-General appearing for the State of Jammu Kashmir had informed us that the matter is pending in the High Court of Jammu and Kashmir and they will be able to get permission for raising construction shortly. We make it clear that all Government departments shall fully coordinate and grant such permissions as are required in accordance with law and expeditiously. We further make it clear that pendency of any proceedings before the High Court would not come in the way of construction of STPs in any manner whatsoever. It is for the reason that this is absolutely essential for maintaining proper sewage system and cleanliness in the areas where large number of persons come and stay overnight or even for a longer period. It was commonly conceded before us that the Shrine Board would provide fabricated toilets and if necessary even the pre-fabricated pathway at and around the Holy Shrine.

21. In its report, the SHPC at para 7.18 has noticed that quality of tents existing at various camps and sites needs improvement. The existing tents were found deficient in all respects. One of the applicants before this Court, M/s. Piramal Healthcare Pvt. Ltd. (In I.A. No. 4 of 2012), had volunteered to provide any help at a large scale that may be required by the State of Jammu and Kashmir and the Board to facilitate the travel, living and darshan of the pilgrims. It was offered that they could provide even pre-fabricated tents and toilets which will

help and provide convenience not only to the pilgrims but even to all the persons, including the officials on duty. We find this request to be reasonable and, therefore, give liberty to them to approach the Shrine Board with a request to provide such pre-fabricated material at large scale. We are hopeful that the Board would consider the request sympathetically and objectively.

22. All these matters require greater attention of all the stakeholders and they need to make their plans well in advance and to fully equip themselves to meet any challenge. Thus, we are of the opinion that the process afore-indicated and as stated in the report, be completed in a timely and expeditious manner.

23. We, therefore, have no hesitation in accepting the report of the SHPC dated 6th September, 2012 in its entirety but with additions as afore-indicated. The report shall be complementary to the directions of the Court and not in derogation thereof.

24. The next question that arises is as to what directions generally and particularly in the cases of the present kind, the Court is competent to issue.

25. In the case of *M.C. Mehta v. Union of India* [(1987) 1 SCC 395], the Court, while discussing the ambit and scope of Article 32 of the Constitution, held as under :

> "We have already had occasion to consider the ambit and coverage of Article 32 in the Bandhua Mukti Morcha v. Union of India and we wholly endorse what has been stated by one of us namely, Bhagwati, J. as he then was in his judgment in that case in regard to the true scope and ambit of that article. It may now be taken as well settled that Article 32 does not merely confer power on this Court to issue a direction, order or writ for enforcement of the fundamental rights but it also lays a constitutional obligation on this Court to protect the fundamental rights

> of the people and for that purpose this Court has all incidental and ancillary powers including the power to forge new remedies and fashion new strategies designed to enforce the fundamental rights. It is in realisation of this constitutional obligation that this Court has in the past innovated new methods and strategies for the purpose of securing enforcement of the fundamental rights, particularly in the case of the poor and the disadvantaged who are denied their basic human rights and to whom freedom and liberty have no meaning.
>
> We are also of the view that this Court under Article 32(1) is free to devise any procedure appropriate for the particular purpose of the proceeding, namely, enforcement of a fundamental right and under Article 32(2) the court has the implicit power to issue whatever direction, order or writ is necessary in a given case, including all incidental or ancillary power necessary to secure enforcement of the fundamental right. The power of the court is not only injunctive in ambit, that is, preventing the infringement of a fundamental right, but it is also remedial in scope and provides relief against a breach of the fundamental right already committed vide Bandhua Mukti Morcha case. If the court were powerless to issue any direction, order or writ in cases where a fundamental right has already been violated, Article 32 would be robbed of all its efficacy, because then the situation would be that if a fundamental right is threatened to be violated, the court can inject such violation but if the violator is quick enough to take action infringing the fundamental right, he would escape from the net of Article 32. That would, to a large extent, emasculate the fundamental right guaranteed under Article 32 and render it impotent and futile. We must, therefore, hold that Article 32 is not powerless to assist a person when he finds that his fundamental right has been violated. He can in that event seek remedial assistance under Article 32. The power of the court to grant such remedial relief may

include the power to award compensation in appropriate cases. We are deliberately using the words "in appropriate cases" because we must make it clear that it is not in every case where there is a breach of a fundamental right committed by the violator that compensation would be awarded by the court in a petition under Article 32."

26. In the case of *Vishaka v. State of Rajasthan* [(1997) 6 SCC 241, this Court held as under :

"Each such incident results in violation of the fundamental rights of "Gender Equality" and the "Right to Life and Liberty". It is a clear violation of the rights under Articles 14, 15 and 21 of the Constitution. One of the logical consequences of such an incident is also the violation of the victim's fundamental right under Article 19(1)(g) *"to practise any profession or to carry out any occupation, trade or business"*. Such violations, therefore, attract the remedy under Article 32 for the enforcement of these fundamental rights of women. This class action under Article 32 of the Constitution is for this reason. A writ of mandamus in such a situation, if it is to be effective, needs to be accompanied by directions for prevention, as the violation of fundamental rights of this kind is a recurring phenomenon. The fundamental right to carry on any occupation, trade or profession depends on the availability of a "safe" working environment. Right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under Articles 14, 19 and 21 are brought before us for redress under Article 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum.

15. In *Nilabati Behera v. State of Orissa* a provision in the ICCPR was referred to support the view taken that "an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right", as a public law remedy under Article 32, distinct from the private law remedy in torts. There is no reason why these international conventions and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity.

16. In view of the above, and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at workplaces, we lay down the guidelines and norms specified hereinafter for due observance at all workplaces or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it is further emphasised that this would be treated as the law declared by this Court under Article 141 of the Constitution."

27. In the case of *Vineet Narain v. Union of India* [(1998) 1 SCC 226], the Court held as under:-

"There are ample powers conferred by Article 32 read with Article 142 to make orders which have the effect of law by virtue of Article 141 and there is mandate to all authorities to act in aid of the orders of this Court as provided in Article 144 of the Constitution. In a catena of decisions of this Court, this power has been recognised and exercised, if need be, by issuing necessary directions to fill the vacuum till such time the legislature steps in to cover the gap or the executive discharges its role. It is in the discharge of this duty that the IRC was constituted by the Government of India with a view to obtain its

recommendations after an in-depth study of the problem in order to implement them by suitable executive directions till proper legislation is enacted. The report of the IRC has been given to the Government of India but because of certain difficulties in the present context, no further action by the executive has been possible. The study having been made by a Committee considered by the Government of India itself as an expert body, it is safe to act on the recommendations of the IRC to formulate the directions of this Court, to the extent they are of assistance. In the remaining area, on the basis of the study of the IRC and its recommendations, suitable directions can be formulated to fill the entire vacuum. This is the exercise we propose to perform in the present case since this exercise can no longer be delayed. It is essential and indeed the constitutional obligation of this Court under the aforesaid provisions to issue the necessary directions in this behalf. We now consider formulation of the needed directions in the performance of this obligation. The directions issued herein for strict compliance are to operate till such time as they are replaced by suitable legislation in this behalf."

28. In the case of *University of Kerala v. Council of Principals of Colleges, Kerala & Ors.* [(2010) 1 SCC 353], this Court held as under :

"32. It may be noted that this Court has on several occasions issued directions, directives in respect of those situations which are not covered by any law. The decision in Vishaka v. State of Rajasthan is one such instance wherein a three-Judge Bench of this Court gave several directions to prevent sexual harassment of women at the workplace. Taking into account the "absence of enacted law" to provide for effective enforcement of the right of gender equality and guarantee against sexual harassment, Verma, C.J. held that guidelines and norms given by the Court will hold the field until legislation was enacted for the

purpose. It was clarified that this Court was acting under Article 32 of the Constitution and the directions "would be treated as the law declared by the Court under Article 141 of the Constitution". (para 16)

33. Similarly, the Supreme Court issued directions regarding the procedure and the necessary precautions to be followed in the adoption of Indian children by foreign adoptive parents. While there was no law to regulate inter-country adoptions, Bhagwati, J., (as His Lordship then was) in *Laxmi Kant Pandey v. Union of India,* formulated an entire scheme for regulating inter-country and intra-country adoptions. This is an example of the judiciary filling up the void by giving directions which are still holding the field."

29. The above stated principles exhibit the scope and width of the power of this Court under Article 32 of the Constitution. There is a clear mandate of law for this Court to protect the fundamental rights of the citizens. Infringements of rights would certainly invite the Court's assistance. The limitation of acceptability to justice will not come in the way of the Court to extend its powers to ensure due regard and enforcement of the fundamental rights. The absence of statutory law occupying the field formulating effective measures to check breach of rights is the true scope of proper administration of justice. It is the duty of the Executive to secure the vacuum, if any, by executive orders because its field is coterminous with that of the Legislature and where there is inaction even by the Executive, for whatever reason, the Judiciary must step in, in pursuance of its constitutional obligation to provide solution in any case till the time the Legislature addresses the issue. The courts have taken precaution not to pass orders even within the ambit of Article 142 of the Constitution that would amount to supplanting substantive law but at the same time these constitutional powers cannot in any way be controlled by any statutory provision. The absence of law and a vacuum or lacunae in law can always be supplied by judicial dictum. In

some cases, where the jurisdiction is invoked to protect the fundamental rights and their enjoyment within the limitation of law, the Court has even stepped in to pass orders which may have the colour of legislation, till an appropriate legislation is put in place. The directions of the Court could be relatable to a particular lis between the parties and even could be of a generic nature where the facts of the case called for. There can be cases like the one in hand where there is no infringement of a specific legislation or even where no legislation is in place but are purely cases of infringement of fundamental rights and their violation. The directives are needed to protect them and to ensure that the State discharges its obligation of protecting the rights of the people as well as the environment. The deficiencies in the aforementioned fields are not deficiencies simplicitor but have far reaching consequences of violating the fundamental protections and rights of the people at large. It is the obligation of the State to provide safety, health care, means to freely move and to profess the religion in the manner as they desire insofar as it is within the limitations of law.

30. Certainly some development projects would have to be undertaken but without infringing on the protection to the forests or the environment. These are ecologically and climatically sensitive areas. It must be ensured that development does not impinge upon the purity of the environment beyond restricted and permissible limits. The doctrine of sustainable development and precautionary principle would be the guiding factors for the courts to pass such directions. We had the advantage of having an Expert Committee Report before us, which recommends the various steps, development programmes and precautions that can be undertaken by the Government and the Shrine Board to the advantage of all stakeholders, particularly the pilgrims. Thus, the directions we contemplate to issue under this order are in conformity with these legal maxims and are likely to cause no practical issues.

31. Applying these principles to the facts of the present case, it is apparently the constitutional obligation of this Court to issue specific directions in addition or which are to be read *mutatis mutandis* to the Report of the SHPC. In the above background, it is axiomatic for us to issue the following directions :

1) The report of the SHPC is hereby accepted in terms of this judgment.

2) The recommendations contained in the report shall be read, construed and applied in aid to the directions of this Court and not in derogation thereto.

3) All the recommendations contained in the report shall be implemented under two different heads, i.e., 'short-term measures' and 'long-term measures'. This categorization shall be made by the Sub-Committee consisting of the following :

   a. Chief Secretary of the State of Jammu and Kashmir;

   b. Secretary, Home, State of Jammu and Kashmir; and

   c. CEO of the Amarnathji Shrine Board.

4) Steps in relation to health care, improvement of walking tracks, providing of pre-fabricated toilets, tents, pre-fabricated walking path/mats, construction of STPs and providing of one way tracks shall be treated as short-term measures.

5) We hereby direct the Chief Secretary of every State to notify the hospitals and medical officers in those hospitals who shall issue health certificates to all the persons who are desirous of going for yatra

henceforth. The authorities shall place such notification in the public domain and give it due publicity. These certificates shall be issued free of cost.

6) We direct the Chief Secretary and Secretary, Health of each respective State, particularly, the State of Uttar Pradesh, Haryana, Punjab, Rajasthan, Himachal Pradesh and Union Territory of Chandigarh to depute such number of doctors during the relevant period to the State of Jammu and Kashmir for ensuring due health care of the pilgrims, as may be necessary.

7) The State of Jammu and Kashmir shall write to the Chief Secretaries/Secretaries, Health of each State by 30th of April of every year, making requisition for the number of doctors and the area of specialization from which such doctors are required. The concerned State shall inform the Chief Secretary/ Secretary, Health and the Director General of Health Services of the State of Jammu and Kashmir by 30th May of the year, the names with specialization of the doctors who have been deputed for the yatra period at the State of Jammu and Kashmir and actually direct and inform the concerned doctors of their 'temporary duty', in public interest, with the State of Jammu and Kashmir.

8) The medical teams shall be deployed en route to the Holy Cave at a regular distance not exceeding two kilometers.

9) The State of Jammu of Kashmir and the Shrine Board shall provide infrastructure, equipment, medicines and all other ancillary items thereto to the medical teams to ensure that the pilgrims can be provided adequate treatment without any loss of time. Largest number of medical teams shall be deputed at the glacier and the passage near the Holy Shrine.

10) The State of Jammu and Kashmir shall make due provision for providing lodging and boarding to doctors on 'temporary duty' and ensure that they are not put to any inconvenience, in any respect, whatsoever.

11) The State of Jammu and Kashmir and the Shrine Board shall make due provision for registration of the yatris as proposed in the report and preferably at Srinagar, Baltal, Chandanvadi, Panchtarni, etc.

12) The STPs shall be constructed at all places, particularly at Baltal. Clearance for that purpose shall be granted by all the concerned departments expeditiously and in accordance with law. This direction of the Court shall be complied with notwithstanding the pendency of any litigation before any Court, including the High Court of Jammu and Kashmir.

13) The request of the applicant M/s. Piramal Healthcare Pvt. Ltd. (In I.A. No. 4 of 2012) for providing pre-fabricated tents or toilets or such other material which they may chose to offer or desired by the authorities, shall be considered by the Shrine Board in its discretion. However, we observe that the request of the applicant should be considered sympathetically and objectively.

14) The walking track/passages should be widened and railing and retaining walls be provided. The extent of width of the passage and manner of providing the railing (thick iron cables supported by wooden

blocks or cement and stone) shall be in the discretion of the Sub-Committee afore-constituted. But, we make it clear that width of no passage shall be less than 12 feet, particularly, that of the track leading from Panchtarni to the Holy Shrine.

15) Neither have we directed nor should we be understood to have implicitly directed that there should be mettled motorable road in place of the walking tracks/passages.

16) There shall be provided separate one way passage for palkis and horses as one unit and the pedestrians as the other, near to and at the passages leading to the Holy Shrine. Preferably on this passage pre-fabricated walking path/matting should be provided.

17) All other walking tracks from various other points, like Baltal, Panchtarni and Chandanvadi may be covered either by pre-fabricated rough cement tiles or such other material, which in the opinion of the SHPC, would be most appropriate for the benefit of the pilgrims.

18) Attempt should be made to construct shelters on the passage/walking paths at regular intervals. Temporary/pre-fabricated shelters should certainly be provided near the Holy Shrine where large number of persons collect and have to wait for long hours for darshan.

19) At the Holy Cave, the existing grill should be replaced by 100 per cent transparent fiber or any other material to ensure that the darshan to the shivlingam is not visually obstructed. In the alternative, the iron grills, as installed can be permitted, but the gaps between the parallel bars,

which are perpendicular to the earth, should not be less than 12 inches, as they would help in giving a clear visual darshan of the shivlingam and the shiv parivar.

The implementation of the above suggestion should be left to the wisdom of the Sub-Committee.

20) The Sub-Committee constituted under this order shall be at liberty to consult or obtain opinion of any expert body, as it may deem fit and proper, in the facts and circumstances.

21) All the above directions and the recommendations made in the report of the SHPC should be carried out by all concerned without demur or protest and expeditiously. We make it clear that any officer of any State irrespective of his position in the State hierarchy shall personally be held liable and proceeded against in the event of default and/or violation of the above directions/ recommendations of the SHPC.

22) The Chief Secretary, Secretary, Health of the State of Jammu and Kashmir and the CEO of the Shrine Board shall personally be responsible and answerable for strict compliance of the recommendations of the report of SHPC and/or directions as contained in this judgment. Since we are holding the Sub-Committee personally liable for compliance of the order of the Court, we grant liberty to this Sub-Committee to seek clarification, if any, at any time.

23) The Sub-Committee is also given liberty to bring to the notice of this Court if any authority/officer/the Government fails to render the required help or take

desired action and/or is instrumental in violating the orders and directions of the Court.

32. We will be failing in our duty if we do not place on record our appreciation for the valuable assistance rendered by various counsel appearing in the case as well as for the positive and progressive approach adopted by the State of Jammu and Kashmir as well as the Shrine Board. We must also place on record, our special commendations, for the echt efforts made by the SHPC with utmost tenacity and verve and also for its expeditious recommendations under the Chairmanship of the Governor of Jammu and Kashmir.

33. Before we part with the file, we express a pious hope that this judgment shall serve a larger public purpose. It will provide a fair opportunity to the pilgrims to complete their yatra to the Holy Cave with human dignity, safety to their lives and with basic amenities being provided to them. We have no doubt in our mind that the State of Jammu and Kashmir and the Shrine Board shall endeavour their best to implement this judgment in its true spirit and substance in the larger interest of public as well as to uphold the rule of law.

34. The petition is accordingly disposed of.

K.K.T. Writ Petition disposed of.

YANAB SHEIKH @ GAGU

v.

STATE OF WEST BENGAL

(Criminal Appeal No. 905 of 2009)

DECEMBER 13, 2012

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

Code of Criminal Procedure, 1973 – ss.154 and 162 – FIR – Requirements – Held: A FIR normally should give the basic essentials in relation to the commission of a cognizable offence upon which the Investigating Officer can immediately start his investigation – On facts, Ex.7 was not a FIR its proper construction in law but was a mere telephonic information inviting the police to the place of occurrence – It gave no details of the commission of the crime as to who had committed the crime and how the occurrence took place – In fact, it was only upon reaching the place of occurrence that the Investigating Officer got particulars of the incident and even the names of the persons who had committed the crime – A written complaint with the basic details was thereafter given by PW1 under his signatures to the police officer, who then made endorsement as Ex.1/1 and registered the FIR as Ex.1/3 – In the circumstances, it cannot be said that Ex.7 was the FIR and that Ex.1/3 was a second FIR for the same incident/occurrence with similar details and was hit by s.162 CrPC.

Penal Code, 1860 – s.302 – Indian Explosives Act – s.9(b)(ii) – Prosecution case that throwing of bomb by appellant-accused led to instantaneous death of PW1's brother – Conviction of appellant – Sustainability – Held: PW1 (complainant), PW5(wife of the deceased) and PW6(cousin of the deceased) clearly supported the case of the prosecution – Their statements, examined in conjunction with the statement of PW11, the doctor and the Investigating Officer,

PW14, clearly established the case of the prosecution beyond any reasonable doubt – Direct and circumstantial evidence against the appellant – Conviction accordingly upheld.

Criminal Trial – Acquittal of co-accused – Effect – Held: Where prosecution is able to establish the guilt of the accused by cogent, reliable and trustworthy evidence, mere acquittal of one accused would not automatically lead to acquittal of another accused – It is only where the entire case of the prosecution suffers from infirmities, discrepancies and where the prosecution is not able to establish its case, the acquittal of co-accused would be of some relevance for deciding the case of the other accused.

Evidence – Appreciation of – Held: It is not always the quantity but the quality of the prosecution evidence that weighs with the Court in determining the guilt of the accused or otherwise – In order to prove its case beyond reasonable doubt, the evidence produced by the prosecution has to be qualitative and may not be quantitative in nature.

The prosecution case was that appellant-accused had a heated altercation with PW1 and his brother while they were drawing water from the village pond (water tank); that thereafter, appellant suddenly went running to his house and came back with the other accused who had a cloth bag in his hand and that thereafter appellant took out a bomb from the said cloth bag and threw the same towards PW1's brother which hit him on his chest causing his instantaneous death.

PW6 gave information with regard to the incident to the Police Station through telephone based on which G.D. Entry No.708, Ex.7 was lodged. Subsequently when the police officials, PWs14 and 15 arrived at the spot, PW1 submitted a written complaint, Ex.1, whereupon a formal FIR, Ex.1/3, was registered. The trial court convicted appellant u/s 302 IPC and Section 9(b)(ii) of the

Indian Explosives Act but acquitted the other accused. In appeal, High Court affirmed the conviction of appellant.

In the instant appeal, the appellant challenged his conviction *inter alia* on grounds:- 1) that Ex.7, the G.D. Entry No. 708, lodged at Police Station by PW6 was, in fact, the FIR whereas Ex.1/3 was a second FIR of the occurrence which was impermissible in law and in fact, was hit by Section 162 CrPC; 2) that the copy of the FIR was sent to the Court of SDJM ten days after the date of occurrence and, therefore, was violative of Section 157(1) CrPC; 3) that the prosecution had not examined all the witnesses and 4) that acquittal of the other accused should necessarily result in acquittal of the appellant as well.

Dismissing the appeal, the Court

HELD: 1. The cumulative effect of the statements of PW1 (Complainant), PW6 (cousin of the deceased) and PW14 (Investigating Officer) clearly indicate that Ex.7 was not the First Information Report of the incident. It gave no details of the commission of the crime as to who had committed the crime and how the occurrence took place. A First Information Report normally should give the basic essentials in relation to the commission of a cognizable offence upon which the Investigating Officer can immediately start his investigation in accordance with the provisions of Section 154, Chapter XII of the Code. In fact, it was only upon reaching the village that PW14 got particulars of the incident and even the names of the persons who had committed the crime. A written complaint with such basic details was given by PW1 under his signatures to the police officer, who then made endorsement as Ex.1/1 and registered the FIR as Ex.1/3. In these circumstances, it cannot be said that Ex.7 was, in fact and in law, the First Information Report and that Ex.1/3 was a second FIR for the same incident/

occurrence with similar details and was hit by Section 162 CrPC. On the contrary, Ex.7 was not a First Information Report upon its proper construction in law but was a mere telephonic information inviting the police to the place of occurrence. [Paras 7, 12] [1162-C-F; 1179-C]

Manu Sharma v. State (NCT of Delhi) **(2010) 6 SCC 1: 2010 (4) SCR 103;** *State of Andhra Pradesh v. V.V. Panduranga Rao* **(2009) 15 SCC 211: 2009 (7) SCR 421;** *Ravishwar Manjhi & Ors. v. State of Jharkhand* **(2008) 16 SCC 561: 2008 (17) SCR 420 and** *Anju Chaudhary v. State of U.P. & Anr.* **[Criminal Appeal @ SLP(Crl.) No. 9475 of 2008 decided on the 6th December, 2012 – relied on.**

2. The incident took place at about 4.00 to 4.30 p.m. The telephonic information was given at about 9.00 p.m. and thereafter the FIR, Ex.1/3, was registered at about 10.00 p.m. The question of delay in lodging the FIR in the present case does not arise. Whatever time was taken in registering the FIR stands fully explained by the statements of PW6 and PW14. [Para 24] [1187-F]

3. The appellant stated that the FIR was registered on 19th December, 1984 but was sent to the Court of the Magistrate on 29th December, 1984 and pointed out the Entry No.793/1984 in this regard. However, the said G.R. Entry is not the entry sending the First Information Report to the Court. The document shown by the appellant is neither the copy of the FIR nor does it contain any acknowledgment of the Court. It is merely a note of the case proceedings as to what steps have been taken by the Investigating Officer and was signed by the Investigating Officer on 19th December, 1984 itself. [Para 13] [1179-E-F]

4.1. PW8, PW9 and PW10 were produced as witnesses before the Court. After recording their

introductory part in the examination-in-chief, the prosecution gave up these witnesses as having been won over and tendered them for cross-examination. The Court recorded this aspect and also mentioned that the witnesses have been cross-examined by the defence. In view of this position, it cannot be said that the defence of the accused has suffered any prejudice as a result of non-examination of these three witnesses. [Para 14] [1180-A-C]

4.2. It is not always the quantity but the quality of the prosecution evidence that weighs with the Court in determining the guilt of the accused or otherwise. The prosecution is under the responsibility of bringing its case beyond reasonable doubt and cannot escape that responsibility. In order to prove its case beyond reasonable doubt, the evidence produced by the prosecution has to be qualitative and may not be quantitative in nature. The Court is primarily concerned and has to satisfy itself with regard to the evidence being reliable, trustworthy and of a definite evidentiary value in accordance with law. PW1, PW5 and PW6 have clearly supported the case of the prosecution. Their statements, examined in conjunction with the statement of PW11, the doctor and the Investigating Officer, PW14, clearly establish the case of the prosecution beyond any reasonable doubt. [Paras 18, 20] [1182-B-C; 1183-B-C]

Namdeo v. State of Maharashtra **(2007) 14 SCC 150: 2007 (3) SCR 939 and** *Bipin Kumar Mondal v. State of West Bengal* **(2010) 12 SCC 91: 2010 (8) SCR 1036 – relied on.**

Masalti v. State of U.P. **AIR 1965 SC 202: 1964 SCR 133 – referred to.**

5.1. The Trial Court in its judgment clearly stated that there was direct and circumstantial evidence against the appellant implicating him with the commission of the

crime. Finding the appellant guilty of the offence, the Trial Court punished him accordingly. Where the prosecution is able to establish the guilt of the accused by cogent, reliable and trustworthy evidence, mere acquittal of one accused would not automatically lead to acquittal of another accused. It is only where the entire case of the prosecution suffers from infirmities, discrepancies and where the prosecution is not able to establish its case, the acquittal of the co-accused would be of some relevancy for deciding the case of the other. [Para 22] [1184-F-H; 1185-A]

5.2. The acquittal of a co-accused *per se* is not sufficient to result in acquittal of the other accused. The Court has to screen the entire evidence and does not extend the threat of falsity to universal acquittal. The Court must examine the entire prosecution evidence in its correct perspective before it can conclude the effect of acquittal of one accused on the other in the facts and circumstances of a given case. [Para 23] [1187-C]

Dalbir Singh v. State of Haryana **(2008) 11 SCC 425: 2008 (8) SCR 1026 – relied on.**

Case Law Reference:

2010 (4) SCR 103	**relied on**	**Para 8**
2009 (7) SCR 421	**relied on**	**Para 8**
2008 (17) SCR 420	**relied on**	**Para 9**
1964 SCR 133	**referred to**	**Para 15, 16**
2007 (3) SCR 939	**relied on**	**Para 18**
2010 (8) SCR 1036	**relied on**	**Para 19**
2008 (8) SCR 1026	**relied on**	**Para 33**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 905 of 2005.

From the Judgment and Order dated 21.11.2006 of the High Court of Calcutta in C.R.A. No. 283 of 1992.

S.K. Gupta, R.K. Gupta, Shekhar Kumar for the Appellant.

Kabir Shankar Bose, Abhijit Sengupta, B.P. Yadav, Faisal M. for the Respondents.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The present appeal is directed against the judgment of the Calcutta High Court dated 21st November, 2006 in exercise of its criminal appellate jurisdiction vide which the High Court affirmed the judgment of conviction and the order of sentence passed by the Trial Court.

2. Before dealing with the rival contentions raised by the learned counsel appearing for the parties, it is necessary for the Court to notice the case of the prosecution in brief. On 19th December, 1984, amongst other villagers of village Lauria, Yamin PW8 and Mohammed Sadak Ali, PW1 hired a pump set of one Humayun Kabir, who was examined as PW7, for taking water from the pond known as Baro Lauria Pukur for irrigating their respective lands. PW8, Yamin and others drew water from the said pond. In the afternoon, when Mohammed Sadak Ali, PW1, and his brother, the deceased Samim Ali, went on the bank of the said tank for drawing water through the said pump, accused Yanab arrived there. He had an altercation with Mohammed Sadak Ali and Samim Ali which related to drawing of water from the tank. Though, PW1 had assured Yanab that they would stop taking water from the Pukur within a short time, yet Yanab forcibly switched off the pump machine. This further aggravated their altercation and accused started abusing them. Thereafter, accused Yanab suddenly went running to his house and came back within a few minutes along with the other accused named Najrul. Yanab then threw a bomb aiming at Samim Ali which hit him on his chest and exploded. As a result thereof, Samim fell onto the ground, his clothes got

burnt and he died instantaneously. It is also the case of the prosecution that Najrul had a cloth bag in his hand and Yanab took out the bomb from that cloth bag and threw the same towards Samim. Immediately after the incident, both the accused persons fled away. With the help of the villagers, Mohammed Sadak Ali took Samim to his house which was stated to be at a short distance from the bank of the tank. The information with regard to the incident was given to the Rampurhat Police Station through telephone. SI R.P. Biswas, PW14, along with SI Samit Chatterjee, PW15, arrived at village Lauria around 10.00 p.m. on 19th December, 1984. The telephonic information, on the basis of which the G.D. Entry No.708, Ex.7, was lodged was made by PW6 from a phone booth. After these officers arrived, PW1, Sadak Ali submitted a written complaint, Ex.1, addressed to the Officer Incharge of Rampurhat Police Station. SI, R.P.Biswas, then made an endorsement, Ex.1/1 and sent the same through Constable Sunil Dutta to Rampurhat Police Station for starting a case under Sections 148/149/324/326/302 of the Indian Penal Code (for short 'IPC') and 9(b)(ii) of the Indian Explosives Act. Ex.1 was received at the police station by SI B.Roy. Upon this, a formal FIR, Ex.1/3, was registered and the investigation was started by PW14. He prepared the Inquest Report, Ex.2, over the dead body of the deceased on identification of the same by his brother, PW2. The sketch map of the place of occurrence, Ex.8, was prepared. The pump set was seized vide seizure list Ex.5 and a Zimma Nama Ex.6 was prepared. PW14 also collected the post mortem report of the deceased from the Sub-Divisional Hospital, Rampurhat on 21st January, 1985. Because of transfer of PW14, the investigation of the case was taken up by SI, N.R. Biswas. Later on the investigation was also completed by PW15, S. Chatterjee, who had filed the charge sheet. The accused persons faced the trial for the above-mentioned offences before the Court of Sessions, which by a detailed judgment dated 18th September, 1992, held them guilty of the offences and punished the

accused Yanab as follows:

> "I, therefore, hold and find accused Yanob not guilty to the charge under section 324 of the I.P.C. and he is acquitted of that charge.
>
> As regards the charge under section 9(b)(ii) of the I.E. Act there is no evidence that accused Nazrul had in his possession bombs which were explosives in nature without any license or permit and as such he is found not guilty to the said charge and is acquitted.
>
> My findings are that accused Yanob threw the bomb which exploded on the chest of Samim causing his instantaneous death and as such it must be held that Yanob was in possession of explosive substance without any license or permit.
>
> Exts. 9 and 9/1 the reports of the Deputy Controller of Explosives go to establish that the remnants of the exploded bomb that was seized by PW14 and sent to him by C.S. witness NO.23 in sealed packets contained an explosive mixture of chlorate of potassium and sulphate of arsenic and such a bomb would be capable of endangering human life on explosion and it has been established from the evidence on record that it has not only endangered human life but brought a premature end of the life of a human being and as such I hold and find accused Yanob guilty to the charge under section 9(b) (ii) of the I.E. Act and he is convicted thereunder.
>
> In the result the prosecution case succeeds in part. Accused Nazrul is found not guilty to both the charges brought against him and is acquitted under section 235(1) Cr.P.C.
>
> Accused Yanob Sk is found guilty to the charge u/s 302 of the I.P.C. and under section 9(b)(ii) of the I.E. Act

and is convicted under both the counts of charges. He is, however, found not guilty to the charge under section 324 I.P.C. and is acquitted of that charge.

Sd/- P.K. Ghosh,
Addl. Sessions Judge,
Birbhum at Rampurhat,
18th September, 1992.

Heard accused Yanob on the point of sentence. The accused refuses to say anything or to make any submission on the point of sentence. Since no lesser than imprisonment for life can be imposed in an offence under section 302 I.P.C., the accused Yanob Sk is sentenced to imprisonment for life for the conviction under section 302 I.P.C. No separate sentence is being passed for the conviction under Section 9(b)(ii) of the I.E. Act.

Let a copy of this judgment of conviction and sentence be supplied free of cost to the convict accused Yanob Sk. as early as possible.

Sd/- P.K. Ghosh,
Addl. Sessions Judge,
Birbhum at Rampurhat,
18th September, 1992."

3. Aggrieved from the above judgment, the convicted accused, Yanab Sheikh, preferred an appeal before the High Court which came to be dismissed vide the impugned judgment, giving rise to the present appeal. While raising a challenge to the impugned judgment, the learned counsel for the appellant contended:

1. Ex.1/3 is a second FIR of the occurrence. Ex.7, the G.D. Entry No. 708, lodged at 2105 hrs. on 19th December, 1984 at Police Station Rampurhat by PW6 is, in fact, the FIR. The second FIR, Ex.1/3,

is neither permissible in law and in fact, is hit by the provisions of Section 162 of the Cr.P.C. (for short 'Code'). Thus, the entire case of the prosecution must fall to the ground.

2. The copy of the FIR was sent to the Court of SDJM after ten days of the date of occurrence and, therefore, is violative of Section 157(1) of the Code, on which account the appellant would be entitled to a benefit.

3. The prosecution has not examined all the witnesses without specifying any reason. Therefore, adverse inference should be drawn against the prosecution. There are material discrepancies and variations in the statements of the witnesses. Even the injured witnesses were not examined. For these reasons, the case of the prosecution must fail.

4. The acquittal of Najrul by the Trial Court should necessarily result in acquittal of the present appellant as well, because without attributing and proving the role of Najrul, the appellant could not be held guilty of committing any offence.

5. Lastly, it is contended that the offence squarely falls under Section 304, Part II of the IPC inasmuch as it was a fight that took place all of a sudden and resulted in the death of the deceased. There was no pre-meditation or intent to murder the deceased.

4. To the contra, it is contended by the learned counsel appearing for the State that the accused was convicted on 18th September, 1992 in the present case. He was granted bail on 29th September, 1992 and was convicted for life in another case under Sections 302/34 IPC in Case No. 44/1993 by the High Court. PW1, PW5 and PW6 are the eye-witnesses to the

occurrence and the prosecution has been able to prove its case beyond any reasonable doubt. The delay in lodging the report was primarily for the reason that the person had walked to the post office which was at quite a distance and then made a phone call to the police station. PW14 had come on the basis of the call made by PW6. Thus, there was neither unexplained delay in making the call nor in lodging the FIR. It is also the contention that Ex.7, the GD Entry is not an FIR but is a mere intimation without any details and, therefore, the provisions of Section 162 of the Code are not attracted in the present case.

5. First and foremost, we may examine the question whether FIR, Ex.1/3, can be treated by the Courts as the First Information Report and if so, what is the effect of Ex.7 in law, keeping in view the facts and circumstances of the present case. It is clearly established on record that the occurrence took place in the evening of 19th December, 1984. The occurrence was a result of an altercation and the abuses hurled at PW1 and the deceased by Yanab near the water tank. Immediately upon the altercation, the accused had ran to his house and returned along with Najrul and threw a bomb at the deceased. PW1, brother of the deceased, PW5, Basera Bibi, wife of the deceased and PW6 Abdus Sukur, cousin of the deceased are the eye-witnesses and they said that they had seen the appellant throwing a bomb upon the deceased and that the accused, Yanab, had taken the said bomb from the bag of Najrul.

6. After the incident, PW6 had gone to the Duni Gram Post Office and informed the police about the incident over the telephone. He informed the police that there had been a murder in the village and they should come. When the police arrived, he was in the village and he met the police at the house of the deceased Samim. This phone call was taken and the G.D. Entry was registered by PW14, SI R.P. Biswas.

7. According to PW14, on 19th December, 1984 at about

the 0805 hours, he had received a telephonic information and noted the information in General Diary No. 708 and thereafter he had proceeded towards village Lauria along with PW15, SI S. Chaterjee. Ex.7 had been recorded by PW14 and he had received the written complaint by PW1, Sadek Ali, and the same was submitted to him after he had reached the village Lauria and was addressed to the Officer In-charge, Rampurath Police Station. This written complaint was Ex.1. The cumulative effect of the statements of PW1, PW6 and PW14 clearly indicate that Ex.7 was not the First Information Report of the incident. It gave no details of the commission of the crime as to who had committed the crime and how the occurrence took place. A First Information Report normally should give the basic essentials in relation to the commission of a cognizable offence upon which the Investigating Officer can immediately start his investigation in accordance with the provisions of Section 154, Chapter XII of the Code. In fact, it was only upon reaching the village Lauria that PW14 got particulars of the incident and even the names of the persons who had committed the crime. A written complaint with such basic details was given by PW1 under his signatures to the police officer, who then made endorsement as Ex.1/1 and registered the FIR as Ex.1/3. In these circumstances, we are unable to accept the contention that Ex.7 was, in fact and in law, the First Information Report and that Ex.1/3 was a second FIR for the same incident/occurrence which was not permissible and was opposed to the provisions of the Section 162 of the Code.

8. In the case of *Manu Sharma v. State (NCT of Delhi)* (2010) 6 SCC 1, a Bench of this Court took the view that cryptic telephone messages could not be treated as FIRs as their object is only to get the police to the scene of offence and not to register the FIR. The said intention can also be clearly culled out from the bare reading of Section 154 of the Code which states that the information if given orally should be reduced to writing, read over to the informant, signed by the informant and

a copy of the same be given to him, free of cost. Similar view was also expressed by a Bench of this Court in the case of *State of Andhra Pradesh v. V.V. Panduranga Rao* (2009) 15 SCC 211, where the Court observed as under: -

> "10. Certain facts have been rightly noted by the High Court. Where the information is only one which required the police to move to the place of occurrence and as a matter of fact the detailed statement was recorded after going to the place of occurrence, the said statement is to be treated as FIR. But where some cryptic or anonymous oral message which did not in terms clearly specify a cognizable offence cannot be treated as FIR. The mere fact that the information was the first in point of time does not by itself clothe it with the character of FIR. The matter has to be considered in the background of Sections 154 and 162 of the Code of Criminal Procedure, 1973 (in short "the Code"). A cryptic telephonic message of a cognizable offence received by the police agency would not constitute an FIR."

9. Thus, the purpose of telephone call by PW6, when admittedly he gave no details, leading to the recording of Entry, Ex.7, would not constitute the First Information Report as contemplated under Section 154 of the Code. The reliance placed by the learned counsel appearing for the appellant upon the provisions of Section 162 of the Code, is thus, not well-founded. Even in the case of *Ravishwar Manjhi & Ors. v. State of Jharkhand,* (2008) 16 SCC 561, another Bench of this Court took the view that "..we are not oblivious to the fact that a mere information received by a police officer without any details as regards the identity of the accused or the nature of the injuries caused to the victim, name of the culprits, may not be treated as FIR, but had the same been produced, the nature of the information received by the police officer would have been clear....."

10. On this principle of law, we have no hesitation in stating that the second FIR about the same occurrence between the same persons and with similarity of scope of investigation, cannot be registered and by applying the test of similarity, it may then be hit by the proviso to Section 162 of the Code.

11. In the case of Anju Chaudhary v. State of U.P. & Anr. [Criminal Appeal @ SLP(Crl.) No. 9475 of 2008 decided on the 6th December, 2012], this Court held :

> "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 doubt 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 Court, 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."

(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 ca*se 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 expressed 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."

12. In light of the above settled principle, we are unable to accept that Ex.1/3 was a second FIR with regard to the same occurrence with similar details and was hit by Section 162 of the Code. On the contrary, Ex.7 was not a First Information Report upon its proper construction in law but was a mere telephonic information inviting the police to the place of occurrence. Thus, we have no hesitation in rejecting this contention raised on behalf of the appellant.

13. Equally without merit is the contention that the case of the prosecution must fail as the copy of the FIR had been sent to the Court after ten days of the registration of the FIR. The learned counsel appearing for the appellant stated that the FIR was registered on 19th December, 1984 but was sent to the Court of the Magistrate on 29th December, 1984. He pointed out the Entry No.793/1984 in this regard. The said G.R. Entry is not the entry sending the First Information Report to the Court. The document shown by the learned counsel for the appellant is neither the copy of the FIR nor does it contain any acknowledgment of the Court. It is merely a note of the case proceedings as to what steps have been taken by the Investigating Officer and was signed by the Investigating Officer on 19th December, 1984 itself. The learned counsel appearing for the appellant has not pointed out any other document from the record which could substantiate this contention raised on behalf of the appellant. The argument is entirely misconceived and is not based on any record of the case and is thus, rejected.

14. The next contention raised on behalf of the appellant that we are to deal with is that the prosecution should have examined all witnesses without exception. The fact that the

prosecution failed to examine PW8, PW9 and PW10 itself renders the prosecution story feeble. It is correct that in the present case, PW8, PW9 and PW10 were produced as witnesses before the Court. After recording their introductory part in the examination-in-chief, the prosecution gave up these witnesses as having been won over and tendered them for cross-examination. The Court in its order dated 3rd July, 1992 recorded this aspect and also mentioned that the witnesses have been cross-examined by the defence. In view of this position, it cannot be said that the defence of the accused has suffered any prejudice as a result of non-examination of these three witnesses.

15. It is interesting to note that PW8, Yamin in his cross-examination admitted that he was examined by the Investigating Officer and also that he had stated before the daroga babu (Investigation Officer) that on the date of the incident, since morning he was drawing water from Baro Lauria Pukur through a pump set taken on hire from Humayon Kabir, PW7. No further questions were put to this witness by the accused. Whatever he stated in his cross-examination, to some extent, supports the case of the prosecution. It proves that the incident occurred on that day, pump was taken on hire and people of the village during the day were drawing water from the Baro Lauria Pukur. It is, thus, clear that non-examination of these witnesses has neither prejudiced the case of the prosecution nor will it be of any serious advantage to the accused. For this purpose, reliance has been placed upon the judgment of this Court in the case of *Masalti v. State of U.P.* [AIR 1965 SC 202] where the Court held that it is undoubtedly the duty of the prosecution to lay before the Court all material evidence available which is necessary for unfolding its case.

16. In the case of *Masalti* (supra), the judgment relied upon by the learned counsel for the appellant, this Court while making it clear that duty lies upon the prosecution to examine all material

witnesses clearly stated the situation where the witnesses may not be examined because they have been won over, terrorised and they may not speak the truth before the court. The court in paragraph 12 held as under:

> "12. In the present case, however, we are satisfied that there is no substance in the contention which Mr Sawhney seeks to raise before us. It is not unknown that where serious offences like the present are committed and a large number of accused persons are tried, attempts are made either to terrorise or win over prosecution witnesses, and if the prosecutor honestly and bona fide believes that some of his witnesses have been won over, it would be unreasonable to insist that he must tender such witnesses before the court. It is undoubtedly the duty of the prosecution to lay before the court all material evidence available to it which is necessary for unfolding its case; but it would be unsound to lay down as a general rule that every witness must be examined even though his evidence may not be very material or even if it is known that he has been won over or terrorised. In such a case, it is always open to the defence to examine such witnesses as their witnesses and the court can also call such witnesses in the box in the interest of justice under Section 540 CrPC. As we have already seen, the defence did not examine these witnesses and the Court, after due deliberation, refused to exercise its power under Section 540 CrPC. That is one aspect of the matter which we have to take into account."

17. Basruddin, admittedly was not produced before the Court. The defence also did not summon this witness. Even if for the sake of arguments, it is assumed that Basruddin, if produced would have spoken the truth, that necessarily does not imply that he would not have supported the case of the prosecution. Even if we give some advantage to the case of the defence, for the reason that this witness has not been produced, even then by virtue of the statement of three other

witnesses, PW1, PW5 and PW6, attendant circumstances and the statement of PW14, the prosecution has been able to bring home the guilt of the accused.

18. We must notice at this stage that it is not always the quantity but the quality of the prosecution evidence that weighs with the Court in determining the guilt of the accused or otherwise. The prosecution is under the responsibility of bringing its case beyond reasonable doubt and cannot escape that responsibility. In order to prove its case beyond reasonable doubt, the evidence produced by the prosecution has to be qualitative and may not be quantitative in nature. In the case of *Namdeo v. State of Maharashtra* [(2007) 14 SCC 150], the Court held as under:

> "28. From the aforesaid discussion, it is clear that Indian legal system does not insist on plurality of witnesses. Neither the legislature (Section 134 of the Evidence Act, 1872) nor the judiciary mandates that there must be particular number of witnesses to record an order of conviction against the accused. Our legal system has always laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence. The bald contention that no conviction can be recorded in case of a solitary eyewitness, therefore, has no force and must be negatived."

19. Similarly, in the case of *Bipin Kumar Mondal v. State of West Bengal* (2010) 12 SCC 91, this Court took the view, "..in fact, it is not the number and quantity but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether evidence has

a ring of truth, is cogent, trustworthy and reliable."

20. Facts of the present case, seen in light of the above principles, makes it clear that the Court is primarily concerned and has to satisfy itself with regard to the evidence being reliable, trustworthy and of a definite evidentiary value in accordance with law. PW1, PW5 and PW6 have clearly supported the case of the prosecution. Their statements, examined in conjunction with the statement of PW11, the doctor and the Investigating Officer, PW14, clearly establish the case of the prosecution beyond any reasonable doubt.

21. Najrul has been acquitted by the Trial Court. His acquittal was not challenged by the State before the High Court. In other words, the acquittal of Najrul has attained finality. While recording the acquittal of the accused Najrul, the Trial Court recorded the following reasoning:

> "P.W.1 and PW-5 at the first blush did not say that accused Yanob threw the bomb at Samim taking the same from the bag of Nazrul and PW-1 stated that Yanob came along with Nazrul with bomb in his hand. He did not say that Nazrul was carrying any cloth bag (Tholey).
>
> It also transpired from the evidence of PW-5 that the house of Yanob is about 200/250 cubits away from the bank of the tank while that of Nazrul is at a further distance of 25/30 cubits from Yanob's house.
>
> It might be that Nazrul was in the house of Yanob or hearing shouts from the bank of the tank seeing Yanob rushing back towards the bank of the tank with bombs in his hand he came close behind him to see what was going on and at that point of time he might have a had a cloth bag in his hand but that itself will not prove that he shared the common intention with Yanob to kill Samim specially when no such cloth bag containing bombs were recovered from his possession.

> I, therefore, on an appreciation of the entire evidence on record feel no hesitation to hold and find accused Yanob guilty to the charge under section 302 I.P.C. and convict him thereunder and hold and find accused Nazrul not guilty to the charge under section 302 read with section 34 of the Indian Penal Code and he is acquitted of that charge under section 235(1) Cr.P.C. So far as the charge under section 324 I.P.C. against accused Yanob for causing voluntary hurt to Mahasin (PW-9) and Basir (C.S. witness No. 10) is concerned there is no evidence that the aforesaid persons sustained and/or received any injury from the splinters of the exploded bomb thrown by accused Yanob. Nahasin when tendered by the prosecution even during cross examination did not say that he sustained any such injury. Basir as already observed had not been examined on the plea that he has been gained over and the defence did not examine him as its witness to prove that the prosecution narrative was not correct and the incident took place in a different manner.
>
> I, therefore, hold and find accused Yanob not guilty to the charge under section 324 of the I.P.C. and he is acquitted of that charge."

22. In the present case, we are concerned with the merit or otherwise of the above reasoning leading to the acquittal of the accused Najrul. We are primarily concerned with the effect of this acquittal upon the case of the appellant-accused. The Trial Court in its judgment clearly stated that there was direct and circumstantial evidence against the accused implicating him with the commission of the crime. Finding the appellant guilty of the offence, the Trial Court punished him accordingly. Where the prosecution is able to establish the guilt of the accused by cogent, reliable and trustworthy evidence, mere acquittal of one accused would not automatically lead to acquittal of another accused. It is only where the entire case of the prosecution suffers from infirmities, discrepancies and

where the prosecution is not able to establish its case, the acquittal of the co-accused would be of some relevancy for deciding the case of the other. In the case of *Dalbir Singh v. State of Haryana* [(2008) 11 SCC 425], this Court held as under:

"13. Coming to the applicability of the principle of *falsus in uno, falsus in omnibus,* even if major portion of evidence is found to be deficient, residue is sufficient to prove guilt of an accused, notwithstanding acquittal of large number of other co-accused persons, his conviction can be maintained. However, where large number of other persons are accused, the court has to carefully screen the evidence:

"51. … It is the duty of court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim falsus in uno, falsus in omnibus has no application in India and the witnesses cannot be branded as liars. The maxim falsus in uno, falsus in omnibus (false in one thing, false in everything) has not received general acceptance in different jurisdiction in India, nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence'. (See Nisar Ali v. State of U.P.) 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. (See *Gurcharan Singh v. State of Punjab.*) The doctrine is a dangerous one, specially in India, for if a whole body of the testimony were to be rejected, because witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See *Sohrab v. State of M.P.*[4] and *Ugar Ahir v. State of Bihar*.) An attempt has to be made to in terms of felicitous metaphor, separate grain from the chaff, truth from falsehood. Where it is not feasible to separate truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is discard the evidence in toto. (See *Zwinglee Ariel v. State of M.P.* and *Balaka Singh v. State of Punjab.*) As observed by this Court in *State of Rajasthan v. Kalk*i[8] normal discrepancies in evidence are those which are due to normal errors of observations, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and these are always there

however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorised. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so."

23. The cumulative effect of the above discussion is that the acquittal of a co-accused per se is not sufficient to result in acquittal of the other accused. The Court has to screen the entire evidence and does not extend the threat of falsity to universal acquittal. The Court must examine the entire prosecution evidence in its correct perspective before it can conclude the effect of acquittal of one accused on the other in the facts and circumstances of a given case.

24. Neither we are able to see nor the counsel appearing for the appellant has been able to point out the contradictions or discrepancies of any material nature in the statements of the witnesses. PW6, cousin of the deceased has supported the prosecution version. His statement is duly corroborated by other witnesses. According to him he had gone to the Duni Gram Post Office and informed the police about the incident over telephone, in response to which PW14 had come to the place of occurrence. The incident took place at about 4.00 to 4.30 p.m. The telephonic information was given at about 9.00 p.m. and thereafter the FIR, Ex.1/3, was registered at about 10.00 p.m. The question of delay in lodging the FIR in the present case does not arise. Whatever time was taken in registering the FIR stands fully explained by the statements of PW6 and PW14.

25. Another very important aspect of the case is, that on behalf of the accused, no question or suggestions were put to the Investigating Officer on any of these aspects which are sought to be raised before us in the present appeal. The Investigating Officer could have easily explained the delay, if

any. No question was also directed to get an explanation on record as to why Basruddin was not examined and PW9 and PW10 without examination were tendered for cross-examination in Court. Absence of such questions on behalf of the accused to the concerned witnesses would show that the accused cannot claim any advantage and thus, cannot default the case of the prosecution in this regard, particularly in the facts of the present case.

26. For the reasons afore-stated, we find no merit in the present appeal. The same is dismissed accordingly.

B.B.B. Appeal dismissed.

Y.K. SINGLA
v.
PUNJAB NATIONAL BANK & ORS.
(Civil Appeal No. 9087 of 2012)

DECEMBER 14, 2012

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

Payment of Gratuity Act, 1972 – ss. 7 (3A), 4(5) and 14 – Withheld gratuity – Interest on – Entitlement – Criminal proceedings pending against Bank employee – In the meantime retirement of the employee on superannuation – Gratuity withheld – Subsequently acquittal of the employee – Gratuity released – Interest thereon granted from the date of the judgment of acquittal @ 5.5% – Employee's claim for the interest from the date of his retirement – Held: Interest on withheld gratuity is permissible u/s. 7(3A) – The Pension Regulations, 1995 which were adopted by the employer, whereby interest on account of delayed payment was debarred would be inconsequential – In view of ss. 4(5) and 14 benefit u/s. 7(3A) cannot be denied to an employee whose gratuity is regulated by some other instrument – Direction to pay the interest on gratuity when it became due to the employee on his retirement at the rate as provided u/s. 7(3A) – Punjab National Bank (Employees) Pension Regulations, 1995.

Criminal proceedings were initiated against the appellant alleging that at the relevant time when he was posted as a Manager with the respondent-Bank, he entered into a conspiracy with the Regional manager of the Bank and an officer of Indian Administrative Service, which caused pecuniary loss to the Bank. In the meantime, the accused retired on 31.10.1996 attaining the age of superannuation. On account of pendency of the criminal case, his gratuity, leave encashment and commutation of permissible portion of pension were

withheld. The appellant was informed that eventual release of the retiral benefits would depend on the outcome of the pending criminal case. On 31.10.2009, the accused was acquitted in the criminal proceedings. On the basis of acquittal, the appellant sought for the retiral benefits with interest from the date they became due to him (i.e. from the date of his retirement) till the actual payment. The Bank released the retiral benefits with interest on the Leave Encashment and Gratuity amount from the date on which he was acquitted in the criminal proceedings i.e. on 31.10.2009 at the rate of 5.5.%.

The appellant filed writ petition. The High Court allowing the petition, directed the Bank to pay the appellant interest at the rate of 8% from the date the retiral benefits become due to him till the actual payment thereof. Writ appeal was partly allowed by Division Bench of High Court holding that the appellant was not entitled to any interest on delayed payment of Gratuity in view of Regulation 46 of Punjab National Bank (Employees) Pension Regulations, 1995. Hence the present appeal.

Disposing of the appeal, the Court

HELD: 1. Sub-Section (3A) of Section 7 of the Gratuity Act provides that in case gratuity is not released to an employee within 30 days from the date the same becomes payable under sub-Section (3) of Section 7, the employee in question would be entitled to "...simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long term loans, as the Government may, by notification specify..." There is, however, one exception to the payment of interest envisaged under sub-Section (3A) of Section 7 of the Gratuity Act, provided for in the proviso under sub-Section (3A). The said proviso reveals, that no interest would be payable "...if the delay in the payment is due to the fault of the employee, and the employer has obtained permission in writing from the controlling

authority for the delayed payment on this ground…". The second ingredient expressed in the proviso under sub-Section (3A) of Section 7 of the Gratuity Act was clearly satisfied, when the competent authority approved the action of withholding the appellant's gratuity. The communication dated 13.5.2000, by which his gratuity was withheld, had been issued at the instance of the concerned controlling authority. Consequent upon the acquittal of the appellant, it would be erroneous to conclude, that the gratuity payable to the appellant on attaining the age of superannuation was withheld on account of some fault of the appellant himself. Accordingly it emerges, that the "fault" ingredient of the employee himself, for denial of gratuity when it became due, remains unsubstantiated. Since one of the two salient ingredients of the proviso under sub-Section (3A) of Section 7 is clearly not satisfied, the appellant cannot be denied interest under the proviso to section 7(3A). Accordingly, the appellant has to be awarded interest under section 7(3A). [Paras 17 and 18] [1207-A-E; 1208-C-D-F-G; 1209-A-B]

2. Even though the Punjab National Bank (Employees) Pension Regulations, 1995 are silent on the issue of payment of interest, the appellant would still be entitled to the benefit of Section 7(3A) of the Gratuity Act. Under Section 4(5) of the Gratuity Act, an employee has the right to make a choice of being governed by some alternative provision/instrument, other than the Gratuity Act, for drawing the benefit of gratuity. If an employee makes such a choice, he is provided with a statutory protection, namely, that the concerned employee would be entitled to receive better terms of gratuity under the said provision/instrument, in comparison to his entitlement under the Gratuity Act. A perusal of Section 14 leaves no room for any doubt, that a superior status has been vested in the provisions of the Gratuity Act, vis-

à-vis, any other enactment (including any other instrument or contract) inconsistent therewith. Therefore, insofar as the entitlement of an employee to gratuity is concerned, it is apparent that in cases where gratuity of an employee is not regulated under the provisions of the Gratuity Act, the legislature having vested superiority to the provisions of the Gratuity Act over all other provisions/enactments (including any instrument or contract having the force of law), the provisions of the Gratuity Act cannot be ignored. The term "instrument" and the phrase "instrument or contract having the force of law" shall most definitely be deemed to include the 1995 Regulations, which regulate the payment of gratuity to the appellant. Even if the provisions of the 1995 Regulations, had debarred payment of interest on account of delayed payment of gratuity, the same would have been inconsequential. The benefit of interest enuring to an employee, as has been contemplated under section 7(3A) of the Gratuity Act, cannot be denied to an employee, whose gratuity is regulated by some provision/instrument other than the Gratuity Act. [Paras 20 and 21] [1210-G-H; 1211-A-F; 1212-A]

3. The Bank is directed to pay to the appellant, interest at "…the rate notified by the Central Government for repayment of long term deposits…" as provided u/s. 7 (3A) of Payment of Gratuity Act. In case no such notification has been issued, the appellant would be entitled to interest, as was awarded to him by the Single Judge of the High Court i.e. interest at the rate of 8%. [Para 21] [1212-D-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9087 of 2012.

From the Judgment & Order dated 29.11.2011 of the High Court of Punjab and Haryana at Chandigarh in Letters Patent Appeal No. 1950 of 2011.

Sudhir Chandra Agarwala, Jitender Vohra, Rameshwar Prasad Goyal for the Appellant.

Yashraj Singh Deora, Rajesh Kumar, Anupama Dhurve, Prashant Narang, Sarv Mitter (for Mitter & Mitter Co.) for the Respondents.

The Order of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. Leave granted.

2. The appellant was inducted into the service of the Punjab National Bank (hereinafter referred to as, the PNB) in the clerical cadre on 19.2.1958. He was successively promoted against the posts of Special Assistant and Accountant with effect from 23.8.1972 and 26.12.1974. He also gained further promotions to the cadres of Manager-B Grade and thereafter, Manager-A Grade with effect from 24.11.1977 and 18.12.1982 respectively. He finally came to be promoted to the post of Chief Manager with effect from 1.10.1986. Whilst holding the post of Chief Manager, the appellant retired from service, on attaining the age of superannuation on 31.10.1996.

3. During 1981-1982, when the appellant was posted as Manager at the Sector 19, Chandigarh Branch of the PNB, he was accused of having entered into a conspiracy with R.L. Vaid, the then Regional Manager of the PNB, Chandigarh, and Dr. A.K. Sinha, IAS, the then Secretary, Department of Town and Country Planning, Haryana and thereby, of fraudulently having sanctioned a loan of Rs.2,70,000/- to Mrs. Rama Sinha (wife of Dr. A.K. Sinha, aforementioned). The said loan was granted to Mrs.Rama Sinha, for construction of a building on a plot in Sector 6, Panchkula. The said building, after its construction, was leased to the PNB, at an allegedly exorbitant rent of Rs.4,985/- per month. The loan amount, was to be adjusted out of the rent account. The PNB was allegedly, not in the need of the said building, because it was already housed in a building in Sector 17, Chandigarh, at a nominal rent of Rs.1,650/- per month. The building rented from Mrs. Rama

Sinha was said to have remained unoccupied from 1.5.1982 to 21.1.1987. This factual position, it was alleged, was sufficient to infer, that the PNB was not in need of the building taken on rent from Mrs.Rama Sinha. Based on the aforesaid factual position, it was felt, that the action of the conspirators caused a pecuniary loss of Rs.2,70,000/- to the PNB. It was also sought to be assumed, that the aforesaid loan and lease were favours extended to Dr. A.K. Sinha, IAS, through his wife Mrs. Rama Sinha. Based on the aforesaid allegations, the appellant Y.K. Singla, the aforesaid R.L. Vaid and Dr. A.K. Sinha, IAS, were charged under Section 120B of the Indian Penal Code and Section 5(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988.

4. The trial in the above matter was conducted by the Special Judge, CBI Court, Chandigarh. On the conclusion of the trial, the Special Judge, CBI Court, Chandigarh arrived at the conclusion, that the prosecution had failed to produce any evidence on the issue of criminal conspiracy. The trial Court accordingly, acquitted all the three accused of the charges framed against them on 31.10.2009, by holding, that the prosecution had failed to establish the charges beyond a shadow of reasonable doubt.

5. During the subsistence of the aforesaid criminal proceedings, the appellant Y.K. Singla retired from the employment of the PNB, on having attained the age of superannuation, on 31.10.1996. On his retirement, on account of the pendency of the criminal proceedings being conducted against him, gratuity, leave encashment and commutation of permissible portion of pension, were withheld. While withholding the aforesaid monetary benefits, the appellant was informed by the PNB through a communication dated 13.5.2000, that the eventual release of the aforesaid retiral benefits, would depend on the outcome of the pending criminal proceedings.

6. As already noticed above, the appellant was acquitted

of the charges framed against him, by the Special Judge, CBI Court, Chandigarh, on 31.10.2009. Based on his aforesaid acquittal, the appellant addressed a letter dated 26.11.2009 to the Executive Director of the PNB seeking release of his gratuity, encashment of privileged leave balance and commutation of permissible portion of pension. Additionally, he claimed interest, from the date the aforesaid retiral benefits became due to him, till the actual payment thereof. It will also be relevant to mention, that by this time, the appellant was over 73 years old. In its reply dated 5.2.2010, the PNB informed the appellant, that it had released leave encashment of Rs.1,28,716.24 on that day itself i.e., on 5.2.2010 itself. The appellant was also informed through the aforesaid communication, that a duly sanctioned gratuity proposal had been sent to the Provident Fund and Pension Department of the PNB, for disbursement of gratuity. Thereupon, the appellant actually received the gratuity payable to him, on 12.2.2010.

7. Having received encashment of privileged leave balance, as also, gratuity in February, 2010, the appellant reiterated his claim for interest, on account of delayed payment of the aforesaid amounts, through another letter dated 17.2.2010. In the instant letter, the appellant pointed out, that he had retired on attaining the age of superannuation on 31.10.1996, and as such, the PNB had withheld the aforesaid monetary benefits due to him for a period of more than 13 years up to February, 2010. The appellant's request for interest on the aforesaid delayed payments, was responded to by the PNB through a letter dated 12.3.2010. The appellant was informed, that he was entitled to interest on account of withholding of his retiral benefits, only with effect from the date of culmination of the proceedings pending against him. Having found the appellant entitled to interest with effect from 31.10.2009 i.e., when the Special Judge, CBI Court, Chandigarh acquitted him, the PNB released a sum of Rs.1,881/- as interest towards delayed payment of leave encashment, and another sum of Rs.3,336/- as interest on account of having withheld his gratuity.

The aforesaid interest, the appellant was informed, had been calculated at the rate of 5.5%.

8. Dissatisfied with the action of the PNB, in not paying interest to him from the date the aforesaid retiral benefits became due (on his retirement on 31.10.1996), till their eventual release (in February, 2010), the appellant filed Civil Writ Petition no. 6469 of 2010 before the High Court of Punjab & Haryana at Chandigarh (hereinafter referred to as, the High Court). The aforesaid Writ Petition came to be allowed on 4.5.2011. While allowing the Writ Petition filed by the appellant, the High Court directed the PNB to pay the appellant, interest at the rate of 8% from the date retiral benefits had became due to the appellant, till the actual payment thereof to him.

9. Dissatisfied with the order dated 4.5.2011, passed by the learned Single Judge of the High Court, the PNB preferred Letters Patent Appeal no. 1950 of 2011. The Letters Patent Appeal filed by the PNB was partly allowed by a Division Bench of the High Court, on 29.11.2011. The Division Bench of the High Court arrived at the conclusion, that the appellant was not entitled to any interest on delayed payment of Gratuity. The award of interest to the appellant for withholding the other retiral benefits was, however, not interfered with. The decision (dated 29.11.2011) rendered by the Division Bench of the High Court, has been assailed by the appellant, through the instant appeal.

10. The reasons which prompted the Division Bench of the High Court to deny interest on the withheld amount of gratuity to the appellant, are ascertainable from the paragraph 7 of the impugned order, which is being extracted hereunder:-

> "7. On having considered the matter, we are in agreement with the submission made by the learned counsel appearing for the appellant-Bank insofar as withholding of gratuity is concerned. The language of the relevant Rule i.e. Rule 46 of the 1995 Rules is clear and unambiguous. The mandate of the Rule is such that it operates as a bar

insofar as the Bank is concerned, as regards the release of gratuity to an employee against whom the departmental or judicial proceedings were pending on the date such employee attains the age of superannuation. The Rule stipulates that such withheld amount of gratuity would become payable only upon conclusion of the proceedings. Admittedly, judicial proceedings were pending against the respondent on the date of his superannuation i.e. 31.10.1996 and concluded only upon his acquittal vide order dated 31.10.2009. The amount viz. gratuity has since been released on 13.2.2010 and interest thereupon has also been paid for the period 31.10.2009 till the date of payment. We, accordingly, hold that respondent no. 1 is not entitled to any interest for the period 31.10.1996 till the conclusion of the trial and his acquittal i.e. 31.10.2009 on the withheld amount of gratuity."

11. It is apparent from a perusal of the reasoning recorded by the High Court, that the High Court relied upon Regulation 46 of the Punjab National Bank (Employees) Pension Regulations, 1995 (hereinafter referred to as, the 1995 Regulations). Regulation 46 is being extracted hereunder:-

"46. **Provisional Pension**

(1) An employee who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued, a provisional pension, equal to the maximum pension which would have been admissible to him, would be allowed subject to adjustment against final retirement benefits sanctioned to him, upon conclusion of the proceedings but no recovery shall be made where the pension finally sanctioned is less than the provisional pension or the pension is reduced or withheld etc. either permanently or for a specified period.

(2) In such cases the gratuity shall not be paid to such an employee until the conclusion of the proceedings against him. The gratuity shall be paid to him on conclusion of the proceedings subject to the decision of the proceedings. Any recoveries to be made from an employee shall be adjusted against the amount of gratuity payable."

(emphasis is ours)

Having perused Regulation 46(2), we are of the view, that the High Court was fully justified in concluding, that it was open to the PNB not to pay to the appellant gratuity, till the culmination of the proceedings pending against him. It is, therefore, apparent, that non-release of gratuity to the appellant after 31.10.1996 (when the appellant retired from his employment, with the PNB), till his acquittal by the Special Judge, CBI Court, Chandigarh, on 31.10.2009, cannot be faulted.

12. The right to withhold gratuity, is an issue separate and distinct, from the claim of interest, which has been raised by the appellant. The question that arises for consideration is, whether an employee whose gratuity has been withheld under Regulation 46(2) of the 1995 Regulations, would he be entitled to interest on the withheld payment of gratuity, if he is found not to be at fault? According to the simple logic of the appellant, since his gratuity was withheld from 1996 (when he retired from service) till 2010 (when gratuity was eventually released to him), i.e., for a period of 14 years, for no fault of his, he is most definitely entitled to interest on the delayed payment. It is, however, not the simple logic of the appellant, which will determine the controversy in hand. For, logic gave rise to diametrically opposite views, one of which was expressed by the Writ Court, and the other by the Letters Patent Bench. We shall therefore endeavour to search for a legal answer, to the issue in hand.

13. The 1995, Regulations, are silent on the subject of an employee's rights whose gratuity has been withheld, even in circumstances where it has eventually been concluded, that he was not at fault. This is exactly the situation in the present controversy, inasmuch as, the appellant's retiral benefits including gratuity, were withheld on 31.10.1996 when he retired on attaining the age of superannuation. The aforesaid withholding, was on account of a pending criminal proceeding. The said withholding has appropriately been considered as valid, under Regulation 46(2) of the 1995, Regulation. But the appellant was acquitted from the criminal prosecution initiated against him on 31.10.2009. As such, it is inevitable to conclude, that his gratuity was withheld without the appellant being at fault. It is in the aforesaid background, that we shall venture to determine the claim of the appellant for interest, despite the PNB having validly withheld his gratuity under Regulation 46(2) of the 1995, Regulations.

14. Insofar as the issue in hand is concerned, reference needs to be made to certain provisions of the Payment of Gratuity Act, 1972 (hereinafter referred to as, the Gratuity Act). In our considered view, Sections 4, 7 and 14 of the Gratuity Act are relevant. Section 4 is being extracted hereunder:-

"4. **Payment of gratuity -**

(1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years,—

(a) on his superannuation, or

(b) on his retirement or resignation, or

(c) on his death or disablement due to accident or disease:

Provided that the completion of continuous service

of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement:

Provided further that in the case of death of the employee, gratuity payable to him shall be paid to his nominee or, if no nomination has been made, to his heirs, and where any such nominees or heirs is a minor, the share of such minor, shall be deposited with the controlling authority who shall invest the same for the benefit of such minor in such bank or other financial institution, as may be prescribed, until such minor attains majority.

Explanation - For the purposes of this section, disablement means such disablement as incapacitates an employee for the work which he was capable of performing before the accident or disease resulting in such disablement.

(2) For every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned:

Provided that in the case of a piece-rated employee, daily wages shall be computed on the average of the total wages received by him for a period of three months immediately preceding the termination of his employment, and, for this purpose, the wages paid for any overtime work shall not be taken into account:

Provided further that in the case of an employee who is employed in a seasonal establishment and who is not so employed throughout the year, the employer shall pay the gratuity at the rate of seven

days' wages for each season.

Explanation.— In the case of a monthly rated employee, the fifteen days' wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen.

(3) The amount of gratuity payable to an employee shall not exceed one lakh rupees.

(4) For the purpose of computing the gratuity payable to an employee who is employed, after his disablement, on reduced wages, his wages for the period preceding his disablement shall be taken to be the wages received by him during that period, and his wages for the period subsequent to his disablement shall be taken to be the wages as so reduced.

(5) Nothing in this section shall affect the right of an employee receive better terms of gratuity under any award or agreement or contract with the employer.

(6) Notwithstanding anything contained in sub- section (1), -

(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused;

(b) the gratuity payable to an employee may be wholly or partially forfeited -

(i) if the services of such employee have been

terminated for his riotous or disorderly conduct or any other act violence on his part, or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment."

(emphasis is ours)

It is not a matter of dispute, that the appellant was entitled to gratuity when he retired on attaining the age of superannuation on 31.10.1996. The quantification of the appellant's gratuity by the PNB is not in dispute. As such, sub-sections (1) to (4) of section 4 of the Gratuity Act are clearly not relevant to the present controversy. Only sub-section (5) of section 4 is relevant in so far as the present case is concerned. Likewise, since the appellant has not been found to be at any fault, sub-section (6) of section 4 is also not attracted in this case.

15. Sub-Section (5) of section 4 of the Gratuity Act permits an employee to be regulated for purpose of gratuity, under an alternative provision/arrangement (award or agreement or contract), other than the Gratuity Act. In such an eventuality, sub-section (5) aforesaid, assures the concerned employee, "…to receive better terms of gratuity under any award or agreement or contract with the employer…" Since the appellant's claim for gratuity is regulated, under the 1995, Regulations, it is evident, that his claim for gratuity is liable to be determined by ensuring his right to better terms than those contemplated under the Gratuity Act. In the instant process of consideration, the aforesaid conclusion, namely, that an employee who receives gratuity under a provision, other than the Gratuity Act, would be entitled to better terms of gratuity, will constitute one of the foundational basis, of determination. Having examined section 4 of the Gratuity Act, we may unhesitatingly record, that none

of the other sub-sections of section 4 of the Gratuity Act, as well as, the other provisions of the Gratuity Act, have the effect of negating the conclusion drawn hereinabove.

16. For the determination of the present controversy, it is also relevant to take into consideration Section 7 of the Gratuity Act, which is being extracted hereunder:-

"7. **Determination of the amount of gratuity.-**

(1) A person who is eligible for payment of gratuity under this Act or any person authorized, in writing, to act on his behalf shall send a written application to the employer, within such time and in such form, as may be prescribed, for payment of such gratuity.

(2) As soon as gratuity becomes payable, the employer shall, whether an application referred to in sub-section (1) has been made or not, determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the controlling authority specifying the amount of gratuity so determined.

(3) The employee shall arrange to pay the amount of gratuity, within thirty days from the date it becomes payable to the person to whom the gratuity is payable.

(3A) If the amount of gratuity payable under sub-Section (3) is not paid by the employer within the period specified in sub-Section (3), the employer shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long-term deposits, as that Government may, by notification specify:

Provided that no such interest shall be payable if the delay in the payment is due to the fault of the employee and the employer has obtained permission in writing from the controlling authority for the delayed payment on this ground.

(4) (a) If there is any dispute as to the amount of gratuity payable to an employee under this Act or as to the admissibility of any claim of, or in relation to, an employee for payment of gratuity, or as to the person entitled to receive the gratuity, the employer shall deposit with the controlling authority such amount as he admits to be payable by him as gratuity.

(b) Where there is a dispute with regard to any matter specified in clause (a), the employer or employee or any other person raising the dispute may make an application to the controlling authority for deciding the dispute.

(c) The controlling authority shall, after due inquiry and after giving the parties to the dispute a reasonable opportunity of being heard, determine the matter or matters in dispute and if, as a result of such inquiry any amount is found to be payable to the employee, the controlling authority shall direct the employer to pay such amount or, as the case may be, such amount as reduced by the amount already deposited by the employer.

(d) The controlling authority shall pay the amount deposited including the excess amount, if any, deposited by the employer, to the person entitled thereto.

(d) as soon as may be after a deposit is made under clause (a), the controlling authority shall pay the amount of the deposit-

(i) to the applicant where he is the employee; or

(ii) where the applicant is not the employee, to the nominee or, as the case may be, the guardian of such nominee or heir of the employee if the controlling authority is satisfied that there is no dispute as to the right of the applicant to receive the amount of gratuity.

(5) For the purpose of conducting an inquiry under sub-section (4), the controlling authority shall have the same powers as are vested in a court, while trying a suit, under the Code of Civil Procedure, 1908, (5 of 1908) in respect of the following matters, namely:-

(a) enforcing the attendance of any person or examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) issuing commission for the examination of witnesses.

(6) Any inquiry under this section shall be a judicial proceeding within the meaning of sections 193 and 228, and for the purpose of section 196, of the Indian Penal Code (45 of 1860).

(7) Any person aggrieved by an order under sub-section (4) may, within sixty days from the date of the receipt of the order, prefer an appeal to the appropriate Government or such other authority as

may be specified by the appropriate Government in this behalf:

Provided that the appropriate Government or the appellate authority, as the case may be, may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of sixty days, extend the said period by a further period of sixty days:

Provided further that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellant either produces a certificate of the controlling authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under sub-Section (4), or deposits with the appellate authority such amount.

(8) The appropriate Government or the appellate authority, as the case may be, may, after giving the parties to the appeal a reasonable opportunity of being heard, confirm, modify or reverse the decision of the controlling authority."

(emphasis is ours)

A perusal of sub-Section (2) of Section 7 reveals, that it is the onerous responsibility of the employer, to determine the amount of gratuity payable to a retiring employee. Sub-Section (3) of Section 7 enjoins a further responsibility on the employer, to disburse the amount of gratuity payable to an employee, within 30 days from the date it becomes payable. Since the appellant had attained the age of superannuation on 31.10.1996, it is apparent, that gratuity had become payable to him on 31.10.1996. Accordingly, the same ought to have been calculated in terms of sub-Section (2) of Section 7 of the

Gratuity Act, and should have been dispersed to the appellant by 30.11.1996 in terms of sub-Section (3) of Section 7 of the Gratuity Act.

17. Sub-Section (3A) of Section 7 of the Gratuity Act is the most relevant provision for the determination of the present controversy. A perusal of the sub-Section (3A) leaves no room for any doubt, that in case gratuity is not released to an employee within 30 days from the date the same become payable under sub-Section (3) of Section 7, the employee in question would be entitled to "…simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long term loans, as the Government may, by notification specify…" There is, however, one exception to the payment of interest envisaged under sub-Section (3) of Section 7 of the Gratuity Act. The aforesaid exception is provided for in the proviso under sub-Section (3A) of Section 7. A perusal of the said proviso reveals, that no interest would be payable "…if the delay in the payment is due to the fault of the employee, and the employer has obtained permission in writing from the controlling authority for the delayed payment on this ground…" The exception contemplated in the proviso under sub-Section (3A) of Section 7 of the Gratuity Act, incorporates two ingredients. Where the two ingredients contemplated in the proviso under sub-Section (3A) are fulfilled, the concerned employee can be denied interest despite delayed payment of gratuity. Having carefully examined the proviso under sub-Section (3A) of Section 7 of the Gratuity Act, we are of the view, that the first ingredient is, that payment of gratuity to the employee was delayed because of some fault of the employee himself. The second ingredient is, that the controlling authority should have approved, such withholding of gratuity (of the concerned employee) on the basis of the alleged fault of the employee himself. None of the other sub-sections of Section 7 of the Gratuity Act, would have the effect of negating the conclusion drawn hereinabove.

18. Insofar as the present controversy is concerned, the appellant was accused of having entered into a conspiracy with a bank employee superior to him, so as to extend unauthorized benefits to a member of the Indian Administrative Services belonging to the Haryana Cadre. Based on the aforesaid alleged fault of the appellant, the PNB, by an order dated 13.5.2000, informed the appellant, that the release of certain retiral benefits including gratuity was being withheld, because of pending of criminal proceedings against him. The appellant was also informed, through the aforesaid communication, that release of his retiral benefits including gratuity, would depend on the outcome of the pending criminal proceedings. It is, therefore apparent, that the second ingredient expressed in the proviso under sub-Section (3A) of Section 7 of the Gratuity Act was clearly satisfied, when the competent authority approved the action of withholding the appellant's gratuity. The instant conclusion is inevitable, because it is not the case of the appellant, that the communication dated 13.5.2000, by which his gratuity was withheld, had not been issued at the instance of the concerned controlling authority. The only question which, therefore, arises for consideration is, whether the first ingredient (culled out above) for the applicability, of the proviso under sub-Section (3A) of Section 7 of the Gratuity Act, can be stated to have been satisfied, in the facts and circumstances of the instant case. If it can be concluded, that the aforesaid ingredient is also satisfied, the appellant would have no right to claim interest, despite delayed release of gratuity. Our determination of the first ingredient is, as follows. We are of the considered view, that consequent upon the acquittal of the appellant by the Special Judge, CBI Court, Chandigarh, it would be erroneous to conclude, that the gratuity payable to the appellant on attaining the age of superannuation i.e., on 31.10.1996, was withheld on account of some fault of the appellant himself. We may hasten to add, if the appellant had been convicted by the Special Judge, CBI Court, Chandigarh, then the first ingredient would also be deemed to have been satisfied. Conversely, because the appellant has been

acquitted, he cannot be held to be at fault. Accordingly it emerges, that the "fault" ingredient of the employee himself, for denial of gratuity when it became due, remains unsubstantiated. Since one of the two salient ingredients of the proviso under sub-Section (3A) of Section 7 of the Gratuity Act is clearly not satisfied in the present case, we are of the view, that the appellant cannot be denied interest under the proviso to section 7(3A) of the Gratuity Act. Accordingly, the appellant has to be awarded interest under section 7(3A) of the Gratuity Act. Therefore, if the provisions of the Gratuity Act are applicable to the appellant, he would most definitely be entitled to interest under sub-Section (3A) of Section 7 of the Gratuity Act, on account of delayed payment of gratuity.

19. The most important question which arises for our consideration is, whether the provisions of the Gratuity Act can be extended to the appellant, so as to award him interest under sub-Section (3A) of Section 7 of the Gratuity Act. Insofar as the instant aspect of the matter is concerned, it was the vehement contention of the learned counsel appearing on behalf of the appellant, that the provisions of the Gratuity Act are extendable to the appellant, and as such, he would be entitled to disbursement of interest under Section 7(3A) thereof. The plea at the behest of the PNB, however, was to the contrary. The contention of the learned counsel representing the PNB was, that the PNB having adopted the 1995, Regulations, the claim of the appellant could only be determined under the provisions of the said Regulations. It was pointed out, that denial of payment of gratuity in the present case, was valid and justified under Regulation 46(2) of the 1995 Regulations. Furthermore, it was pointed out, that the 1995 Regulations, did not make any provision for the award of interest in case of delayed payment of gratuity. Therefore, since gratuity had legitimately been withheld, under the provisions of the 1995, Regulations, and the payment of gratuity to the appellant is not regulated under the Gratuity Act, there was no question of payment of interest to the appellant. It was submitted that the

appellant's gratuity had been withheld during the pendency of criminal proceedings initiated against him, his entitlement to gratuity stood extended to such time as the said criminal proceedings were eventually disposed of. Thus viewed, the entitlement to gratuity stood extended to 31.10.2009 (i.e., the date of the disposal of the proceedings pending against him). In this behalf, it was also pointed out, that as soon as the criminal proceedings pending against the appellant, concluded in his favour, the PNB released all the appellant's retiral benefits, including gratuity. The documents available on the record of the case reveal, that gratuity was released to the appellant on 12.2.2010. As such, the delay in release of gratuity, if at all, was only from 31.10.2009 to 12.2.2010. For the aforesaid delayed payment of gratuity, the appellant was admittedly awarded interest quantified at Rs.3,336/- (calculated at the rate of 5.5%).

20. In order to determine which of the two provisions (the Gratuity Act, or the 1995, Regulations) would be applicable for determining the claim of the appellant, it is also essential to refer to Section 14 of the Gratuity Act, which is being extracted hereunder:-

> "**14. Act to override other enactments, etc.** – The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act."
>
> (emphasis is ours)

A perusal of Section 14 leaves no room for any doubt, that a superior status has been vested in the provisions of the Gratuity Act, vis-à-vis, any other enactment (including any other instrument or contract) inconsistent therewith. Therefore, insofar as the entitlement of an employee to gratuity is concerned, it is apparent that in cases where gratuity of an employee is not

regulated under the provisions of the Gratuity Act, the legislature having vested superiority to the provisions of the Gratuity Act over all other provisions/enactments (including any instrument or contract having the force of law), the provisions of the Gratuity Act cannot be ignored. The term "instrument" and the phrase "instrument or contract having the force of law" shall most definitely be deemed to include the 1995 Regulations, which regulate the payment of gratuity to the appellant.

21. Based on the conclusions drawn hereinabove, we shall endeavour to determine the present controversy. First and foremost, we have concluded on the basis of Section 4 of the Gratuity Act, that an employee has the right to make a choice of being governed by some alternative provision/instrument, other than the Gratuity Act, for drawing the benefit of gratuity. If an employee makes such a choice, he is provided with a statutory protection, namely, that the concerned employee would be entitled to receive better terms of gratuity under the said provision/instrument, in comparison to his entitlement under the Gratuity Act. This protection has been provided through Section 4 (5) of the Gratuity Act. Furthermore, from the mandate of Section 14 of the Gratuity Act, it is imperative to further conclude, that the provisions of the Gratuity Act would have overriding effect, with reference to any inconsistency therewith in any other provision or instrument. Thus viewed, even if the provisions of the 1995, Regulations, had debarred payment of interest on account of delayed payment of gratuity, the same would have been inconsequential. The benefit of interest enuring to an employee, as has been contemplated under section 7(3A) of the Gratuity Act, cannot be denied to an employee, whose gratuity is regulated by some provision/ instrument other than the Gratuity Act. This is so because, the terms of payment of gratuity under the alternative instrument has to ensure better terms, than the ones provided under the Gratuity Act. The effect would be the same, when the concerned provision is silent on the issue. This is so, because the instant situation is not worse than the one discussed above, where

there is a provision expressly debarring payment of interest in the manner contemplated under Section 7(3A) of the Gratuity Act. Therefore, even though the 1995, Regulations, are silent on the issue of payment of interest, the appellant would still be entitled to the benefit of Section 7(3A) of the Gratuity Act. If such benefit is not extended to the appellant, the protection contemplated under section 4(5) of the Gratuity Act would stand defeated. Likewise, even the mandate contained in section 14 of the Gratuity Act, deliberated in detail hereinabove, would stand negated. We, therefore, have no hesitation in concluding, that even though the provisions of the 1995, Regulations, are silent on the issue of payment of interest, the least that the appellant would be entitled to, are terms equal to the benefits envisaged under the Gratuity Act. Under the Gratuity Act, the appellant would be entitled to interest, on account of delayed payment of gratuity (as has already been concluded above). We therefore hold, that the appellant herein is entitled to interest on account of delayed payment, in consonance with sub-Section (3A) of Section 7 of the Gratuity Act. We, accordingly, direct the PNB to pay to the appellant, interest at "…the rate notified by the Central Government for repayment of long term deposits…". In case no such notification has been issued, we are of the view, that the appellant would be entitled to interest, as was awarded to him by the learned Single Judge of the High Court vide order dated 4.5.2011, i.e., interest at the rate of 8%. The PNB is directed, to pay the aforesaid interest to the appellant, within one month of the appellant's furnishing to the PNB a certified copy of the instant order. The appellant shall also be entitled to costs quantified at Rs.50,000/-, for having had to incur expenses before the Writ Court, before the Division Bench, and finally before this Court. The aforesaid costs shall also be disbursed to the appellant within the time indicated hereinabove.

22. Disposed of in the aforesaid terms.

K.K.T. Appeal disposed of.

ATTAR SINGH
v.
STATE OF MAHARASHTRA
(Criminal Appeal No. 1091 of 2010)

DECEMBER 14, 2012

[SWATANTER KUMAR AND GYAN SUDHA MISRA, JJ.]

Penal Code, 1860:

s. 304 (Part I) – Prosecution u/s. 302 and 498A – Of the accused for killing his wife – Conviction u/s. 302 by trial court relying an evidence of daughter of the accused – However, accused acquitted u/s. 498A – Order Confirmed by High Court – On appeal, held: The prosecution has proved that accused was responsible for causing the death of the deceased – The evidence of the daughter of the accused is reliable even though she turned hostile, as the same is corroborated by other evidence – But since it is not proved that the accused had pre-meditated intention to kill the deceased, the case would fall u/s. 304 (Part I) and not u/s. 302 – Conviction altered u/s. 304 (Part I) and sentence reduced to 10 years RI from life imprisonment.

Witness – Hostile witness – Evidentiary value – Held: Merely because a witness turns hostile, would not result in throwing out the prosecution case – Evidence of such witness is acceptable to the extent, it is corroborated by that of a reliable witness.

Appellant-accused was prosecuted u/ss. 302 and 498A IPC for having killed his wife by hitting her with a wooden log on her head. The prosecution case was that the accused and the deceased, with their nine children, were living together. The complainant-village Kotwal received information about the incident. He went to the

house of the accused alongwith village Sarpanch. On his querry, the accused hold him that he killed his wife because she was of loose character. Defence case was that she sustained the injury as she had fallen down on the floor.

Trial court disbelieved the defence version on the basis of medical evidence which categorically stated that the injury was not possible due to fall on the ground. It convicted the accused u/s. 302 IPC relying on the testimony of the daughter of the accused and the deceased. However, the accused was acquitted u/s. 498A IPC on the ground that prosecution failed to prove that the accused used to subject the deceased to cruelty from time to time. In appeal, High Court confirmed the judgment of High Court.

In appeal to this Court, appellant-accused contended that his conviction could not have been based on the evidence of the daughter of the accused as she was a hostile witness and did not support the prosecution version fully. In the alternative, he contended that even if the offence is proved, the same should be brought down within the ambit of s. 304 (Part II) IPC, as only a single blow was inflicted; that the incident took place in a fit of anger and that there was no pre-plan or pre-meditation to kill.

Partly allowing the appeal, the Court

HELD: 1.1 Merely because a witness becomes hostile, it would not result in throwing out the prosecution case, but the Court must see the relative effect of his testimony. If the evidence of a hostile witness is corroborated by other evidence, there is no legal bar to convict the accused. Thus testimony of a hostile witness is acceptable to the extent it is corroborated by that of a reliable witness. It is, therefore, open to the Court

to consider the evidence and there is no objection to a part of that evidence being made use of in support of the prosecution or in support of the accused. [Para 13] [1224-B-D]

1.2 In the instant case, the support rendered by the daughter approving the incident should be accepted as reliable part of evidence, in spite of she being a hostile witness. Evidence of this witness shows that the accused was the only person in the company of the deceased soon before the death. The defence of the accused that injury on the deceased was a result of fall is ruled out by medical evidence and the details available of the location in the panchnama of offence. The courts below thus have rightly drawn some support from the reports of the chemical analysis since all the articles of the victims and clothes of the accused are found having blood stains of human blood group A. This was in view of the fact that the results of the analysis for determination of the blood group of the victim and accused were conclusive when blood sent to phial was analysed. Thus, the evidence of the daughter of the deceased coupled with other material as also evidence of other witnesses provided a complete chain and the prosecution successfully proved that the incident occurred in the manner and the place which was alleged. [Para 14] [1224-D-H; 1225-A]

1.3 The accused, in answer to questions under Section 313 Cr.P.C., has admitted his presence at the place of occurrence where his deceased wife was lying injured and dead on the floor. However, this does not mean that the failure of the defence could be treated as success of the prosecution since the conviction cannot be based only on the replies given by the accused, but these replies may be considered as support to the special knowledge of the accused and this lends sufficient weight to the evidence of the daughter of the

deceased and other attending circumstances. The trial Judge, has rightly placed reliance upon the evidence of the daughter of the victim and the accused. [Para 14] [1225-A-D]

1.4 The retracted statement of the daughter of the accused stands fully supported by the evidence of other witnesses. Thus, the material on record along with the evidence of the prosecution witnesses leads to only one inference that the accused-appellant was the author of the injury suffered by the victim and the accused alone inflicted fatal injuries upon the person of victim. The courts below have rightly held that she was killed by her husband-appellant in the manner which has been alleged by the prosecution. [Para 15] [1225-H; 1226-A-B]

Syed Akbar vs. State of Karnataka **AIR 1979 SC 1848: 1980 (1) SCR 95;** *State of U.P. vs. Chet Ram* **AIR 1989 SC 1543;** *Shatrughan vs.State of M.P.* **(1993) Crl.L.J. 3120;** *Sat Paul vs. Delhi Administration* **AIR 1976 SC 294: 1976 (2) SCR 11 – relied on.**

Gulshan Kumar vs. State ***(1993) Crl.L.J. 1525;*** *Kunwar vs. State ofU.P.* **(1993) Crl.L.J. 3421;** *Haneefa vs. State* **(1993) Crl.L.J. 2125 – referred to.**

2.1 The appellant although does not appear to have killed his wife by planning out the whole incident in a methodical manner, yet the evidence disclosed that he was nurturing a grudge against the wife over a long period of time and on the date of the incident when the husband started to abuse his deceased wife alleging her of loose moral character, the accused-husband gave vent to his deep-seated grudge by hitting her with such intensity that he did not bother about the consequence of his action. But it cannot be overlooked or ignored that the intensity with which he hit his wife after abusing her is indicative of the fact that he was not oblivious of the

consequence which would have resulted from his violent act of beating his wife with a log of wood. Thus, it will have to be inferred that he had sufficient knowledge about the consequence of his heinous act at least to the extent that it was sufficient in the ordinary course of nature to cause death of his wife. [Para 18] [1228-C-F]

2.2 When the village Kotwal reached the incident, the deceased did not even express any remorse for what he had done to his wife nor he appeared to be repentant of the incident. This clearly reflects his state of mind that he committed the crime with full knowledge to kill his wife on account of his deep-seated grudge which he was carrying since long. Therefore, the charge under Section 302 I.P.C. cannot be converted into one under Section 304 (Part-II) I.P.C. [Para 18] [1228-G-H; 1229-A]

State of Punjab vs. Bakhshish Singh and Ors. **(2008) 17 SCC 411:2008 (14) SCR 742;** *Anil Sharma and Ors. vs. State of Jharkhand***(2004) 5 SCC 679: 2004 (1) Suppl. SCR 907;** *Harbans Kaur vs.State of Haryana* **(2005) 9 SCC 195: 2005 (2) SCR 450;** *AmitsinghBhikamsingh Thakur vs. State of Maharashtra* **(2007) 2 SCC 310:2007 (1) SCR 191 ;** *Pannayar vs. State of Tamil Nadu by Inspectorof Police* **(2009) 9 SCC 152: 2009 (13) SCR 367 – referred to**

3. The appellant was living with his deceased wife day in and day out, but none of the witnesses has deposed that she was abused and beaten earlier. Thus, there is lack of evidence that on the fateful day, the appellant-husband had the pre-meditated intention to kill the deceased with a log of wood due to which he inflicted the fatal blow on the deceased. The anger and frustration, no doubt was acute in the mind of the appellant on account of his suspicion which aggravated due to hot exchange of words and abuses resulting into loss of mental balance as a consequence of which he

hit his wife with such intensity that she died on the spot itself. The appellant is fit to be convicted and sentenced under Section 304 (Part-I) I.P.C. in view of the evidence on record, the surrounding circumstance and the factual scenario in which the incident occurred. Therefore, the conviction and sentence of the appellant recorded under Section 302 I.P.C. is set aside and the same is converted under Section 304 (Part-I) I.P.C. The sentence of life imprisonment is substituted with a sentence of 10 years imprisonment. [Paras 20 and 23] [1229-F-H; 1230-A; 1231-A-C]

Case Law Reference:

1980 (1) SCR 95	**Relied on**	**Para 13**
(1993) Crl.L.J. 1525	**Referred to**	**Para 13**
(1993) Crl.L.J. 2125	**Referred to**	**Para 13**
AIR 1989 SC 1543	**Relied on**	**Para 13**
(1993) Crl.L.J. 3120	**Relied on**	**Para 13**
1976 (2) SCR 11	**Relied on**	**Para 13**
2008 (14) SCR 742	**Referred to**	**Para 16**
2004 (1) Suppl. SCR 907	**Referred to**	**Para 16**
2005 (2) SCR 450	**Referred to**	**Para 16**
2007 (1) SCR 191	**Referred to**	**Para 16**
2009 (13) SCR 367	**Referred to**	**Para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1091 of 2010.

From the Judgment and Order dated 26.06.2008 of the High Court of Bombay at Aurangabad in Criminal Appeal No. 7 of 2007.

Manjeet Chawla for the Appellant.

Shankar Chillarge, AAG, Asha Gopalan Nair for the Respondent.

The Judgment of the Court was delivered by

GYAN SUDHA MISRA, J. 1. This appeal has been preferred against the judgment and order dated 26.6.2008 passed by the High Court of Judicature at Bombay, Bench at Aurangabad in Criminal Appeal No. 7/2007 whereby the High Court upheld the judgment and order passed by the Sessions Judge, Dhule in Sessions Case No. 90/2005 by which the appellant had been convicted for an offence under Section 302, Indian Penal Code (I.P.C. for short) and was sentenced to undergo life imprisonment along with a fine of Rs.1,000/-. In default of payment of fine, he was ordered to undergo simple imprisonment for three months.

2. The appellant was initially charged and tried for an offence under Section 302 and 498-A of the I.P.C. for killing his wife by hitting her on her head with a woodenlog as he was suspecting her loyalty and character.

3. The specific case of the prosecution which was registered under Section 302 and 498-A of the I.P.C. is that the appellant-Attarsingh Barakya Pawara was residing along with his wife and 9 children at village Majanipada in Shirpur Taluk. On 22.6.2005, the complainant-Khandu Kalu Ahire who is also the village Kotwal received an information from one Ramesh Pawara, resident of Majanipada and Appa Shahada Pawara, resident of Fattepur village that the appellant Attarsing has committed murder of his wife by hitting her with a woodenlog on her head. On receipt of this information, the village Kotwal along with the Sarpanch Bhatu Ditya and one Rattan Lalsing went to the appellant's house and found the dead body of Nagibai (deceased wife of the appellant) lying on the floor of the house which indicated that the deceased had sustained head injury and had bleeded profusely. The woodenlog was found near her dead body and the appellant

was also found sitting in the house. The village Kotwal enquired about the incident and questioned the appellant as to how his wife had died. The appellant replied that his wife was of a loose character and, therefore, he had killed her by hitting woodenlog on her head. He narrated the incident to other persons accompanying the village Kotwal.

4. The village Kotwal thereafter came to the police station at Shirpur and lodged the report of the incident (Exh.15) on the basis of which the offence was registered vide crime No. 161/2005 under Section 302 of the I.P.C The police thereafter completed the usual legal formality by reaching on the spot and as the body was found there, inquest was also conducted and spot panchnama was also prepared whereby the clothes of the accused containing blood stains were seized. Woodenlog (Article No.3) which was found lying on the spot was also seized at the time of preparation of spot panchnama. The body of the deceased was then sent to the Government Hospital, Shirpur where post-mortem was conducted.

5. The accused-appellant was subsequently arrested and taken to the police station. Investigation thereafter followed in course of which it transpired that it was the appellant who had killed his wife Nagibai as he was suspecting her character. Charges were then framed against the appellant under Section 498-A and 302 of the I.P.C. to which the appellant pleaded not guilty and claimed to be tried.

6. In course of trial, the prosecution examined 12 witnesses on the question as to whether the appellant had subjected his wife to cruelty by giving her beating and abuses from time to time suspecting her character. The trial court further examined the question as to whether the accused had committed the murder of his wife Nagibai in his house at village Majanipada and thirdly as to what other offence he has committed.

7. The defence story set up on behalf of the appellant is

that his wife had fallen down on the floor of the house due to which she sustained severe head injury which resulted in her death.

8. The trial court on a scrutiny of the evidence and other materials on record rejected the defence story on the basis of the post-mortem report as Dr. Gohil who had conducted post-mortem categorically expressed that the head injury which the deceased Nagibai has sustained were not possible due to fall on the ground.

9. Insofar as the charge under Section 498-A of Indian Penal Code was concerned, the trial court held that none of the prosecution witnesses deposed that the accused-appellant was subjecting his wife Nagibai to cruelty by giving her beating and abuses from time to time as alleged by the prosecution. The learned Sessions Judge recorded that the evidence on record indicates that it was only a single incident in which accused-appellant had assaulted his wife Nagibai suspecting her fidelity and character as the evidence is missing that the accused-appellant was subjecting his wife to cruelty by abusing and assaulting her from time to time. The learned Sessions Judge thus was pleased to hold that the prosecution had failed to prove the charge under Section 498-A of the I.P.C. against the accused-appellant and hence acquitted him of this charge.

10. Insofar as the second charge is concerned as to whether the accused-appellant is the author of the head injury of the deceased, the testimony of the daughter of accused-appellant Mangibai was held to be significant for even though Mangibai had turned hostile, her testimony revealed that on the day of the incident, her father was running behind her mother with a woodenlog for beating her. On witnessing this incident, she started weeping and came out. Thereafter, her father closed the door and only her father and mother were inside the house. Immediately thereafter, her mother Nagibai was found lying injured in a pool of blood inside the house and the accused

also was there. It was, therefore, held that this circumstance indicated that it is the accused-appellant who had assaulted his wife and caused her death. It was further held, that though the panch witness Mangibai is a hostile witness, such portion of the hostile witness which is worth believing and which is supported by other circumstances can be used and relied upon by the prosecution in view of well-settled legal position. The Sessions Court thus on a scrutiny and analysis of the evidence accepted the prosecution version based on the evidence on record that the accused-appellant had committed the murder of his wife by hitting her with a woodenlog in his house and recorded a finding in the affirmative to the effect that it is the accused-appellant who committed the murder of his wife-Nagibai in his house at village Majanipada. Thus, the appellant succeeded in securing an order of acquittal in his favour in so far as the charge under Section 498-A of the Indian Penal Code is concerned, but suffered conviction and sentence of imprisonment for life for offence under Section 302 of the I.P.C. for the charge of murder of his wife.

11. The appellant feeling aggrieved with the conviction and sentence preferred an appeal before the High Court of Bombay Bench at Aurangabad, but the High Court confirmed the view taken by the trial court on all aspects including the charge under Section 302 of the I.P.C.

12. Assailing the judgment and order passed by the Sessions Court as also the High Court which concurrently upheld the conviction of the appellant under Section 302 I.P.C., the counsel for the appellant first of all attempted to demolish the case of the prosecution in its entirety by submitting that the conviction and sentence imposed on the appellant was not fit to be sustained on the testimony of the daughter Mangibai as she had not supported the prosecution version totally due to which she had been declared hostile. Hence, it was first of all contended that the testimony of the hostile witness could not have been relied upon for recording conviction of the appellant.

13. We have meticulously considered the arguments advanced on this vital aspect of the matter on which the conviction and sentence imposed on the appellant is based. This compels us to consider as to whether the conviction and sentence recorded on the basis of the testimony of the witness who has been declared hostile could be relied upon for recording conviction of the accused-appellant. But it was difficult to overlook the relevance and value of the evidence of even a hostile witness while considering as to what extent their evidence could be allowed to be relied upon and used by the prosecution. It could not be ignored that when a witness is declared hostile and when his testimony is not shaken on material points in the cross-examination, there is no ground to reject his testimony in toto as it is well-settled by a catena of decisions that the Court is not precluded from taking into account the statement of a hostile witness altogether and it is not necessary to discard the same in toto and can be relied upon partly. If some portion of the statement of the hostile witness inspires confidence, it can be relied upon. He cannot be thrown out as wholly unreliable. This was the view expressed by this court in the case of *Syed Akbar vs. State of Karnataka* reported in AIR 1979 SC 1848 whereby the learned Judges of the Supreme Court reversed the judgment of the Karnataka High Court which had discarded the evidence of a hostile witness in its entirety. Similarly, other High Courts in the matter of *Gulshan Kumar vs. State* (1993) Crl.L.J. 1525 as also *Kunwar vs. State of U.P.* (1993) Crl.L.J. 3421 as also *Haneefa vs. State* (1993) Crl.L.J. 2125 have held that it is not necessary to discard the evidence of the hostile witness in toto and can be relied upon partly. So also, in the matter of *State of U.P. vs. Chet Ram* reported in AIR 1989 SC 1543 = (1989) Crl.L.J. 1785; it was held that if some portion of the statement of the hostile witness inspires confidence it can be relied upon and the witness cannot be termed as wholly unreliable. It was further categorically held in the case of *Shatrughan vs. State of M.P.* (1993) Crl.L.J. 3120 that hostile

witness is not necessarily a false witness. Granting of a permission by the Court to cross-examine his own witness does not amount to adjudication by the Court as to the veracity of a witness. It only means a declaration that the witness is adverse or unfriendly to the party calling him and not that the witness is untruthful. This was the view expressed by this Court in the matter of *Sat Paul vs. Delhi Administration* AIR 1976 SC 294. Thus, merely because a witness becomes hostile it would not result in throwing out the prosecution case, but the Court must see the relative effect of his testimony. If the evidence of a hostile witness is corroborated by other evidence, there is no legal bar to convict the accused. Thus testimony of a hostile witness is acceptable to the extent it is corroborated by that of a reliable witness. It is, therefore, open to the Court to consider the evidence and there is no objection to a part of that evidence being made use of in support of the prosecution or in support of the accused.

14. While examining the instant matter on the anvil of the aforesaid legal position laid down by this Court in several pronouncements, we have noticed that the support rendered by the daughter Mangibai approving the incident should be accepted as reliable part of evidence in spite of she being a hostile witness. The witness Mangibai's evidence pushes the accused with his bag to the wall and the accused is obliged to explain because her evidence shows that the accused was the only person in the company of the deceased soon before the death. The defence of the accused that Nagibai's injury was a result of fall is ruled out by medical evidence and the details available of the location in the panchnama of offence. The courts below thus have rightly drawn some support from the reports of the chemical analysis since all the articles of the victims and clothes of the accused are found having blood stains of human blood group A. This was in view of the fact that the results of the analysis for determination of the blood group of the victim and accused were conclusive when blood sent to phial was analysed. Thus, the evidence of the daughter

of the deceased coupled with other material as also evidence of other witnesses i.e. Ramesh, Khandu, Bhatu and Makhan, provided a complete chain and the prosecution successfully proved that the incident occurred in the manner and the place which was alleged. In fact, the accused in answer to questions under Section 313 Cr.P.C. has admitted his presence at the place of occurrence where his wife Nagibai was lying injured and dead on the floor. However, we do not wish to be understood that the failure of the defence could be treated as success of the prosecution since the conviction cannot be based only on the replies given by the accused, but these replies may be considered as support to the special knowledge of the accused and this lends sufficient weight to the evidence of the daughter of the deceased and other attending circumstances. The trial Judge, in our view, has rightly placed reliance upon the evidence of Mangibai, the daughter of the victim and the accused when she candidly supported the prosecution story when she stated as follows:-

> "When my mother had sustained head injury, my father was there only i.e. near my mother. He was near the oven. He was talking loudly.
>
> It is true that my father hit her with a wooden log and therefore she ran to the kitchen. It is true that my father immediately ran after her. I started weeping. It is true that thereafter my father closed the door from inside."……

15. Thus, we are of the view that the evidence of Mangibai who was declared hostile supported the prosecution case in her cross-examination and, therefore, the courts below do not appear to have fallen into any error in accepting part of the evidence of Mangibai and the retracted confession of the witness Mangibai cannot be accepted to the extent that her evidence in support of the prosecution version was fit to be ruled out. The retracted statement of Mangibai stands fully supported by the evidence of other witnesses. Thus, the

material on record along with the evidence of the prosecution witnesses leads to only one inference that the accused-appellant was the author of the injury suffered by the victim and we have rightly been convinced that the accused and the accused alone inflicted fatal injuries upon the person of victim Nagibai. We are, therefore, clearly of the view that in so far as the incident of killing of the deceased Nagibai is concerned, the courts below have rightly held that she was killed by her husband-appellant in the manner which has been alleged by the prosecution.

16. However, learned counsel for the appellant next submitted that the offence alleged to have been committed by the accused-appellant ought to be brought down within the ambit of Section 304 Part II of the I.P.C. as there was only a single blow inflicted by the accused-appellant which is clear from the narration of incident by the daughter of the accused and deceased-Nagibai which shows that the accused was alone with the victim within the house and the accused did not kill his wife with a pre-meditated mind but the incident took place in a fit of anger due to the fact that he was suspecting his wife. It was, therefore, submitted that the accused in fact had no intention to kill his wife as the death had occurred on account of a single blow which was not the result of a pre-plan or pre-meditation. In support of the submission, he relied upon the judgment and order of this Court in the case of *State of Punjab vs. Bakhshish Singh & Ors.* (2008) 17 SCC 411 which also had relied on the judgment in the case of *Anil Sharma & Ors. vs. State of Jharkhand,* (2004) 5 SCC 679, *Harbans Kaur vs. State of Haryana,* (2005) 9 SCC 195, *Amitsingh Bhikamsingh Thakur vs. State of Maharashtra,* (2007) 2 SCC 310 and this Court had been pleased to hold that :

> "In all cases, it cannot be stated that when only a single blow is given, Section 302, IPC is made out, yet it would depend upon the factual scenario of each case, more

particularly the nature of the offence, the background facts, the part of the body where injuries were inflicted and the circumstances in which the assault is made" that the offence under Section 302 IPC is not made out."

In view of the aforesaid observation, learned counsel submitted that offence under Section 302 I.P.C. in the instant matter also cannot be held to have been made out as the deceased had sustained a single blow alleged to have been inflicted by the appellant. Learned counsel for the appellant taking further assistance from the observation of the Supreme Court in the matter of *State of Punjab vs. Bakhshish Singh* (supra) submitted further that the past history about the relations between the appellant and the deceased goes to prove that they did not have any strained relations. In fact, they had absolutely normal relations and had nine children out of the wedlock and it was only on the spur of the moment when the appellant abused suspecting the character of deceased Nagibai and beat her with a stick unintentionally that the incident happened. In support of his argument, he relied on the case of *Pannayar vs. State of Tamil Nadu by Inspector of Police* (2009) 9 SCC 152 wherein this Hon'ble Court held that absence of motive in case of circumstantial evidence is more favourable to defence.

17. The arguments advanced by learned counsel for the appellant-accused when tested in the light of the evidence led by the prosecution while considering whether the charge under Section 302 could be scaled down to Section 304 Part-II, we have already examined the circumstances in which the deceased had been killed and hence it could be noticed that the deceased Nagibai and accused-appellant although had been leading a so-called normal family life along with their nine children, the fact remains that the appellant-husband had been suspecting his wife's character and nurturing deep rooted grudge over a period of time. However, the evidence does further indicate that on the date and time of incident, the

appellant had not indulged in pre-planning the incident in any manner so as to eliminate his wife by killing her. The evidence of other witnesses also indicated that the incident of beating had not happened in the past and the daughter of the accused and deceased-Mangibai also deposed that there were heated exchange of words between the couple on the date of incident and the appellant-accused heaped abuses on his wife and then picked up a woodenlog in a fit of anger by which he hit the deceased as a result of which she sustained head injury and bleeded profusely which lead to her death.

18. Thus the appellant although do not appear to have killed his wife by planning out the whole incident in a methodical manner, yet the evidence disclosed that he was nurturing a grudge against the wife over a long period of time and on the date of the incident when the husband started to abuse his deceased wife alleging her of loose moral and character, the accused-husband gave vent to his deep seated grudge by hitting her with such intensity that he did not bother about the consequence of his action. But it cannot be overlooked or ignored that the intensity with which he hit his wife after abusing her is indicative of the fact that he was not oblivious of the consequence which would have resulted from his violent act of beating his wife with a log of wood. Thus, it will have to be inferred that he had sufficient knowledge about the consequence of his heinous act at least to the extent that it was sufficient in the ordinary course of nature to cause death of his wife. He was thus fully aware of the consequence that this would result in a serious consequence and in fact it did result in the said manner since the wife died as a result of the injury inflicted on her. In fact, when the village Kotwal reached the incident, the deceased did not even expressed any remorse for what he had done to his wife nor he appeared to be repentant of the incident. This clearly reflects his state of mind that he committed the crime with full knowledge to kill his wife Nagibai on account of his deep seated grudge

which he was carrying since long. Therefore, the submission of the counsel for the appellant that the charge under Section 302 I.P.C. should be converted into one under Section 304 Part-II I.P.C. is fit to be rejected and accordingly we do so.

19. The matter, however, do not set at rest at this stage as the evidence on record and the surrounding circumstances compels us to consider further, whether the offence would be made out under Section 302 I.P.C. or the same would fall under Section 304 Part-I of the I.P.C. since the appellant-accused and his wife-Nagibai had been married for a long time and were having nine children as also the manner of occurrence and the circumstance under which the incident happened does indicate that the incident of hot exchange of words between the accused-appellant and his deceased-wife got precipitated and as the appellant was already aggrieved of his wife suspecting her character, he hit his wife severely with whatever was available without caring for the consequence. Thus, the intention to kill his wife and the knowledge that she would be killed due to the hard hit blow by the log of wood surely cannot be ruled out. We take assistance from the observations of this Court quoted hereinabove that in all cases it cannot be said that when only a single blow is given, Section 302 I.P.C. is made out. Yet it would depend upon the factual scenario of each case more particularly nature of the offence, background facts and the part of the body where injury is inflicted and the circumstances in which the assault is made.

20. Taking assistance from these apt and relevant considerations when we examined the case of the appellant, we have noticed that the appellant was living with his deceased wife day in and day out, but none of the witness has deposed that she was abused and beaten earlier. Thus, there is lack of evidence that on the fateful day the appellant-husband had the pre-meditated intention to kill the deceased with a log of wood due to which he inflicted the fatal blow on the deceased. The anger and frustration no doubt was acute

in the mind of the appellant on account of his suspicion which aggravated due to hot exchange of words and abuses resulting into loss of mental balance as a consequence of which he hit his wife with such intensity that she died on the spot itself. In view of this the appellant will have to be attributed with the knowledge that his act was sufficient in the ordinary course of nature to kill the victim-wife.

21. Thus, in our view, the accused-appellant although might not be attributed with the intention to kill his wife, sufficient knowledge that his act would result into killing her was definitely there in the appellant's mind and he in fact gave vent to his feeling by finally killing her when he hit her with a woodenlog to take revenge for her alleged infidelity without realising that suspicion of her fidelity was not proved and even if it did, that gave no right to him to kill his wife in a brutal manner by hitting her hard enough with a log of wood with such intensity which was sufficient in the ordinary course of nature to kill the victim.

22. There are no dearth of incidents referred in the case laws where the husband has gone to the extent of shooting his wife and many a times a paramour shoots the husband or the husband shoots the paramour on account of suspicion founded or unfounded. But if the evidence discloses that the accused killed the victim in a pre-meditated manner as for instance by using a firearm, the same might be a clear case under Section 302 of the I.P.C. But the facts and circumstances of the incident in which the appellant has been convicted, indicate that the accused-appellant was not armed with any weapon or a firearm. As already noticed the evidence do not disclose in any manner that the appellant had come with a pre-meditated mind to kill his wife, but it was only in course of hot exchange of words and abuses which mindlessly drove him to take the extreme step of beating his wife with a log of wood with such force and intensity that she sustained head injury, profusely bled and finally died on the spot.

23. We are, therefore, of the considered view that although the conviction and sentence of the appellant might not be sustainable under Section 302 I.P.C., it cannot also be scaled down to Section 304 Part-II I.P.C. But we are surely of the view that the appellant is fit to be convicted and sentenced under Section 304 Part-I of the I.P.C. in view of the evidence on record, the surrounding circumstance and the factual scenario in which the incident occurred. We, therefore, set aside the conviction and sentence of the appellant recorded under Section 302 I.P.C. but convert the same under Section 304 Part-I I.P.C. Thus, we deem it fit and appropriate to substitute the sentence of life imprisonment with a sentence of 10 years imprisonment. The appeal thus, is partly allowed. We order accordingly.

K.K.T. Appeal Partly Allowed.

MST. PARAM PAL SINGH THROUGH FATHER
v.
M/S NATIONAL INSURANCE CO. & ANR.
(Civil Appeal No.9084 of 2012)

DECEMBER 14, 2012

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

Workmen's Compensation Act, 1923 – s.3 – Truck driver employed with second respondent was driving truck to a destination 1152 kms. away in connection with the commercial transport operation of the second respondent – In course of driving activity, he felt uncomfortable and parked the truck on the side of the road soon whereafter he fainted and died – Claim for compensation under the Act – Held: There was casual connection to death of the deceased with that of his employment as a truck driver – Deceased would have definitely undergone grave strain and stress due to long distance driving – Vocation of driving was a material contributory factor if not the sole cause that accelerated his unexpected death to occur which in all fairness should be held to be an untoward mishap in his life span – Such 'untoward mishap' can be reasonably described as an 'accident' – Death of the truck driver was in an accident arising out of and in the course of his employment with the second respondent – Order of Commissioner awarding compensation to adopted son of deceased accordingly upheld.

Adoption – Validity of – Proof – In a simple ceremony deceased 'J' had expressed that he being a bachelor thought it fit to take appellant in adoption – Biological parents of the appellant were also willing to give him in adoption – Process of adoption was carried out in presence of respected persons of the Panchayat in a ceremony where goods and sweets were

distributed – Adoption Deed was written by the Sarpanch of the village – Left thumb impression of 'J' was found affixed in the Adoption Deed which was signed both by the biological parents apart from three witnesses – Appellant was three years old at the time when the adoption took place – In ration card, name of 'J' was mentioned as father of the appellant – Held: In view of oral and documentary evidence on record, it was conclusively proved that appellant was the adopted son of 'J'.

One 'J' was employed as truck driver by the second respondent. 'J' was driving a truck in connection with the commercial transport operation of the second respondent from Delhi to Nimiaghat. When the truck reached near Nimiaghat, 'J' felt giddy and, therefore, parked the vehicle on the road side near a hotel and soon thereafter he fainted. 'J' was removed to a nearby hospital where the doctors declared him brought dead.

The appellant, claiming himself to be the adopted son of 'J', filed application before the Commissioner of Workmen's Compensation submitting that the death of 'J' was due to the strain and stress of continuous driving in the course of his employment with the second respondent, that the vehicle which he was driving was insured with the first respondent and that an additional premium was also paid for coverage of compensation payable under the Workmen's Compensation Act. The Commissioner awarded compensation. In appeal, however, the High Court held that the death of 'J' was due to natural causes and it had no CAUSAL CONNECTION with his employment and also held that the adoption of the appellant was not proved and thus set aside the order passed by the Commissioner. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1. On a conspectus consideration of the deed of adoption and the oral evidence led on behalf of

the appellant, it is found that there was a simple ceremony though not a mantra ceremony held in which the deceased participated wherein it was expressed that the deceased being a bachelor thought it fit to take the appellant in adoption for which the biological parents of the appellant were also willing to give him in adoption. In the Adoption Deed it was specifically mentioned that the process of adoption was carried out in the presence of respected persons of the Panchayat in a ceremony where goods and sweets were distributed in commemoration of the function of adoption. It has come in evidence that the Adoption Deed was written by the Sarpanch of the village. The left thumb impression of the deceased was found affixed in the Adoption Deed which was signed both by the biological parents apart from three witnesses. It was stated that about 15 to 20 persons apart from women folk were present at the time when the adoption ceremony was held. The suggestion, that the deed was written later on, was duly denied by the witnesses. It was also stated that the appellant was just three years old at the time when the adoption took place. Further Exhibits AW1/5 and AW1/6 are the copies of ration cards in which the name of the deceased is mentioned as the father of the appellant. [Para 15] [1246-D-H; 1247-A-B]

1.2. It was, thus, conclusively proved that the appellant was the adopted son of the deceased having been adopted as early as on 15.02.1999 i.e. long before the death of the deceased, namely, 17.07.2002. The High Court in the impugned judgment completely misled itself by rejecting the claim of adoption by holding that the document was not registered with the Tahsildar, that no ceremony was held, that the adoptive father was not present, that there was no giving and taking of the adopted son and, therefore, the adoption of the appellant by the deceased not proved. On the contrary, every

prescription required for a valid adoption was very much present in the form of both oral and documentary evidence on record and consequently the conclusion of the High Court in having held that the appellant was not the adopted son of the deceased cannot be sustained and the same is set aside. [Para 16] [1247-B-E]

Lakshman Singh Kothari v. Smt. Rup Kanwar **AIR 1961 SC 1378: 1962 SCR 477;** *M. Gurudas and others v. Rasaranjan and others* **2006 (8) SCC 367: 2006 (6) Suppl. SCR 103 and** *Vishvanath Ramji Karale v. Rahibai Ramji Karale and others* **AIR 1931 Bombay 105 –referred to.**

State of Rajasthan v. Ram Prasad and another **2001 A.C.J. 647;** *Anand Bihari and others v. Rajasthan State Road Trans. Corpn. and another* **1991 A.C.J. 848 and** *Lalo Devi v. Superintendent of Mines* **1988 ACJ 886 – cited.**

2.1. The entitlement to claim compensation is dependent on fulfillment of the stipulations contained in Section 3(1) of the Workmen's Compensation Act. However, there are decisions of the English Court as early as of the year 1903 onwards stating that unlooked-for mishap or an untoward event which is not expected or designed should be construed as falling within the definition of an "accident" and in the event of such "untoward" "unexpected" event resulted in a personal injury caused to the workman in the course of his employment in connection with the trade and business of his employer, the same would be governed by the provisions of Section 3 of the Workmen's Compensation Act. Such a legal principle evolved from time immemorial got the seal of approval of this Court. Thus, in the facts of this case, it can be validly concluded that there was CAUSAL CONNECTION to the death of the deceased with that of his employment as a truck driver. One cannot lose sight of the fact that a 45 years old driver meets with his unexpected death, may be due to heart failure while

driving the vehicle from Delhi to a distant place called Nimiaghat near Jharkhand which is about 1152 kms. away from Delhi, would have definitely undergone grave strain and stress due to such long distance driving. The deceased being a professional heavy vehicle driver when undertakes the job of such driving as his regular avocation it can be safely held that such constant driving of heavy vehicle, being dependant solely upon his physical and mental resources & endurance, there was every reason to assume that the vocation of driving was a material contributory factor if not the sole cause that accelerated his unexpected death to occur which in all fairness should be held to be an untoward mishap in his life span. Such an 'untoward mishap' can therefore be reasonably described as an 'accident' as having been caused solely attributable to the nature of employment indulged in with his employer which was in the course of such employer's trade or business. [Paras 21, 22 and 27] [1249-G; 1250-C-E; 1255-A-E]

2.2. Having regard to the evidence placed on record, there is no scope to hold that the deceased was simply travelling in the vehicle and that there was no obligation for him to undertake the work of driving. On the other hand, the evidence as stood established proved the fact that the deceased was actually driving the truck and that in the course of such driving activity as he felt uncomfortable he safely parked the vehicle on the side of the road near a hotel soon whereafter he breathed his last. In such circumstances, the conclusion of the Commissioner of Workmen's Compensation that the death of the deceased was in an accident arising out of and in the course of his employment with the second respondent was perfectly justified and the conclusion to the contrary reached by the High Court deserves to be set aside. The order of the Commissioner for Workmen's Compensation shall stand restored. [Para 28] [1255-E-H; 1256-A]

Messrs Mackinnon Mackenzie & Co. Pvt. Ltd. v. Ritta Farnandes **1969 A.C.J. 419;** *Shakuntala Chandrakant Shreshti v. Prabhakar Maruti Garvali & Another* **IV (2006) ACC 769 (SC);** *Mallikarjuna G. Hiremath v. Branch Manager, Oriental Insurance Co. Ltd. and Another* **AIR 2009 SC 2019: 2009 (2) SCR 320;** ***Smt. Sundarbai v. The General Manager, Ordnance Factory, Khamaria, Jabalpur*** **1976 Lab I.C. 1163 and** *Mackinnon Mackenzie & Co. Pvt. Ltd. v. Ibrahim Mahmmod Issak* **1969 A.C.J. 422 – referred to.**

Clover Clayton & Co. v. Hughes **1910 A.C. 242 – referred to.**

Case Law Reference:

1962 SCR 477	**referred to**	**Para 7, 10**
1969 A.C.J. 419	**referred to**	**Para 7, 22**
1969 A.C.J. 422	**referred to**	**Para 7, 26**
2001 A.C.J. 647	**cited**	**Para 7**
1991 A.C.J. 848	**cited**	**Para 7**
1988 ACJ 886	**cited**	**Para 7**
(2006) ACC 769 (SC)	**referred to**	**Para 7, 23**
2006 (6) Suppl. SCR 103	**referred to**	**Para 11**
AIR 1931 Bombay 105	**referred to**	**Para 12**
1910 A.C. 242	**referred to**	**Para 12**
2009 (2) SCR 320	**referred to**	**Para 24**
1976 Lab I.C. 1163	**referred to**	**Para 25**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9084 of 2012.

From the Judgment and Order dated 23.05.2007 of the High Court of Delhi at New Delhi in FAO No. 184 of 2005.

R.K. Nain, Pratibha Nain and Mahender Singh for the appellant.

M.K. Dua for the Respondents.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. Leave granted.

2. This appeal is directed against the judgment of the High Court of Delhi passed in FAO No.184/2005 dated 23.05.2007. The said appeal before the High Court arose out of an award passed by the Workmen's Compensation Commissioner in its order dated 29.12.2004 in WCD/113/NWD/02. The Workmen's Compensation Commissioner determined the compensation payable to the appellant herein in a sum of Rs.2,20,280/- along with another sum of Rs.2500/- as funeral charges under Section 4(4) of the Workmen's Compensation Act. A separate show-cause-notice was issued for payment of interest and penalty. The respondent herein preferred the abovesaid appeal in FAO No.184/2005 in which the High Court passed the impugned order setting aside the order passed by the Commissioner. It is in the abovesaid background the appellant-claimant has come forward with this appeal.

3. At the very outset, it is required to be stated that the appellant claimed himself to be the adopted son of the deceased Jeet Singh @ Ajit Singh. According to the claimant the deceased Jeet Singh @ Ajit Singh was employed as Truck Driver by the second respondent herein to drive truck bearing No.DL-IG-8255. It is stated that in July 2002 the deceased Jeet Singh @ Ajit Singh was assigned the duty of driving the abovesaid truck in connection with the trade and business of the second respondent from Delhi to Nimiaghat, that on 17.07.2002 when the vehicle reached near about the

destination Nimiaghat, District Giridih, the deceased suffered a health set-back and therefore he parked the vehicle on the road side of a nearby hotel. It is further stated that immediately after parking the vehicle he fainted and the persons nearby took him to the hospital where the doctors declared that he was brought dead. An FIR was stated to have been lodged with the police and thereafter the postmortem was conducted at Civil Hospital, District Giridih. The said truck was insured with the first respondent herein. In the abovesaid background the appellant preferred the application before the Commissioner of Workmen's Compensation, Delhi contending that the death of the deceased was in the course of his employment with the trade and business of the second respondent and that his death was due to stress and strain while driving the said truck continuously over a period of time. It was further claimed that at the time of his death the deceased was drawing wages at the rate of Rs.3091/- per month apart from a sum of RS.50/- per day as allowances and in all a sum of Rs.4591/- per month. The age of the deceased was stated to be 45 years at the time of his death. Appellant also claimed interest @ 12% p.a from the date of accident till realization apart from claiming penalty.

4. The claim of the appellant was resisted by the first respondent substantively on two grounds. In the first place it was contended that the appellant had no locus to file the claim petition inasmuch as he was not a dependant. It was then contended that the death of the deceased was due to natural causes and that there was no CAUSAL CONNECTION between the death of the deceased and that of his employment. The specific stand of the first respondent was that the deceased was an unmarried person, that on that day he was not driving the vehicle and that one Bhure Singh s/o Dharam Pal Singh was driving the truck in question and that no accident took place. The jurisdiction of the Commissioner was also questioned.

5. Before the Commissioner the biological father of the

appellant examined himself as a witness who was cross-examined on behalf of the respondents. One Anil Sharma s/o the second respondent gave evidence on his side who was cross-examined by the counsel for the appellant. On behalf of the first respondent one A.B. Dutta was examined. On behalf of the appellant Exhibits AW1/1 to AW1/7 and AW1/R were marked. AW1/1 is the copy of FIR, AW1/2 is the copy of postmortem report, AW1/3 is the copy of insurance policy, AW1/4 is the copy of registration certificate, AW1/5 and AW1/6 are copies of ration card, AW1/7 is the copy of affidavit of Sh. Santokh Singh regarding the age and name of the deceased and AW1/R is the Adoption Deed.

6. The Commissioner repelled both the contentions of the respondents, namely, about the locus of the appellant as well as the CAUSAL CONNECTION of the death of the deceased with that of his employment and awarded the compensation as mentioned above. The learned Judge, however, held that the death of the deceased was due to natural causes and it had no CAUSAL CONNECTION with his employment and also held that the adoption of the appellant was not proved.

7. We heard Mr. R.K. Nain, learned counsel for the appellant and Shri M.K. Dua, learned counsel for the respondent(s). Learned counsel for the appellant strenuously contended that the impugned judgment of the High Court is liable to be set aside on both the grounds. According to learned counsel when once the employment of the deceased with the second respondent was proved there was every justification for the Commissioner in having held that the death of the deceased was in the course of his employment in an accident arising out of such employment. It was then contended that the learned Judge failed to consider the evidence which was placed before the Court relating to valid adoption of the appellant by the deceased in a ceremony held for that purpose where the biological father gave appellant in adoption when he was three years old which was accepted by the deceased to be his

adopted son. The learned counsel relied upon the decisions in *Lakshman Singh Kothari V. Smt. Rup Kanwar* - AIR 1961 SC 1378, *Messrs Mackinnon Mackenzie & Co. Pvt. Ltd. V. Ritta Farnandes* - 1969 A.C.J. 419, *Mackinnon Mackenzie & Co. Pvt. Ltd. V. Ibrahim Mahmmod Issak* 1969 A.C.J. 422, *State of Rajasthan V. Ram Prasad and another* - 2001 A.C.J. 647, *Anand Bihari and others V. Rajasthan State Road Trans. Corpn. and another* - 1991 A.C.J. 848, *Lalo Devi V. Superintendent of Mines* -1988 ACJ 886 and *Shakuntala Chandrakant Shreshti V. Prabhakar Maruti Garvali & another* - IV (2006) ACC 769 (SC) in support of his submission.

8. Though notice was duly served on the second respondent, he did not evince any interest in contesting this appeal. Learned counsel for the first respondent in his submissions contended that the judgment of the High Court does not call for any interference. According to learned counsel since there was no accident and the death of the deceased was due to natural causes, no compensation was payable under the Workmen's Compensation Act. Learned counsel also contended that the adoption of the appellant by the deceased was not proved in the manner known to law.

9. Having heard learned counsel for the respective parties and having perused the judgment of the learned Judge as well as that of the Workmen's Compensation Commissioner and all other material papers placed before us, we find that the judgment of the learned Judge cannot be sustained.

10. In the first instance we wish to deal with the issue relating to validity of the adoption of the appellant since if only his adoption is held to be valid there is scope for examining his right to claim compensation over the death of the deceased as his adopted son. In Hindu Law in the celebrated decision of this Court reported in *Lakshman Singh Kothari* (supra), the legal requirement for a valid adoption has been succinctly stated in paragraph 10 which reads as under:

"**10.** The law may be briefly stated thus: Under the Hindu law, whether among the regenerate caste or among Sudras, there cannot be a valid adoption unless the adoptive boy is transferred from one family to another and that can be done only by the ceremony of giving and taking. The object of the corporeal giving and receiving in adoption is obviously to secure due publicity. To achieve this object it is essential to have a formal ceremony. No particular form is prescribed for the ceremony, but the law requires that the natural parent shall hand over the adoptive boy and the adoptive parent shall receive him. The nature of the ceremony may vary depending upon the circumstances of each case. But a ceremony there shall be, and giving and taking shall be part of it. The exigencies of the situation arising out of diverse circumstances necessitated the introduction of the doctrine of delegation; and, therefore, the parents, after exercising their volition to give and take the boy in adoption, may both or either of them delegate the physical act of handing over the boy or receiving him, as the case may be, to a third party."

11. The said legal position has been consistently followed by this Court which can be mentioned by referring to a recent decision of this Court reported in *M. Gurudas and others V. Rasaranjan and others* - 2006 (8) SCC 367. Paragraphs 26 and 27 are relevant for our purpose which read as under:

"**26.** To prove valid adoption, it would be necessary to bring on record that there had been an actual giving and taking ceremony. Performance of "*datta homam*" was imperative, subject to just exceptions. Above all, as noticed hereinbefore, the question would arise as to whether adoption of a daughter was permissible in law.

27. In *Mulla's Principles of Hindu Law*, 17th Edn., p. 710, it is stated:

"488. *Ceremonies relating to adoption.*—(1) The

ceremonies relating to an adoption are—

(*a*) the physical act of giving and receiving, with intent to transfer the boy from one family into another;

(*b*) the *datta homam*, that is, oblations of clarified butter to fire; and

(*c*) other minor ceremonies, such as *putresti jag* (sacrifice for male issue).

(2) The physical act of giving and receiving is essential to the validity of an adoption.

As to *datta homam* it is not settled whether its performance is essential to the validity of an adoption in every case.

As to the other ceremonies, their performance is not necessary to the validity of an adoption.

(3) No religious ceremonies, not even *datta homam*, are necessary in the case of shudras. Nor are religious ceremonies necessary amongst Jains or in the Punjab."

12. In this context, it will be worthwhile to note the requirement of registration of an Adoption Deed. Section 17 of the Registration Act specifically refers to the documents of which registration is compulsory. The deed of adoption is not one of the documents mentioned in sub-section 1 of Section 17 which mandatorily required registration. Sub-section 3 of Section 17 only refers to the mandatory requirement of registration of an authorization that may be given for adopting a son executed after 01.01.1872 if such authorization was not conferred by a Will. Dealing with the said provision relating to authorization, it has been held in the decision reported in *Vishvanath Ramji Karale V. Rahibai Ramji Karale and others* - AIR 1931 Bombay 105 by a deed of adoption as

distinguished from authority to adopt does not require registration.

13. Keeping the above statement of law in mind as regards the procedure to be followed for a valid adoption and the statutory stipulation that an adoption deed does not require registration, the claim of the appellant as the adopted son of the deceased requires to be considered. We find from the record that the appellant has produced Exhibit AW1/R which is the copy of the Adoption Deed. To appreciate the claim of the appellant in the proper perspective the contents of the said document can be usefully referred to which reads as under:

"TRUE TRANSLATION IN ENGLISH

Stamp

ADOPTION DEED

1. Ajit Singh son of Surta Singh son of Deva Singh, am residing at village Dhariwal Kalan, Tehsil & Distt-Gurdaspur, Punjab (hereinafter called the first party). That I am unmarried so I have no children. Keeping in mind that in absence of the children one becomes without any care. Hence, for the purpose of proper maintenance a son is necessary. So, I have thought it fit to take Master Parampal son of Sh. Santokh Singh and Smt. Nirmal Kaur (hereinafter called the second party) resident of village Dhariwal Kalan in adoption and they have decided to give. Master Parampal's date of birth is 8-12-1996. His bringing up is being done by me and I am planning to send him to school. For the interest of his health and medication I myself do care. Parampal Singh is a very obedient boy and he always remains obedient to me and show me utter respect. I always have a great affection for him. I want that whatever I leave behind be owned by Parampal Singh. I, in the presence of all respected persons and Panchayat, adopt Master Parampal Singh as my son and in the ceremony

goods and sweets are distributed for the happiness of one and all.

Adoption Deed is reduced in writing for the purpose of proof.

First party	Second party
Ajit Singh LTI	Sd/-
Sd/- Gurbax Singh Sarpanch 15/2/1999 Gram Panchayat Seal & Stamp Dhariwal Kalan	Nirmal Kaur Sd/-
Witnesses:- Sd/-	Witnesses:- Sd/-
Nishan Singh S/o-Dayal Singh Vill- Chhina Retwala	Tarsem Singh S/o-Bawa Singh R/o-Dhariwalkalan
15/2/1999	Sd/-
	Karnail Singh Nambardar Vill-Kallu Sohal"

14. The biological father of the appellant filed his proof affidavit on behalf of the appellant and offered himself for cross-examination. In the said affidavit it was specifically mentioned that the appellant was the dependent of the deceased workman as his adopted son. In the course of the cross-examination of the appellant by the respondents, the witness produced the original Adoption Deed along with the photocopy and after verifying with the original the photocopy was marked as Exhibit AW1/R. The relevant part of cross-examination as regards the adoption of the appellant can be extracted which are as under:

"……It is correct that Ajit Singh is my elder brother. At the time of writing of this Adoption Deed there were 15-20 persons present. Those who were present were known to me. This Adoption Deed was written by "SARPANCH OF THE VILLAGE" Shri Gurbux Singh. At the time of writing of this 'Adoption Deed' no mantra ceremony was done. It is wrong to say that at the time of writing of this 'Adoption Deed' Ajit Singh was not present. 'Adoption Deed' exbt. AW1/R at point 'A' my signatures are there. At point 'B' & 'C' there are signatures of witnesses. At point 'D' there was signature of SARPANCH. At point 'E' there are signatures of another witness. Signatures are of only five persons. Apart from 15-20 people there were some women as well. It is wrong to say that this 'Adoption Deed' has been written afterwards. At the time of writing of this 'Adoption Deed' Parampal was 3 years old. It is wrong to say that I am deposing falsely."

15. Conspectus consideration of the deed of adoption and the oral evidence led on behalf of the appellant, we find that there was a simple ceremony though not a mantra ceremony held in which the deceased participated wherein it was expressed that the deceased being a bachelor thought it fit to take the appellant in adoption for which the biological parents of the appellant were also willing to give him in adoption. In the Adoption Deed it was specifically mentioned that the process of adoption was carried out in the presence of respected persons of the Panchayat in a ceremony where goods and sweets were distributed in commemoration of the function of adoption. It has come in evidence that the Adoption Deed was written by Gurbux Singh on 15.02.1999 who was the Sarpanch of the village at that point of time. The left thumb impression of the deceased was found affixed in the Adoption Deed which was signed both by the biological parents apart from three witnesses, namely, Nishan Singh s/o Dayal Singh of village Chhina Retwala, Tarsem Singh s/o Bawa Singh r/o Dhariwalkalan and Karnail Singh Nambardar of village Kallu Soha. It was stated that about 15 to 20 persons apart from women folk were present at the time when the adoption

ceremony was held. The suggestion, that the deed was written later on, was duly denied by the witnesses. It was also stated that the appellant was just three years old at the time when the adoption took place. Further Exhibits AW1/5 and AW1/6 are the copies of ration cards in which it is mentioned that the father of the appellant is Ajit Singh.

16. All the above factors which are born out by records as well as in the oral version of the witnesses, examined on behalf of the appellant, in our considered opinion conclusively proved that the appellant was the adopted son of the deceased having been adopted as early as on 15.02.1999 i.e. long before the death of the deceased, namely, 17.07.2002. Unfortunately, the learned Judge in the impugned judgment has completely misled himself by rejecting the claim of adoption by holding that the document was not registered with the Tahsildar, that no ceremony was held, that the adoptive father was not present, that there was no giving and taking of the adopted son and, therefore, the adoption of the appellant by the deceased not proved. On the contrary, as stated above, we find that everyone of the prescription required for a valid adoption were very much present in the form of both oral and documentary evidence on record and consequently the conclusion of the learned Judge in having held that the appellant was not the adopted son of the deceased cannot be sustained and the same is set aside. Having reached the above conclusion, we proceed to deal with the claim of the appellant on merits.

17. On merits to retrace the facts, the deceased Jeet Singh @ Ajit Singh was employed as truck driver by the second respondent. His services were utilized for driving the truck belonging to the second respondent bearing No.DL-IG-8255. The deceased was driving the said truck in connection with the commercial transport operation of the second respondent from Delhi to Nimiaghat on 17.07.2002. According to the claimant when the truck reached the near about of Nimiaghat, District Giridih, the deceased felt giddy and, therefore, parked the

vehicle on the road side near a hotel and soon thereafter he stated to have fainted. The deceased was removed to a nearby hospital where the doctors declared him brought dead. An FIR was lodged with the Police Station, Nimiaghat in FIR No.7/2002 dated 18.07.2002. The postmortem was stated to have been conducted on 19.07.2002 and thereafter the dead body was taken to his native place for performing last rites. The claimant in his application before the Commissioner submitted that the death of the deceased was due to the strain and stress of continuous driving in the course of his employment with the second respondent, that the vehicle which he was driving bearing No.DL-IG-8255 was insured with the first respondent vide covering note No.0968499 for the period of 14.02.2002 to 13.02.2003 and that an additional premium was also paid for coverage of compensation payable under the Workmen's Compensation Act. The claimant, as an adopted son of the deceased, claimed compensation as his dependant.

18. As far as the merits of the claim was concerned, the stand of the first respondent in its written statement was that the deceased was not in the employment of the second respondent, that no accident took place in the course of the employment of the deceased with the second respondent, that the deceased was not holding a valid license at the time of alleged accident, that the deceased was under the influence of alcohol or drug at the time of alleged accident and, therefore, no compensation was payable and the first respondent was not liable to pay any compensation. The second respondent also took the stand in his written statement that the deceased was not in his employment and that he was not in his professional visit in the truck bearing No.DL-IG-8255 to Nimiaghat. It was also stated that one Bhure Singh s/o Dharam Pal Singh was driving the said truck and that in all possibilities the said Bhure Singh might have given lift to the deceased and the deceased might have died due to heavy dose of drug with tea.

19. On behalf of the first respondent its Divisional Manager

filed his proof affidavit while on behalf of the second respondent one Anil Sharma was examined. As far as the employment of the deceased was concerned, the Commissioner has noted that the FIR which was marked as Exhibit AW1/1 disclose that the second driver Bhure Singh himself admitted therein that the deceased was the senior driver who was driving the vehicle at the time of his death. As regards the said piece of evidence contained in AW1/1 nothing was brought out in his evidence either by way of trip sheet or attendance register or payment of wages register or any other document to show that the deceased was not in the employment of the second respondent at any point of time or on the fateful day. The Commissioner also noted that there was no cross-examination of WW1/A Santokh Singh on that issue. On the other hand RW.1 Anil Sharma in his cross-examination admitted that a sum of Rs.10,000/- was given to the family of the deceased for cremation purposes. Therefore, the issue relating to the employment of the deceased by the second respondent as found to have been established before the Commissioner cannot be assailed.

20. Once we cross the said hurdle only other question to be considered is whether death of the deceased was in an accident arising out of and in the course of his employment with the second respondent? It is common ground that the vehicle which was driven by the deceased did not meet with any road accident on 17.07.2002. As a matter of fact, the deceased while driving the vehicle from Delhi to Nimiaghat when reached near the destination, namely, Nimiaghat felt giddy and thereafter stated to have collapsed as he was found in a faint condition in the vehicle which he managed to park on the road side.

21. The entitlement to claim compensation is therefore dependent on fulfillment of the stipulations contained in Section 3(1) of the Workmen's Compensation Act, which read as under:

"**3. Employer's liability for compensation**.-(1) If personal

injury is caused to an employee by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter:

Provided that the employer shall not be so liable –

(a) …… …… ……

(b) …… …… ……

(i) …… …… ……

(ii) …… …… ……

(iii) …… …… ……"

22. However, there are decisions of the English Court as early as of the year 1903 onwards stating that unlooked-for mishap or an untoward event which is not expected or designed should be construed as falling within the definition of an "accident" and in the event of such "untoward" "unexpected" event resulted in a personal injury caused to the workman in the course of his employment in connection with the trade and business of his employer, the same would be governed by the provisions of Section 3 of the Workmen's Compensation Act. Such a legal principle evolved from time immemorial got the seal of approval of this Court and for this purpose we can refer to the celebrated decision in *Ritta Farnandes* (supra). After referring to the decision of House of Lords in *Clover Clayton & Co. V. Hughes* reported in 1910 A.C. 242 this Court referred to the relevant passage in the decision of House of Lords in paragraph 4, which reads as under:

"4. Even if a workman dies from a pre-existing disease, if the disease is aggravated or accelerated under the circumstances which can be said to be accidental, his death results from injury by accident. This was clearly laid

down by the House of Lords in *Clover Clayton & Co. v. Hughes* where the deceased, whilest tightening a nut with a spanner, fell back on his hand and died. A post mortem examination showed that there was a large aneurism of the aorta, and that death was caused by a rupture of the aorta. The aneurism was in such an advanced condition that it might have burst while the man was asleep, and very slight exertion or strain would have been sufficient to bring about a rupture. The County Court Judge found that the death was caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal, and held upon the authorities that this was an accident within the meaning of the Act. His decision was upheld both by the Court of Appeal and the House of Lords:

> "No doubt the ordinary accident," said Lord Loreburn, L.C. "is associated with something external: the bursting of a boiler or an explosion in a mine, for example. But it may be merely from the man's own miscalculation, such as tripping and falling. Or it may be due both to internal and external conditions, as if a seaman were to faint in the rigging and tumble into the sea. I think it may also be something going wrong within the human frame itself, such as straining of muscle or the breaking of a blood vessel. If that occurred when he was lifting a weight, it would properly be described as an accident. So, I think, rupturing an aneurism when tightening a nut with a spanner may be regarded as an accident."

With regard to Lord Macnanghten's definition of an accident being "an unlooked for mishap or untoward event which is not expected or designed" it was said that an event was unexpected if it was not expected by the man who suffered it, even though everyman of commonsense

who knew the circumstances would think it certain to happen."

23. In a recent decision of this Court in *Shakuntala Chandrakant Shreshti* (supra), the factors to be established to prove that an accident has taken place have been culled out and stated as under in paragraph 28:

> "28. In a case of this nature to prove that accident has taken place, factors which would have to be established, inter alia, are:
>
> 1. stress and strain arising during the course of employment
>
> 2. nature of employment
>
> 3. injury aggravated due to stress and strain"

24. In *Mallikarjuna G. Hiremath V. Branch Manager, Oriental Insurance Co. Ltd. and another* reported in AIR 2009 SC 2019 the principles to attract Section 3 of the Workmen's Compensation Act have been stated as under in paragraph 14:

> "14. There are a large number of English and American decisions, some of which have been taken note of in *ESI Corpn's* case (supra) in regard to essential ingredients for such finding and the tests attracting the provisions of Section 3 of the Act. The principles are:
>
> (1) There must be a casual connection between the injury and the accident and the accident and the work done in the course of employment.
>
> (2) The onus is upon the applicant to show that it was the work and the resulting strain which contributed to or aggravated the injury.
>
> (3) If the evidence brought on records establishes a greater

probability which satisfies a reasonable man that the work contributed to the causing of the personal injury, it would be enough for the workman to succeed, but the same would depend upon the fact of each case."

25. The Madhya Pradesh High Court in *Smt. Sundarbai V. The General Manager, Ordnance Factory, Khamaria, Jabalpur* reported in 1976 Lab I.C. 1163 in paragraph 10 the principles have been culled out as under:

"10. On a review of the authorities, the principles insofar as relevant for our purposes may be stated as follows:

(A) Accident means an untoward mishap which is not expected or designed by the workman. "Injury" means physiological injury.

(B) "Accident" and "injury" are distinct in cases where accident is an event happening externally to a man; e.g. when a workman falls from a ladder and suffers injury. But accident may be an event happening internally to a man and in such cases "accident" and "injury" coincide. Such cases are illustrated by bursting of an aneurism, failure of heart and the like while the workman is doing his normal work.

(C) Physiological injury suffered by a workman due mainly to the progress of disease unconnected with employment, may amount to an injury arising out of and in the course of employment if the work which the workman was doing at the time of the occurrence of the injury contributed to its occurrence.

(D) The connection between the injury and employment may be furnished by ordinary strain of ordinary work if the strain did in fact contribute to or accelerate or hasten the injury.

(E) The burden to prove the connection of employment with the injury is on the applicant, but he is entitled to succeed if on a balance of probabilities a reasonable man might hold that the more probable conclusion is that there was a connection."

26. Again in yet another celebrated decision of this Court in *Ibrahim Mahmmod Issak* (supra) this Court has set down the principles applied in such cases as under in paragraph 5:

"5. To come within the Act the injury by accident must arise both out of and in the course of employment. The words "in the course of the employment" mean "in the course of the work which the workman is employed to do and which is incidental to it." The words "arising out of employment" are understood to mean that "during the course of the employment, injury has resulted from some risk incidental to the duties of the service, which, unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered." In other words there must be a casual relationship between the accident and the employment. The expression "arising out of employment" is again not confined to the mere nature of the employment. The expression applies to employment as such to its nature, its conditions, its obligations and its incidents. If by reason of any of those factors the workman is brought within the zone of special danger the injury would be one which arises 'out of employment'. To put it differently if the accident had occurred on account of a risk which is an incident of the employment, the claim for compensation must succeed, unless of course the workman has exposed himself to an added peril by his own imprudent act. In *Lancashire and Yorkshire Railway Co. v. Highley,* Lord summer laid down the following test for determining whether an accident "arose out of the employment."

(Emphasis added)

27. Applying the various principles laid down in the above decisions to the facts of this case, we can validly conclude that there was CAUSAL CONNECTION to the death of the deceased with that of his employment as a truck driver. We cannot lose sight of the fact that a 45 years old driver meets with his unexpected death, may be due to heart failure while driving the vehicle from Delhi to a distant place called Nimiaghat near Jharkhand which is about 1152 kms. away from Delhi, would have definitely undergone grave strain and stress due to such long distance driving. The deceased being a professional heavy vehicle driver when undertakes the job of such driving as his regular avocation it can be safely held that such constant driving of heavy vehicle, being dependant solely upon his physical and mental resources & endurance, there was every reason to assume that the vocation of driving was a material contributory factor if not the sole cause that accelerated his unexpected death to occur which in all fairness should be held to be an untoward mishap in his life span. Such an 'untoward mishap' can therefore be reasonably described as an 'accident' as having been caused solely attributable to the nature of employment indulged in with his employer which was in the course of such employer's trade or business.

28. Having regard to the evidence placed on record there was no scope to hold that the deceased was simply travelling in the vehicle and that there was no obligation for him to undertake the work of driving. On the other hand, the evidence as stood established proved the fact that the deceased was actually driving the truck and that in the course of such driving activity as he felt uncomfortable he safely parked the vehicle on the side of the road near a hotel soon whereafter he breathed his last. In such circumstances, we are convinced that the conclusion of the Commissioner of Workmen's Compensation that the death of the deceased was in an accident arising out of and in the course of his employment with the second respondent was perfectly justified and the conclusion to the contrary reached by the learned Judge of the High Court

in the order impugned in this appeal deserves to be set aside. The appeal stands allowed. The order impugned is set aside. The order of the Commissioner for Workmen's Compensation shall stand restored and there shall be no order as to costs.

B.B.B. Appeal allowed.

END OF 2012