YUMMAN ONGBI LEMBI LEIMA

v.

STATE OF MANIPUR & ORS.

(Criminal Appeal No. 26 of 2012)

JANUARY 4, 2012

[ALTAMAS KABIR, SURINDER SINGH NIJJAR AND J. CHELAMESWAR, JJ.]

NATIONAL SECURITY ACT, 1980:

s.3(4) - Order of detention - Held: An individual incident of an offence under the Indian Penal Code, however heinous, is insufficient to make out a case for issuance of an order of preventive detention - In the instant case, the grounds of detention do not disclose any material which was before the detaining authority, other than the fact that there was every likelihood of the detenu being released on bail in connection with the case in respect of which he had been arrested - The power is required to be exercised with due caution as well as upon a proper appreciation of the facts as to whether the acts are in any way prejudicial to the interest and the security of the State and its citizens, or seek to disturb public law and order, warranting the issuance of such an order -The detaining authority acted rather casually in the matter in issuing the order of detention and the High Court also appears to have missed the right to liberty as contained in Article 21 of the Constitution and Article 22(2) thereof, as well as the provisions of s.167 of the Code of Criminal Procedure, 1973 - The order of detention is quashed - Constitution of India, 1950 - Articles 21 and 22 - Code of Criminal Procedure, 1973 - s.167.

The appellant's husband, who had been earlier arrested and released on bail in connection with offences punishable under Indian Penal Code and Unlawful

Activities (Prevention) Act (the last such case being of the year 1998) was, on 31.1.2011, remanded to police custody in connection with the murder of the then Chairman of the Board of Secondary Education. He was served with a detention order dated 31.1.2011 issued by the District Magistrate under the National Security Act, 1980. The order was confirmed by the Governor fixing the period of detention for 12 months. The writ petition challenging the detention order on behalf of the detenu having been dismissed, the instant appeal was filed.

Allowing the appeal, the Court

HELD: 1.1. The extra-ordinary powers of detaining an individual in contravention of the provisions of Article 22(2) of the Constitution was not warranted in the instant case, where the grounds of detention do not disclose any material which was before the detaining authority, other than the fact that there was every likelihood of the detenu being released on bail in connection with the cases in respect of which he had been arrested, to support the order of detention. [Para 13] [10-D-E]

1.2. When the courts thought it fit to release the detenu on bail in connection with the cases in respect of which he had been arrested, the mere apprehension that he was likely to be released on bail as a ground of his detention, is not justified. Besides, the FIRs in respect of which the detenu had been arrested relate to the years 1994, 1995 and 1998 respectively, whereas the order of detention was passed against him, almost 12 years after the last FIR. There is no live link between the earlier incidents and the incident in respect of which the detention order was passed. [Para 14] [10-G-H; 11-A-B]

1.3. Article 21 of the Constitution enjoins that no person shall be deprived of his life or personal liberty except, according to procedure established by law. In the instant case, although the power is vested with the

authorities concerned, unless the same is invoked and implemented in a justifiable manner, such action of the detaining authority cannot be sustained, inasmuch as, such a detention order is an exception to the provisions of Articles 21 and 22(2) of the Constitution. The power is required to be exercised with due caution as well as upon a proper appreciation of the facts as to whether such acts are in any way prejudicial to the interest and the security of the State and its citizens, or seek to disturb public law and order, warranting the issuance of such an order. An individual incident of an offence under the Indian Penal Code, however heinous, is insufficient to make out a case for issuance of an order of preventive detention. [Para 13 and 15] [10-F; 11-C-D]

1.4. The detaining authority acted rather casually in the matter in issuing the order of detention and the High Court also appears to have missed the right to liberty as contained in Article 21 of the Constitution and Article 22(2) thereof, as well as the provisions of s.167 of the Code of Criminal Procedure, 1973. The order of detention dated 31.1.2011, passed by the District Magistrate, in regard to the detention of the detenu, is quashed. [Para 16 and 17] [11-E-G]

Rekha Vs. State of Tamil Nadu through Sec. to Govt. **2011 (3) SCR 885 = (2011) 4 SCC 260;** *Union of India Vs. Paul Manickam & Anr.* **2003 Suppl. (4) SCR 618 = (2003) 8 SCC 342; and** *Haradhan Saha Vs. The State of West Bengal & Ors.* **1975 (1) SCR 778 = (1975) 3 SCC 198 - relied on.**

Case Law Reference:

2011 (3) SCR 885	**relied on**	**para 5**
2003 (4) Supple. SCR 618	**relied on**	**para 9**
1975 (1) SCR 778	**relied on**	**para 10**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 26 of 2012.

From the Judgment & Order dated 25.8.2011 of the High Court of Gauhati (Imphal Bench) in Writ Petition (Criminal) No. 41 of 2011.

Sanjay Parikh, Pukhrambam Ramesh Kumar, Mamta Sinha, Pranav Raina, Shanmugo Patro, A.N. Singh for the Appellant.

Jaideep Gupta, Khwairakpam Nobin Singh, B. Krishna Prasad for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. Under the Detention Order No.Cril/NSA/No.10 of 2011, Imphal, the 31st January, 2011, issued by the District Magistrate, Imphal West District, Manipur, the Appellant's husband, Yumman Somendro @ Somo @ Tiken, was detained under the provisions of the National Security Act, 1980. The said detention order was approved by the Governor of Manipur on 7th February, 2011, in exercise of his powers conferred under Section 3(4) of the aforesaid Act. The order of the Governor of Manipur dated 18th March, 2011, confirming the detention order passed against the husband of the Appellant and fixing the period of detention for 12 months on the subjective satisfaction of the detaining authority that the detenu was likely to be released on bail by the normal criminal Courts in the near future, was challenged on behalf of Yumman Somendro in the Gauhati High Court (Imphal Bench), but without success. This Appeal is directed against the said order of the High Court and the order of detention itself. Earlier, the Appellant's husband had been arrested on 21st March, 1994 in connection with FIR No.478(3)1994 IPS u/s 13 Unlawful Activities (Prevention) Act, but was released on bail by the normal criminal Court. Despite the above, again on 29th June, 1995, the Appellant's husband

was arrested in connection with FIR No.450(6)95 under Churachandpur P.S. under Sections 386 and 34 IPC. Though he was released on bail by the normal criminal Court, he was again arrested under Section 13 UA (P) Act in connection with FIR No.190(5)98 and was released on bail on 8th July, 1998. After being released on bail by the normal Criminal Court, Yumman Somendro was again arrested on 16th January, 2011, in connection with FIR No.21(1)11 IPS under Section 302 IPC for the alleged murder of the then Chairman of the Board of Secondary Education, Manipur, Dr. N. Kunjabihari Singh. The Appellant's husband was produced before the Magistrate on 17th January, 2011, who remanded him to police custody till 31st January, 2011. On the said date, he was further remanded to police custody till 2nd February, 2011, and when he was produced before the Chief Judicial Magistrate in connection with the said case, he was served with a copy of the detention order dated 31st January, 2011, issued by the District Magistrate, Imphal West, under the National Security Act, 1980.

3. On 31st January, 2011, the Appellant's husband was served with the grounds of detention under the National Security Act, 1980, under the authority of the District Magistrate, Imphal West. Along with the said order, copies of the documents on which the detaining authority had relied on to arrive at the conclusion that the detention of the Appellant's husband was necessary, was also served on him.

4. On a perusal of the grounds of detention, it is clear that the subjective satisfaction of the detaining authority is founded on the belief that after having availed of bail facility, the Appellant's husband could indulge in commission of further prejudicial activities. An alternative preventive measure was, therefore, immediately needed in the circumstances.

5. On behalf of the Appellant, Mr. Sanjay Parikh, relied heavily on the decision of this Court in *Rekha Vs. State of Tamil Nadu through Sec. to Govt.* [(2011) 4 SCC 260], in which it had been held that in the absence of material particulars in

similar cases in which bail had been granted, the subjective satisfaction of the detaining authority was merely a ruse for issuance of the impugned detention order. After considering various decisions of this Court and the views of several jurists and the submissions made on behalf of the parties, the Division Bench of the High Court was of the view that the subjective satisfaction of the detaining authority was based on proper material and the detaining authority was also aware that the detenu was in custody and was likely to be released on bail. The detaining authority, therefore, was of the view that the detention of the detenu was required in order to prevent him from acting in a manner prejudicial to the maintenance of public order as he was likely to be released on bail in the near future by the normal criminal Courts. On the aforesaid reasoning, the Division Bench of the High Court dismissed the Writ Petition filed by the detenu's wife.

6. The main contention urged by Mr. Parikh appearing for the Appellant was that the personal life and liberty of a person was too precious to be allowed to be interfered with in the manner in which it had been done. Mr. Parikh submitted that as would be evident, the detention order was passed on a mere supposition that the Appellant's husband was likely to be released on bail in the near future in connection with the case in respect of which he had been arrested and that in view of such future apprehension, the detention order was sought to be legitimised. Mr. Parikh submitted that not only had the Appellant's husband not applied for bail at any stage, nor was there any indication that he intends to do so, which could give rise to the supposition that in the future there was every likelihood that he would be released on bail. Mr. Parikh submitted that supposition could never take the place of facts which were necessary to establish a case which warranted the detention of a person without any trial.

7. Mr. Parikh pointed out that Yumman Somendro had been arrested in connection with several cases, but had been

released on bail in all the said cases till ultimately an order of detention was passed against him under the National Security Act, 1980, on the flimsiest of excuses. Mr. Parikh submitted that if at all the Appellant's husband was alleged to have committed a crime which was punishable under the Indian Penal Code, the same could not be equated with the national security in any way, which warranted the issuance of a detention order under the National Security Act, 1980.

8. Referring to the provisions of Section 3 of the aforesaid Act, Mr. Parikh submitted that the sine qua non for an order of detention to be passed under the National Security Act, 1980, is that the Central Government or the State Government would have to be satisfied that in order to prevent any person from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of the public order or from acting in any manner prejudicial to the maintenance of supply of services essential to the community that it was necessary so to do, make an order directing that such person be detained. Mr. Parikh submitted that although the Appellant's husband had been charged with having committed an offence under Section 302 IPC, Section 386 and Section 13 Unlawful Activities (Prevention) Act, there was no material whatsoever to bring the Appellant's husband within the ambit of the grounds enumerated in Sub-Section (2) of Section 3 of the aforesaid Act. Mr. Parikh submitted that the order of detention had been passed not for the reasons enumerated in Sub-Section (2) of Section 3, but since the police was unable to pin any offence against the Appellant's husband on account whereof he could be denied bail by the Courts.

9. In support of his submissions, Mr. Parikh firstly referred to the decision of this Court in *Union of India Vs. Paul Manickam & Anr.* [(2003) 8 SCC 342], wherein while considering the delay in disposal of a representation in the matter of preventive detention, this Court noticed that when the detenu was already in custody, the anticipated and

apprehended acts were practical impossibilities, as was the case as far as the Appellant's husband is concerned. This Court further observed that as far as the question relating to the procedure to be adopted in case the detenu is already in custody is concerned, the detaining authorities would have to apply their minds and show their awareness in this regard in the grounds of detention. The necessity of keeping such person in detention under preventive detention laws have to be clearly indicated. It was further observed that the subsisting custody of the detenu by itself does not invalidate an order of his preventive detention and the decision in this regard has to depend on the facts of each case. However, preventive detention being necessary to prevent the detenu from acting in any manner prejudicial to the security of the State or to the maintenance of public order or economic stability, ordinarily it is not needed when the detenu is already in custody and the detaining authority must be reasonably satisfied with cogent materials that there is likelihood of his release and in view of his antecedent activities which are proximate in point of time, he must be detained in order to prevent him from indulging in such prejudicial activities.

10. Mr. Parikh also referred to another decision of this Court in *Haradhan Saha Vs. The State of West Bengal & Ors.* [(1975) 3 SCC 198], wherein in the case of a preventive detention order passed under the Maintenance of Internal Security Act, 1971, the distinction between preventive detention and criminal prosecution was sought to be defined and it was held that the essential concept of preventive detention is that the detention of a person is not to punish him for something he has done, but to prevent him from doing it. It was further observed that the basis of detention is the satisfaction of the Executive of a reasonable probability or the likelihood of the detenu acting in a manner similar to his past acts and preventing him by detention from doing the same. The criminal conviction, on the other hand, is for an act already done which can only be possible by a trial and legal evidence.

11. Referring to the Division Bench order dated 31st January, 2011, Mr. Parikh submitted that the same did not contain any material whatsoever on which the detaining authority could have arrived at a satisfaction that Yumman Somendro had acted in any manner which warranted his detention under the provisions of Section 3(2) of the National Security Act, 1980. The only reason given for issuing such order of detention was that Yumman Somendro, who was in police custody, was likely to be released on bail in the near future by the normal criminal Courts, as, according to him, bails are granted in similar cases by the criminal Courts. Mr. Parikh submitted that this is a case where the detention order passed against the Appellant's husband was without any basis whatsoever and had been resorted to on account of the failure of the police to keep him in judicial custody.

12. On the other hand, appearing for the State of Manipur, Mr. Jaideep Gupta, learned Senior Advocate, repeated the facts indicated earlier to the effect that the Appellant's husband had been arrested in connection with several cases and, in particular, for the murder of Dr. N. Kunjabihari Singh, the then Chairman of the Board of Secondary Education, Manipur, in his office room on 11th January, 2011. Mr. Gupta submitted that it was subsequent to the murder of Dr. N. Kunjabihari Singh that on 31st January, 2011, the order of detention was passed under Section 3 of the aforesaid Act and was served on the Appellant's husband, while he was in judicial custody, on 2nd February, 2011. It was also submitted that thereafter the grounds of detention were provided to the Appellant's husband, as required under Section 8 of the above-mentioned Act to enable him at the earliest opportunity of making a representation against the order to the appropriate Government. The detention order was considered by the State Government which approved the same on 7th February, 2011, and the representation made by Yumman Somendro to the State Government was rejected on 10th February, 2011. The

matter was, thereafter, referred to the Advisory Board which came to the conclusion that since Yumman Somendro was a member of the banned organization, Kanglei Yaol Kanna Lup, he was a potential danger to society, whose activities were prejudicial to the maintenance of public order and there was a likelihood that he would continue such activities the moment he was released from detention and accordingly he should be detained for the maximum period of 12 months, as provided under Section 13 of the Act. Mr. Gupta submitted that since the detention order was to end on 31st January, 2012, there could be no reason to interfere with the same prior to its dissolution by efflux of time.

13. Having carefully considered the submissions made on behalf of respective parties, we are inclined to hold that the extra-ordinary powers of detaining an individual in contravention of the provisions of Article 22(2) of the Constitution was not warranted in the instant case, where the grounds of detention do not disclose any material which was before the detaining authority, other than the fact that there was every likelihood of Yumman Somendro being released on bail in connection with the cases in respect of which he had been arrested, to support the order of detention. Article 21 of the Constitution enjoins that no person shall be deprived of his life or personal liberty except, according to procedure established by law. In the instant case, although the power is vested with the concerned authorities, unless the same are invoked and implemented in a justifiable manner, such action of the detaining authority cannot be sustained, inasmuch as, such a detention order is an exception to the provisions of Articles 21 and 22(2) of the Constitution.

14. When the Courts thought it fit to release the Appellant's husband on bail in connection with the cases in respect of which he had been arrested, the mere apprehension that he was likely to be released on bail as a ground of his detention, is not justified. In addition to the above, the FIRs in respect of which the Appellant's husband had been arrested relate to the years

1994, 1995 and 1998 respectively, whereas the order of detention was passed against him on 31st January, 2011, almost 12 years after the last FIR No.190(5)98 IPS under Section 13 of the Unlawful Activities (Prevention) Act. There is no live link between the earlier incidents and the incident in respect of which the detention order had been passed.

15. As has been observed in various cases of similar nature by this Court, the personal liberty of an individual is the most precious and prized right guaranteed under the Constitution in Part III thereof. The State has been granted the power to curb such rights under criminal laws as also under the laws of preventive detention, which, therefore, are required to be exercised with due caution as well as upon a proper appreciation of the facts as to whether such acts are in any way prejudicial to the interest and the security of the State and its citizens, or seek to disturb public law and order, warranting the issuance of such an order. An individual incident of an offence under the Indian Penal Code, however heinous, is insufficient to make out a case for issuance of an order of preventive detention.

16. In our view, the detaining authority acted rather casually in the matter in issuing the order of detention and the High Court also appears to have missed the right to liberty as contained in Article 21 of the Constitution and Article 22(2) thereof, as well as the provisions of Section 167 of the Code of Criminal Procedure.

17. The Appeal must, therefore, succeed. The impugned order of detention dated 31st January, 2011, passed by the District Magistrate, Imphal West District, Manipur, in regard to the detention of Yumman Somendro @ Somo @ Tiken son of Y. Roton Singh, is hereby quashed. The Appeal accordingly succeeds. Let the Appellant's husband, Yumman Somendro, be released from custody, if he is not required in connection with any other case.

R.P. Appeal allowed.

MOHD. AYUB & ANR.
v.
MUKESH CHAND
(Civil Appeal No. 4495 of 2006)

JANUARY 05, 2012

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972: s.21 - Eviction application - Bonafide need - Case of landlord that he required suit premises for his unemployed sons for running business and for his married son for residence and that landlord's family comprised of 13 members and needed space as they were living in congestion in three rooms - Prescribed Authority dismissed the eviction application on the ground that the landlord and his family were financially sound and other properties were available to them whereas except the tenanted premises, the tenant did not have any place for residence and business and if evicted tenant would experience more difficulty - First appellate authority upheld the said order - High court partly allowed the appeal of landlord holding that the requirement of landlord was bonafide, however without going into aspect of comparative hardship it directed that only one room out of four rooms be handed over to the landlord - On appeal, held: There was nothing to suggest that the landlord's business was more flourishing than the business which he proposed to start in the tenanted premises - All his sons were educated but unemployed - They wanted to start business in the tenanted premises - In all, there were thirteen members in the landlord's family and they were living in three rooms and one verandah with great difficulty - As against that the tenant's family consisted of four persons and there were four rooms in his possession - The courts below were swayed by the fact that the financial position of the landlord was better

than the tenant and erroneously observed that the landlord could buy another building and start business - Perverse findings of the courts below on the aspect of comparative hardship set aside - The hardship landlord would suffer by not occupying their own premises would be far greater than the hardship the tenant would suffer by having to move out to another place - The impugned order is set aside to the extent it permits the tenant to retain possession of three rooms out of four rooms in his occupation - Tenant granted six months time to vacate the premises in question - U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972 - r.16(2) - Rent control and eviction.

The landlord-appellants case was that they purchased the suit premises in which the respondent was the tenant under the previous owner. The respondent continued to remain in occupation of the two shops facing the road and the two rooms situated at the rear of the said shops @ Rs.35 per month. The appellants filed suit for eviction under Section 21 of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 on the ground of bonafide requirement. The case of appellants was that the first appellant was carrying on business in three small stalls situated in a shop of the cantonment council whose rent kept on increasing. His three sons aged 23, 28 and 19 years were unemployed. Two sons wanted to start general merchant business in one shop and the third son wanted to start wholesale egg business in the other shop. The appellants' family consisted of 13 members. One son was married having three children and the two other sons were of a marriageable age. The married son wanted to live in the room behind the shop. The appellants' family was living in three rooms and a verandah with great difficulty. The defence of the respondent-tenant was that he was conducting photography business from the said shops for many years; that he was enjoying goodwill in

the area; and that appellants were financially well off as compared to him and owned other properties and that greater hardship would be caused to the respondent if the decree of eviction was passed.

The Prescribed Authority dismissed the eviction application on the ground that the appellants were financially sound and other properties were available to them whereas except the suit shops the respondent did not have any place for residence and business and, if evicted from the shops in his occupation, he would experience more difficulty.

The first appellate Court dismissed the appeal of the landlord. The High Court held that the landlord cannot be dictated by the tenant what business his sons should do and the observations made by the courts below to that effect and the findings reached by the courts below on bona fide requirement of the landlord were perverse; however, without going into the aspect of comparative hardship, it directed that only one room out of the four rooms should be handed over to the appellants. The instant appeal was filed challenging the order of the High Court.

Disposing of the appeal, the Court

HELD: 1.1. The respondent had not assailed the High Court's finding that the appellants' requirement was bona fide. However, the High Court erroneously held that greater comparative hardship would be caused to the respondent if decree of eviction is passed was correct so far as two rooms occupied by him for residence and one room in which he was running a shop was concerned. The High Court observed that no hardship would be caused to the respondent if one room was directed to be handed over to the appellants because it was used as a

passage by the respondent. Surprisingly, the High Court did not give any reasons why only partial relief was being granted to the appellants. In fact, it did not discuss the issue of comparative hardship at all. Section 21(1)(a) of the U.P. Act provides for eviction of a tenant on the ground of bona fide requirement of the landlord. The fourth proviso thereof states that the Prescribed Authority shall take into account the likely hardship to the tenant from the grant of the application as against the likely hardship to the landlord from the refusal of the application and for that purpose shall have regard to such factors as may be prescribed. Rule 16(2) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972 states the factors which Prescribed Authority has to consider while dealing with an application for release under clause (a) of sub-section (1) of Section 21 of the U.P. Act. Rule 16 (2) refers to building let out for purpose of any business and the facts which have to be taken into consideration are: (a) length of tenancy of the tenant; (b) availability of suitable accommodation for tenant; (c) whether the landlords existing business is more flourishing than that which is proposed to be set up by him in the leased premises and (d) need of self-employment of a son or married or unmarried or widowed or divorced or judicially separated daughter or daughter or a male lineal descendant of the landlord who has completed his or her technical education and who is not employed in government service. [Paras 9-11] [21-A-H; 22-A]

Raghunath G. Panhale (Dead) by Lrs. v. Chaganlal Sundarji & Co. **(1999) 8 SCC 1 : 1999(3) Suppl. SCR 629;** *Bhimanagouda Basanagouda Patil v. Mohd. Gudusaheb* **(2003) 3 SCC 101 - relied on.**

1.2. The first appellant carried on his business from three small stalls of a shop of the Cantonment Council whose rent kept on increasing. There was nothing on

record to suggest that the appellants' present business was more flourishing than the business which they proposed to start in the leased premises. All the three sons of the appellants were educated but unemployed. They wanted to start business in the premises in occupation of the respondent. One of them was married and had three children. The other three were of a marriageable age. In all, there were thirteen members in the appellants' family and they were living in three rooms and one verandah with great difficulty. As against that the respondent's family consisted of four persons and there were four rooms in his possession. It was observed by the courts below that the appellants owned other premises. However, details of those premises were not on record. The High Court rightly noted that this bald assertion was based on conjectures. It is well settled the landlord's requirement need not be a dire necessity. The court cannot direct the landlord to do a particular business or imagine that he could profitably do a particular business rather than the business he proposes to start. It was wrong on the part of the District Court to hold that the appellants' case that his sons wanted to start the general merchant business was a pretence because they were dealing in eggs and it was not uncommon for a Muslim family to do the business of non-vegetarian food. It is for the landlord to decide which business he wants to do. The Court cannot advise him. Similarly, length of tenancy of the respondent in the circumstances of the case ought not to have weighed with the courts below. [Para 13] [23-B-H; 24-A]

Ganga Devi v. District Judge, Nainital & Ors. **(2008) 7 SCC 770:2008 (8) SCR 538;** *Bhagwan Das v. Jiley Kumar* **(1991) suppl. (2)SCC 300;** *Rishi Kumar Govil v. Maqsoodan* **(2007) 4 SCC 465: 2007(4) SCR 483 - relied on.**

1.3. The courts below were swayed by the fact that

the financial position of the appellants was better than the respondent. The District Court erroneously observed that the appellants can buy another building and start business. It also observed that the appellants had purchased the building to make profit. There was nothing on record to show that during the pendency of this litigation the respondent made any genuine efforts to find out any alternative accommodation. The perverse findings of the courts below on the aspect of comparative hardship must be set aside. The High Court rightly found the need of the appellants to be bona fide. It however, fell into an error in directing the respondent to handover only one room to the appellants. The hardship appellants would suffer by not occupying their own premises would be far grater than the hardship the respondent would suffer by having to move out to another place. No doubt, whenever the tenant is asked to move out of the premises some hardship is inherent. The respondent is in occupation of the premises for a long time. But in the facts of this case that circumstance cannot be the sole determinative factor. That hardship can be mitigated by granting him longer period to move out of the premises in his occupation so that in the meantime he can make alternative arrangement. The impugned order is set aside to the extent it permits the respondent to retain possession of three rooms out of four rooms in his occupation. The respondent is directed to handover possession of all the rooms in his occupation to the appellants. He is granted six months time to vacate the premises in question on the condition that he files usual undertaking before the Registry of this Court within eight weeks from today. [Paras 14-17] [24-B-G-H; 25-A-E]

Case Law Reference:

1999 (3) Suppl. SCR 629	**referred to**	**Para 7**
(2003) 3 SCC 101	**referred to**	**Para 7**

2008 (8) SCR 538	**referred to**	**Para 7**
(1991) suppl. (2) SCC 300	**referred to**	**Para 12**
2007 (4) SCR 483	**referred to**	**Para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4495 of 2006.

From the Judgment & Order dated 12.9.2005 of the High Court of Uttaranchal at Naintial Writ Petition No. 296 of 2004.

Vijay Hansaria, Sneha Kalita, Nagendra Singh (for Vishwa Pal Singh) for the Appellants.

Achal Chabbra, Rajesh Sharma, Nitin Kumar (for Shalu Sharma) for the Respondent.

The Judgment of the Court was delivered by

(SMT.) RANJANA PRAKASH DESAI, J. 1. This appeal, by grant of special leave, is directed against the judgment and order dated 12.9.2005 passed by the High Court of Uttaranchal at Nainital partly allowing the Writ Petition No. 296 of 2004 filed by the appellants.

2. The appellants/landlords filed an application under Section 21 of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (for short, 'the U.P Act') for eviction of the respondent/tenant on the ground that they *bona fide* required the premises occupied by the respondent to start business for their sons.

3. According to the appellants when the house in question was purchased by them the respondent was occupying two shops facing the road and two rooms situate at the rear of the said shops as a tenant of the previous landlord at the rent of Rs.35/- per month. These rooms are situated on the ground floor of the said building. The respondent continued to occupy

the said rooms as tenant at the same rent. It is the case of the appellants that the first appellant is carrying on business in three small stalls situated in a shop of the Cantonment Council, the rent of which keeps increasing. The three sons of the appellants aged 23, 28 and 19 years are unemployed. Two sons want to start general merchant business in one shop and the third son wants to start wholesale egg business in the other shop. The appellants' family consists of 13 members. Their one son is married and has three children and the two other sons are of a marriageable age. The married son wants to live in the room behind the shop. Presently, the appellants' family is living in three rooms and a verandah with great difficulty. On these grounds the appellants filed the application for release of the rooms in occupation of the respondent.

4. In response, the respondent inter alia contended that he is conducting photography business from the said shops for many years; that he is enjoying goodwill in the area; that he will find it difficult to get premises in the same area; that appellants are financially well off as compared to him; that they own other properties and that greater hardship would be caused to the respondent if the decree of eviction is passed than that would be caused to the appellants if it is not passed.

5. The Prescribed Authority dismissed the application holding inter alia that the appellants are financially sound and other properties were available to them whereas except the suit shops the respondent does not have any place for residence and business and hence, if he is evicted from the shops in his occupation, he will experience more difficulty. The appeal carried from the said judgment was dismissed by the District Court holding inter alia that financial position of the appellants is far better than that of the respondent. They could have purchased a vacant bungalow and started business for their sons. Learned District Judge held that the appellants have purchased the building to make profit and then filed the application for eviction. According to learned District Judge, the

respondent was doing business from the said shops for many years and it would be difficult for him to find a place for business. Hardship caused to the respondent would be more.

6. While disposing of the petition filed by the appellants the High Court rightly held that the landlord cannot be dictated by the tenant what business his sons should do and the observations made by the courts below to that effect and the findings reached by the courts below on bona fide requirement of the landlord are perverse. However, without going into the aspect of comparative hardship, the High Court directed that only one room out of the four rooms should be handed over to the appellants by the respondent as from the affidavit it appears that the respondent was using it as a passage. Being aggrieved by the said judgment, the appellants have approached this Court.

7. Shri Vijay Hansaria, learned senior counsel, appearing for the appellants submitted that having come to the conclusion that the need of the appellants was genuine, the High Court erred in directing the respondent to only handover one room to the appellants. The High Court has wrongly granted only partial relief to the appellants without going into the aspect of comparative hardship. In support of his submissions, learned counsel relied on *Raghunath G. Panhale (Dead) by Lrs. v. Chaganlal Sundarji & Co.,*[1] *Bhimanagouda Basanagouda Patil v. Mohd. Gudusaheb*[2], *Ganga Devi v. District Judge, Nainital & Ors*[3].

8. Shri Achal Chabbra, learned counsel for the respondent on the other hand submitted that the High Court has balanced the interest of both sides and hence no interference is necessary with the impugned judgment.

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1. (1999) 8 SCC 1.
2. (2003) 3 SCC 101.
3. (2008) 7 SCC 770

9. There is no challenge to the High Court's finding that the appellants' requirement is bona fide. The respondent has not assailed the High Court's order. We concur with the High Court on this point. However, the High Court erroneously held that the view expressed by the courts below that greater comparative hardship would be caused to the respondent if decree of eviction is passed is correct so far as two rooms occupied by him for residence and one room in which he is running a shop is concerned. The High Court observed that no hardship will be caused to the respondent if one room is directed to be handed over to the appellants because it was used as a passage by the respondent. Surprisingly, the High Court has not given any reasons why only partial relief was being granted to the appellants. In fact, it has not discussed the issue of comparative hardship at all. Since this issue is of utmost relevance and the application of the appellants is of the year 1998, we proceed to deal with it.

10. Section 21 (1) (a) of the U.P. Act provides for eviction of a tenant on the ground of bona fide requirement of the landlord. The fourth proviso thereof states that the Prescribed Authority shall take into account the likely hardship to the tenant from the grant of the application as against the likely hardship to the landlord from the refusal of the application and for that purpose shall have regard to such factors as may be prescribed.

11. Rule 16 (2) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972 (for short, 'the said Rules') states which facts the Prescribed Authority has to consider while dealing with an application for release under clause (a) of sub-section (1) of Section 21 of the U.P. Act. Rule 16 (2) refers to building let out for purpose of any business and the facts which have to be taken into consideration are: (a) length of tenancy of the tenant; (b) availability of suitable accommodation for tenant; (c) whether the landlords existing business is more flourishing than that which is proposed to be set up by him in the leased premises and (d) need of self-

employment of a son or married or unmarried or widowed or divorced or judicially separated daughter or daughter or a male lineal descendant of the landlord who has completed his or her technical education and who is not employed in government service.

12. In *Ganga Devi* this Court held that comparative hardship indisputably is a relevant factor for determining the question as to whether the requirement of the landlord is bona fide or not within the meaning of the provisions of the U.P. Act and the said Rules and it is essentially a question of fact. This Court observed that Rule 16 provides for some factors which are required to be taken into consideration. This Court clarified that the court would not determine the question only on the basis of sympathy or sentiment. This Court referred to its judgment in *Bhagwan Das v. Jiley Kumar*[4] where it is observed that the outweighing circumstance in favour of the landlord was that two of her sons after completing their education were unemployed and wanted to carry on business for self-employment. This Court further observed that there was an additional circumstance that the tenant had not brought on record any material to indicate that at any time during the pendency of this long drawn out litigation he had made any attempt to seek an alternative accommodation and was unable to get it. This Court also referred to its judgment in *Rishi Kumar Govil v. Maqsoodan*[5] where it has particularly taken note of the fact that the landlady had no other shop where she can establish her son who is married and unemployed and there was nothing on record to indicate that the business of the father was huge or flourishing. This Court clarified that the length of the period of tenancy as provided under clause (a) of sub-rule (2) of Rule 16 of the said Rules is only one of the factors to be taken into account in context with other facts and circumstances of the case and cannot be a sole criterion or deciding factor to order

4. (1991) supp. (2) SCC 300.
5. (2007) 4 SCC 465.

or not the eviction. This Court held that in the circumstances of the case the balance tilted in favour of the unemployed son of the landlady whose need is certainly bona fide. After quoting the above judgment in *Ganga Devi* this Court gave six months time to the landlady to handover the premises to the landlord in the interest of justice.

13. In our opinion, *Ganga Devi* applies on all fours to the present case. The first appellant carries on his business from three small stalls of a shop of the Cantonment Council whose rent keeps on increasing. There is nothing on record to suggest that the appellants' present business is more flourishing than the business which they propose to start in the leased premises. All the three sons of the appellants are educated but unemployed. They want to start business in the premises in occupation of the respondent. One of them is married and has three children. The other three are of a marriageable age. In all there are thirteen members in the appellants' family and they are living in three rooms and one verandah with great difficulty. As against that the respondent's family consists of four persons and there are four rooms in his possession. It is observed by the courts below that the appellants own other premises. However, details of those premises are not on record. The High Court has rightly noted that this bald assertion is based on conjectures. It is well settled the landlord's requirement need not be a dire necessity. The court cannot direct the landlord to do a particular business or imagine that he could profitably do a particular business rather than the business he proposes to start. It was wrong on the part of the District Court to hold that the appellants' case that their sons want to start the general merchant business is a pretence because they are dealing in eggs and it is not uncommon for a Muslim family to do the business of non-vegetarian food. It is for the landlord to decide which business he wants to do. The Court cannot advise him. Similarly, length of tenancy of the respondent in the

circumstances of the case ought not to have weighed with the courts below.

14. We also find that the courts below were swayed by the fact that the financial position of the appellants was better than the respondent. The District Court has erroneously gone on to observe that the appellants can buy another building and start business. It has also observed that the appellants had purchased the building to make profit. In this connection we may usefully refer to the judgment of this Court in Bhimanagouda Basanagouda Patil where the District Judge decided the issue of comparative hardship in favour of the tenant solely on the basis of affluence of the parties. This Court observed that if this is the correct approach then an affluent landlord can never get possession of his premises even if he proves all his bona fide requirements. This Court further observed that the fact that a person has the capacity to purchase the property cannot be the sole ground against him while deciding the question of comparative hardship. If the purchase is pursuant to a genuine need of the landlord the said purchase has to be given due weightage unless, of course, the purchase is actuated by collateral consideration. This Court rejected the High Court's finding that the landlord had secured the premises apparently in a game of speculation. Somewhat similar observations are made in this case by the District Court which in our opinion are totally unsubstantiated.

15. It is also important to note that there is nothing on record to show that during the pendency of this litigation the respondent made any genuine efforts to find out any alternative accommodation. We specifically asked learned counsel for the respondent to point out any evidence to establish that the respondent made any such genuine efforts. He was unable to answer this query satisfactorily.

16. In the ultimate analysis, we are of the view that the perverse findings of the courts below on the aspect of

comparative hardship must be set aside. The High Court has rightly found the need of the appellants to be bona fide. It has however, fallen into an error in directing the respondent to handover only one room to the appellants. In our opinion, the hardship appellants would suffer by not occupying their own premises would be far grater than the hardship the respondent would suffer by having to move out to another place. We are mindful of the fact that whenever the tenant is asked to move out of the premises some hardship is inherent. We have noted that the respondent is in occupation of the premises for a long time. But in our opinion, in the facts of this case that circumstance cannot be the sole determinative factor. That hardship can be mitigated by granting him longer period to move out of the premises in his occupation so that in the meantime he can make alternative arrangement.

17. In the view that we have taken, the appeal succeeds. The impugned order is set aside to the extent it permits the respondent to retain possession of three rooms out of four rooms in his occupation. The respondent is directed to handover possession of all the rooms in his occupation to the appellants. He is granted six months time to vacate the premises in question on the condition that he files usual undertaking before the Registry of this Court within eight weeks from today.

18. The appeal is disposed of in the aforesaid terms.

D.G. Appeal disposed of.

MUNAGALA YADAMMA
v.
STATE OF A.P. & ORS.
(Criminal Appeal No.67 of 2012)

JANUARY 05, 2012

[ALTAMAS KABIR AND SURINDER SINGH NIJJAR, JJ]

Andhra Pradesh Prevention of Dangerous Activities of Boot Leggers Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986 - ss. 3(1) read with s. 2A and B - Detention Order under, against the appellant's husband - Also stated therein that several cases going against detenue for violation of the provisions of s. 7A rw s. 8(C) of the Andhra Pradesh Prohibition Act, 1995 - Writ petition - High Court upheld the detention order on the ground that under the normal laws, it would be difficult to check the activities of the detenue - On appeal, held: Ordinary law of the land was sufficient to deal with the offences complained of against the appellant - Offences alleged to have been committed by the appellant were such as to attract punishment under the Andhra Pradesh Prohibition Act, but that has to be done under the said laws and taking recourse to preventive detention laws would not be warranted - Preventive detention involves detaining of a person without trial in order to prevent him/her from committing certain types of offences - But such detention cannot be made a substitute for the ordinary law and absolve the investigating authorities of their normal functions of investigating crimes which the detenue may have committed - Thus, order passed by the High Court set aside and the detention order quashed - Andhra Pradesh Prohibition Act, 1995.

Rekha Vs. State of Tamil Nadu through Secretary to Government and Anr. **2011 (5) SCC 244;** *Yumman Ongbi*

Lembi Leima Vs. State of Manipur & Ors. **Criminal Appeal No.26 of 2012- relied on.**

G.Reddelah Vs. The Govt.of Andhra Pradesh and Anr. **2011 (10) SCALE 224 - referred to.**

Case Law Reference:

2011 (10) SCALE 224	**Referred to.**	**Para 9**
2011 (5) SCC 244	**Relied on.**	**Para 10, 11**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 67 of 2012.

From the Judgment & Order dated 20.7.2011 of the High Court of Andhra Pradesh at Hyderabad in Writ Petition (Crl.) No. 13313 of 2011.

Anil Kumar Tandale for the Appellant.

I. Venkatanarayana, G.N. Reddy, C. Kannan, Ravi Shankar for the Respondent.

The following Order of the Court was delivered

O R D E R

1. Leave granted.

2. The appellant's husband, Shri Munagala Anjaiah, son of Gandaian, resident of Ranga Reddy District in Andhra Pradesh, was served with a Detention Order dated 15th February, 2011, under Section 3(1) read with Section 2A and B of the Andhra Pradesh Prevention of Dangerous Activities of Boot Leggers Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986.

3. In the Detention Order, the Detaining Authority indicated that the detenue was a bootlegger within the meaning of

Section 2(b) of the aforesaid Act and that recourse to normal legal procedure would involve more time and would not be an effective deterrent in preventing the detenue from indulging in further prejudicial activities.

4. It has been mentioned that the detenue was involved in several cases of violation of the provisions of Section 7A read with Section 8(C) of the Andhra Pradesh Prohibition Act, 1995, involving illicit distillation of liquor.

5. The Detention Order passed by the Collector and District Magistrate, Ranga Reddy District, was questioned by the wife of the detenue by way of WP No.13313 of 2011 before the Andhra Pradesh High Court, which dismissed the same on the ground that under the normal laws, it would be difficult to check the activities of the detenue and, accordingly, the order of detention was justified.

6. The order of the High Court has been challenged before us in this appeal.

7. On behalf of the appellant, it has been urged that the ground taken for issuance of the Detention Order was improper and not available in view of the reasoned judgment of this Court in the case of *Rekha Vs. State of Tamil Nadu through Secretary to Government and Anr.,* 2011(5)SCC 244, where a similar question had arisen and in paragraph 23 of the judgment, a three-Judge Bench of this Court was of the view that criminal cases were already going on against the detenue under various provisions of the Penal Code, 1860, as well as under the Drugs and Cosmetics Act, 1940, and that if he was found guilty, he would be convicted and given appropriate sentence. Their Lordships also indicated that in their opinion, the ordinary law of the land was sufficient to deal with the situation, and hence, recourse to the preventive detention law was illegal.

8. It has been submitted by Mr. Anil Kumar Tandale, learned advocate appearing for the appellant, that in the instant case also all the offences alleged to have been committed by the husband of the appellant, were under the provisions of the A.P. Prohibition Act, 1995, for which the normal law was sufficient to deal with the offence, if proved. He submitted that the Detaining Authority had wrongfully taken the easy way out and had resorted to an order of preventive detention in order to avoid having to investigate the cases filed against the appellant.

9. On behalf of the State of Andhra Pradesh, another decision of a two-Judge Bench of this Court in the case of *G.Reddelah Vs. The Govt.of Andhra Pradesh and Anr.,* [2011(10)SCALE 224], was brought to our notice, in which while referring to the three-Judge Bench decision in *Rekha's* case (supra) their Lordships were of the opinion that in view of the factual position and the enormous activities of the detenue, violating various provisions of the Indian Penal Code and the Andhra Pradesh Prohibition Act and Rules, continuous and habitual pursuing of the same type of offences damaging the wealth of the nation, the decision in *Rekha's* case (supra) was not applicable to the facts of the said case. Accordingly, the order passed by the Detaining Authority, as approved by the Division Bench and upheld by the High Court, did not require any interference.

10. Having considered the submissions made on behalf of the respective parties, we are unable to accept the submissions made on behalf of the State in view of the fact that the decision in *Rekha's* case (supra), in our view, clearly covers the facts of this case as well. The offences complained of against the appellant are of a nature which can be dealt with under the ordinary law of the land. Taking recourse to the provisions of preventive detention is contrary to the constitutional guarantees enshrined in Articles 19 and 21 of the Constitution and sufficient grounds have to be made out by the detaining

authorities to invoke such provisions. In fact, recently, in Criminal Appeal No.26 of 2012, *Yumman Ongbi Lembi Leima Vs. State of Manipur & Ors.,* we had occasion to consider the same issue and the three-Judge Bench had held that the personal liberty of an individual is the most precious and prized right guaranteed under the Constitution in Part III thereof. The State has been granted the power to curb such rights under criminal laws, as also under the laws of preventive detention, which, therefore, are required to be exercised with due caution as well as upon a proper appreciation of the facts as to whether such acts are in any way prejudicial to the interest and the security of the State and its citizens, or seek to disturb public law and order, warranting the issuance of such an order.

11. No doubt, the offences alleged to have been committed by the appellant are such as to attract punishment under the Andhra Pradesh Prohibition Act, but that in our view has to be done under the said laws and taking recourse to preventive detention laws would not be warranted. Preventive detention involves detaining of a person without trial in order to prevent him/her from committing certain types of offences. But such detention cannot be made a substitute for the ordinary law and absolve the investigating authorities of their normal functions of investigating crimes which the detenue may have committed. After all, preventive detention in most cases is for a year only and cannot be used as an instrument to keep a person in perpetual custody without trial. Accordingly, while following the three-Judge Bench decision in *Rekha's* case (supra), we allow the appeal and set aside the order passed by the High Court dated 20th July, 2011, and also quash the Detention Order dated 15th February, 2011, issue by the Collector and District Magistrate, Ranga Reddy District, Andhra Pradesh.

12. This order should not in any way prejudice the outcome of the pending cases against the appellant.

N.J. Appeal allowed.

DR. MRS. NUPUR TALWAR
v.
C.B.I., DELHI & ANR.
(Criminal Appeal No. 68 of 2012)

JANUARY 6, 2012

[ASOK KUMAR GANGULY AND JAGDISH SINGH KHEHAR, JJ.]

Constitution of India, 1950:

Article 136 - Jurisdiction of Supreme Court to interfere with order of Magistrate taking cognizance, as affirmed by High Court - Held: The order whereby cognizance of the offence has been taken by the Magistrate, unless is perverse or based on no material, should be sparingly interfered with - In the instant case, it is evident from the order of the Magistrate taking cognizance that there has been due application of mind by him and it is a well reasoned order - The order of the High Court would also show that there has been a proper application of mind and a detailed speaking order has been passed - Therefore, the concurrent order of the Magistrate which is affirmed by the High Court is not interfered with.

Code of Criminal Procedure, 1973:

s.190(1)(b) - Cognizance of offence by Magistrate - Held: At the stage of taking cognizance of an offence, the court has only to see whether prima facie there are reasons for issuing the process and whether the ingredients of the offence are there on record - At this stage the Magistrate is required to exercise sound judicial discretion and apply his mind to the facts and materials before him - In doing so, the Magistrate is not bound by the opinion of the investigating officer and he is competent to exercise his discretion irrespective of the views expressed by the police in its report and may prima

facie find out whether an offence has been made out or not.

In the investigation by the State police, of a case of the death of a young girl and a domestic help, initially the implication of the parents of the deceased girl transpired. However, when the investigation of the case was entrusted to the CBI, it filed a closure report. On a notice issued by the court, the father of the deceased girl filed a protest petition. The Magistrate then took cognizance u/s 190(1)(b), CrPC of the offences punishable u/s 302/34 and 201/34 IPC against the parents of the deceased girl for committing her murder and the murder of the domestic help. On a petition u/s 397/401 CrPC, the High Court declined to interfere.

In the instant appeal filed by the accused mother of the deceased girl, the question or consideration before the Court was: what should be the extent of judicial interference by Supreme Court in connection with an order of taking cognizance by a Magistrate while exercising his jurisdiction u/s 190 of the Code of Criminal Procedure, 1973.

Disposing of the appeal, the Court

HELD: 1.1. Section 190 of the Code of Criminal Procedure, 1973 lays down the conditions which are requisite for the initiation of a criminal proceeding. At this stage the Magistrate is required to exercise sound judicial discretion and apply his mind to the facts and materials before him. In doing so, the Magistrate is not bound by the opinion of the investigating officer and he is competent to exercise his discretion irrespective of the views expressed by the police in its report and may prima facie find out whether an offence has been made out or not. [para 18-19] [41-B-C]

1.2. The taking of cognizance means the point in time

when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence which appears to have been committed. At the stage of taking cognizance of an offence, the court has only to see whether prima facie there are reasons for issuing the process and whether the ingredients of the offence are there on record. [para 20-21] [41-D-E]

S.K. Sinha, Chief Enforcement Officer Vs. Videocon International Ltd. and Ors. **2008 (2) SCR 36 = (2008) 2 SCC 492 -relied on**

1.3. The correctness of the order whereby cognizance of the offence has been taken by the Magistrate, unless it is perverse or based on no material, should be sparingly interfered with. In the instant case, it is evident from the order of the Magistrate taking cognizance that there has been due application of mind by the Magistrate and it is a well reasoned order. The order of the High Court passed on a criminal revision u/ss 397 and 401 of the Code (not u/s 482) at the instance of the appellant would also show that there has been a proper application of mind and a detailed speaking order has been passed. [para 23] [42-D-F]

1.4. At this stage, sitting in a jurisdiction under Article 136 of the Constitution, this Court does not feel inclined to go into all the factual aspects of the case. Obviously, at this stage the Court cannot weigh evidence. The Court should exercise utmost restrain and caution before interfering with an order of taking cognizance by the Magistrate, otherwise the holding of a trial will be stalled. The superior courts should maintain this restrain to uphold the rule of law and sustain the faith of the common man in the administration of justice. Therefore, the concurrent order of the Magistrate which is affirmed by the High Court is not interfered with. [para 11,25 and 27] [37-D; 42-H; 43-A-G]

Case Law Reference:

2008 (2) SCR 36 relied on para 26

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 68 of 2012.

From the Judgment & Order dated 18.3.2011 of the High Court Allahabad in Criminal Revision No. 1127 of 2011.

WITH

SLP (Crl) No. 2982 of 2011.

H.P. Raval, Harish N. Salve, Ranjeet Kumar, Rajiv Nanda, P.K. Dey, Padmalakshmi Nigam, A.K. Sharma, R.N. Karanjawala, Manik Karanjawala, Sandeep Kapur, Shivek Trehan, Udit Mendiratta (for Karanjawala & Co.), Binu Tamta, Dhruv Tamta for the appearing parties.

The Judgment of the Court was delivered by

GANGULY, J. 1. We have heard learned counsel for the parties.

2. Leave granted.

3. The subject matter of challenge before this Court is an order dated 18th March, 2011 of the Allahabad High Court whereby the High Court on a petition under Section 397/401 of the Criminal Procedure Code (hereinafter 'Code') challenging the order dated 9th February, 2011 passed by Special Judicial Magistrate (CBI), Ghaziabad in Special Case No.01 of 2011 (*Rajesh Talwar Vs. Unknown* under Section 302, I.P.C. P.S. S.C.B. C.B.I., Delhi) refused to interfere with Magistrate's order of taking cognizance.

4. By the said order dated 9th February, 2011, the Magistrate had taken cognizance of the offences under

Sections 302/34 and 201/34 I.P.C. against the appellant and one Dr. Rajesh Talwar. The concluding portion of the order of the Magistrate is:-

> "While rejecting the conclusion given in the Final Report by the Investigating Officer, cognizance on the basis of Police report under section 190(1)(b) of Cr.P.C. is taken under section 302/34 and 201/34 IPC against accused Dr. Rajesh Talwar and Dr. Nupur Talwar for committing murders of Arushi and Hem Raj and for tampering with the proofs. The accused be summoned for appearance on 28.02.2011. Copies be prepared."

5. The entire case arises out of an unfortunate murder of a young girl namely, 'Aarushi' in her own residence and also the murder of one Hemraj, a domestic help. It appears that the said unfortunate murder of the young girl raised some kind of a sensation in public mind and an uproar. Be that as it may, sitting in the Courts of law, we have to steer clear of the public debate and follow the course of law.

6. Initially, the investigation was conducted by the Uttar Pradesh Police in which the implication of Dr. Rajesh Talwar and Dr. Nupur Talwar, parents of the deceased victim girl transpired. Thereafter, the investigation of the case was handed over to the C.B.I. on 29th May, 2008 on the basis of a notification by the State. Prior to that, on 23rd May, 2008, Dr. Rajesh Talwar was arrested. The CBI initially filed a closure report of the investigation. On the basis of that report, an application was filed by the C.B.I. under Section 169 of the Code before the Special Judicial Magistrate, C.B.I., Ghaziabad. The contents of the said petition read as under:

> "i. That accused Rajesh Talwar was arrested in the aforesaid case on 23.5.2008. Subsequently, following expiry of his police remand, this Hon'ble Court remanded him to judicial custody upto 11.7.2008 vide order dated 2.7.2008.

> ii. That the investigation of this case is still pending and all the facts and circumstances of the case are being investigated.
>
> iii. That during investigation, the role of accused Rajesh Talwar was thoroughly investigated regarding the aforesaid crime.
>
> iv. That during investigation, the poly right to psychological analysis test of accused Rajesh Talwar was conducted and no deception has been found in the test reports.
>
> v. That during investigation, the cloths, shoes and finger palm/foot prints of accused Rajesh Talwar was forwarded/submitted to CFSL, New Delhi for examination and expert opinion. The Scientific examination results could not connect accused Rajesh Talwar with the crime.
>
> vi. That in view of the above circumstances, the further judicial custody remand of accused Rajesh Talwar is not required in the interest of justice.
>
> Prayer
>
> It is, therefore, prayed that Judicial custody remand of accused Rajesh Talwar may not be extended."

7. On the basis of the aforementioned prayer of C.B.I. under Section 169 of the Code, an order came to be passed on 11th July, 2008 by the learned Magistrate and Dr. Rajesh Talwar was released on his furnishing two sureties of Rs.5 lakh each with a personal bond of the same amount.

8. Thereafter, the C.B.I. filed another closure report on 29th December, 2010. Then, on a notice being issued by the Court, a protest petition came to be filed by Dr. Rajesh Talwar. Only thereafter, the impugned order of the Magistrate dated 9th

February, 2011 came to be passed. The learned Magistrate in his detailed order after considering various aspects of the matter took cognizance of the offence and passed the order, quoted above.

9. It is apparent from the detailed order that the Magistrate rejected the conclusion given in the official report of the Investigating Officer and took cognizance under Section 190(1)(b) of the Code.

10. Attention of this Court has been drawn to various parts of the CBI closure report and certain other documents by Mr. Ranjit Kumar, learned senior counsel appearing for the appellant.

11. Sitting in a jurisdiction under Article 136 of the Constitution, we do not feel inclined to go into all the factual aspects of the case. Obviously at this stage we cannot weigh evidence. Looking into the order of Magistrate, we find that he applied his mind in coming to the conclusion relating to taking of cognizance. The Magistrate has taken note of the rejection report and gave his prima facie observation on the controversy upon a consideration of the materials that surfaced in the case. We reproduce the conclusions reached by the Special Judicial Magistrate.

> "From the analysis of evidence of all above mentioned witnesses prima facie it appears that after investigation, on the basis of evidence available in the case diary when this incident occurred at that time four members were present in the house—Dr. Rajesh Talwar, Dr. Nupur Talwar, Arushi and servant Hem Raj; Arushi and Hem Raj, the two out of four were found dead. In the case diary there is no such evidence from which it may appear that some person had made forcible entry and there is no evidence regarding involvement of the servants. In the night of the incident, Internet was switched on and off in the

> house in regard to which this evidence is available in the case diary that it was switched on or off by some person. Private parts of deceased Arushi were cleaned and deceased Hem Raj was dragged in injured condition from the flat of Dr. Rajesh Talwar up to the terrace and the terrace was locked. Prior to 15.5.2008, terrace was not locked. According to documents available on the case diary, blood stains were wiped off on the staircase, both the deceased were slit with the help of a surgical instrument by surgically trained persons and shape of injury on the head and forehead was V shaped and according to the evidence available in the case diary that appeared to have been caused with a golf stick. A person coming from outside, during the presence of Talwar couple in the house could have neither used the Internet nor could have taken the dead body of deceased Hem Raj to the terrace and then locked when the Talwar couple was present in the house. On the basis of evidence available in the case diary footprints stained with blood were found in the room of Arushi but outside that room bloodstained footprints were not found. If the assailant would go out after committing murder then certainly his footprints would not be confined up to the room of Arushi and for an outsider it is not possible that when Talwar couple were present in the house he would use liquor or would try to take dead body on the terrace. Accused after committing the offence would like to run away immediately so that no one could catch him.
>
> On the basis of evidence of all the above witnesses and circumstantial evidence available in case diary during investigation it was expected from the Investigating Officer to submit charge-sheet against Dr. Rajesh Talwar and Dr. Nupur Talwar. In such type of cases, when offence is committed inside a house, there direct evidence cannot be expected. Here it is pertinent to mention that CBI is the highest investigating agency of the country in which the

public of the country has full confidence. Whenever in a case if any one of the investigating agencies of the country remained unsuccessful then that case is referred to CBI for investigation. In such circumstances, it is expected of CBI that applying the highest standards, after investigation it should submit such a report before the Court which is just and reasonable on the basis of evidence collected in investigation, but it was not done so by the CBI which is highly disappointing. If I draw a conclusion from the circumstances of case diary, then I find that in view of the facts, the conclusion of the investigating officer that on account of lack of evidence, case may be closed; does not appear to be just and proper. When offence was committed inside a house, on the basis of evidence received from case diary, a link is made from these circumstances, and these links are indicating prima facie the accused Dr. Rajesh Talwar and Dr. Nupur Talwar to be guilty. The evidence of witness Shoharat that Dr. Rajesh Talwar asked him to paint the wooden portion of a wall between the rooms of Arushi and Dr. Rajesh Talwar, indicates towards the conclusion that he wants to tamper with the evidence. From the evidence … so many in the case diary, prima facie evidence is found in this regard. Therefore, in the light of above evidences conclusion of Investigating Officer given in the final report deserves to be rejected and there is sufficient basis for taking prima facie cognizance against Dr. Rajesh Talwar and Dr. Nupur Talwar for committing murder of deceased Arushi and Hem Raj and for tampering with the proof. At this stage, the principle of law laid down by Hon'ble Supreme Court in the case of *Jagdish Ram Vs. State of Rajasthan and another,* reported in AIR 2004 SC 1734 is very important wherein the Hon'ble Supreme Court held that investigation is the job of police and taking of cognizance is within the jurisdiction of the Magistrate. If on the record, this much of evidence is available that prima facie cognizance can be

taken then the Magistrate should take cognizance. Magistrate should be convinced that there is enough basis for further proceedings rather for sufficient basis for proving the guilt."

12. Assailing the said order, a Criminal Revision was filed before the High Court under Sections 397 and 401 of the Code, not by Dr. Rajesh Talwar, father of the girl but by Dr. Mrs. Nupur Talwar, her mother.

13. The High Court passed its order dated 18th March, 2011 after a detailed consideration of the factual aspects and legal questions involved in the matter of taking cognizance and the same order is impugned before us.

14. In the concluding portion of its order, High Court held:

"However, considering the facts of the case it is directed that in case the revisionist surrenders before the Special Judicial Magistrate (C.B.I.), Ghaziabad and applies for bail within a period of two weeks from today her bail application shall be dealt with in accordance with the law expeditiously."

15. On the next day i.e. 19th March 2011, which was a Saturday, a Bench of this Court entertained at 7 P.M. an SLP against the High Court's order and passed the following order:-

"List on the notified date. In the meanwhile, there shall be stay as prayed for. However, the petitioners shall deposit their passports with the trial Court on Monday i.e. 21.03.2011."

16. Since then, the matter has remained pending before this Court.

17. Now the question is what should be the extent of judicial interference by this Court in connection with an order of taking

cognizance by a Magistrate while exercising his jurisdiction under Section 190 of the Code.

18. Section 190 of the Code lays down the conditions which are requisite for the initiation of a criminal proceeding.

19. At this stage the Magistrate is required to exercise sound judicial discretion and apply his mind to the facts and materials before him. In doing so, the Magistrate is not bound by the opinion of the investigating officer and he is competent to exercise his discretion irrespective of the views expressed by the Police in its report and may prima facie find out whether an offence has been made out or not.

20. The taking of cognizance means the point in time when a Court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence which appears to have been committed.

21. At the stage of taking of cognizance of offence, the Court has only to see whether prima facie there are reasons for issuing the process and whether the ingredients of the offence are there on record.

22. The principles relating to taking of cognizance in a criminal matter has been very lucidly explained by this Court in *S.K. Sinha, Chief Enforcement Officer Vs. Videocon International Ltd. and Ors.* – (2008) 2 SCC 492, the relevant observations are set out:

> "19. The expression "cognizance" has not been defined in the Code. But the word (cognizance) is of indefinite import. It has no esoteric or mystic significance in criminal law. It merely means "become aware of" and when used with reference to a court or a Judge, it connotes" to take notice of judicially". It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view

> to initiating proceedings in respect of such offence said to have been committed by someone."
>
> 20. "Taking Cognizance" does not involve any formal action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance is taken prior to commencement of criminal proceedings. Taking of cognizance is thus a sine qua non or condition precedent for holding a valid trial. Cognizance is taken of an offence and not of an offender. Whether or not a Magistrate has taken cognizance of an offence depends on the facts and circumstances of each case and no rule of universal application can be laid down as to when a Magistrate can be said to have taken cognizance."
>
> (para nos. 19 and 20 at page 499 of the report)

23. The correctness of the order whereby cognizance of the offence has been taken by the Magistrate, unless it is perverse or based on no material, should be sparingly interfered with. In the instant case, anyone reading the order of the Magistrate taking cognizance, will come to the conclusion that there has been due application of mind by the Magistrate and it is a well reasoned order. The order of the High Court passed on a Criminal Revision under Sections 397 and 401 of the code (not under Section 482) at the instance of Dr. Mrs. Nupur Talwar would also show that there has been a proper application of mind and a detailed speaking order has been passed.

24. In the above state of affairs, now the question is what is the jurisdiction and specially the duty of this Court in such a situation under Article 136?

25. We feel constrained to observe that at this stage, this Court should exercise utmost restrain and caution before interfering with an order of taking cognizance by the Magistrate,otherwise the holding of a trial will be stalled. The

superior Courts should maintain this restrain to uphold the rule of law and sustain the faith of the common man in the administration of justice.

26. Reference in this connection may be made to a three Judge Bench decision of this Court in the case of *M/s. India Carat Private Ltd. Vs. State of Karnataka & Anr.* (1989) 2 SCC 132. Explaining the relevant principles in paragraphs 16, Justice Natarajan, speaking for the unanimous three Judge Bench, explained the position so succinctly that we would rather quote the observation: as under:-

> "The position is, therefore, now well settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer; and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused..."

27. These well settled principles still hold good. Considering these propositions of law, we are of the view that we should not interfere with the concurrent order of the Magistrate which is affirmed by the High Court.

28. We are deliberately not going into various factual

aspects of the case which have been raised before us so that in the trial the accused persons may not be prejudiced. We, therefore, dismiss this appeal with the observation that in the trial which the accused persons will face, they should not be prejudiced by any observation made by us in this order or in the order of the High Court or those made in the Magistrate's order while taking cognizance. The accused must be given all opportunities in the trial they are to face. We, however, observe that the trial should be expeditiously held.

29. The appeal is accordingly disposed of.

R.P. Appeal disposed of.

STATE OF PUNJAB
v.
BALWINDER SINGH AND ORS.
(Criminal Appeal No. 47-48 of 2012)

JANUARY 6, 2012

[P. SATHASIVAM AND J. CHELAMESWAR, JJ.]

Penal Code, 1860:

ss. 304-A, 337 and 279 - Five deaths caused due to rash and negligent driving and by colliding of two vehicles - Sentence - Held: While considering the quantum of sentence to be imposed for the offence of causing death or injury by rash and negligent driving of automobiles, one of the prime considerations should be deterrence - For lessening the high rate of motor accidents due to careless and callous driving of vehicles, the courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence if the prosecution is able to establish the guilt of the accused beyond reasonable doubt - Further, the criminal courts cannot treat the nature of the offence u/s 304A as attracting the benevolent provisions of s.4 of the Probation of Offenders Act, 1958 - Order of High Court reducing the sentence to the period already undergone i.e. 15 days, set aside - Accused sentenced to six months RI each with fine - Probation of Offenders Act, 1958 - s. 4 - Sentence/ Sentencing.

In a motor accident, caused by the collision between a bus and a truck due to rash and negligent driving by the drives of both the vehicles, five persons travelling in the bus lost their lives. The trial court convicted the accused-drivers u/ss304-A, 337 and 279 IPC and sentenced each of them to two years rigorous

imprisonment u/s 304-A and six months rigorous imprisonment u/ss 337 and 279 IPC. In the appeal, the Additional Sessions Judge confirmed the conviction and sentence. However, the High Court, in revision while confirming the conviction reduced the sentence to the period already undergone, which was for 15 days.

Allowing the appeals filed by the State, the Court

HELD: 1. It is not in dispute that the trial court on appreciation of evidence and accepting the version of the prosecution witnesses convicted the respondents u/s 304A IPC. To bring a case of homicide u/s 304A IPC, the conditions are: (1) There must be death of the person in question; (2)the accused must have caused such death; and (3) that such act of the accused was rash or negligent and that it did not amount to culpable homicide. [para 6-7] [50-B; 51-F-G]

2.1. While considering the quantum of sentence to be imposed for the offence of causing death or injury by rash and negligent driving of automobiles, one of the prime considerations should be deterrence. For lessening the high rate of motor accidents due to careless and callous driving of vehicles, the courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence if the prosecution is able to establish the guilt beyond reasonable doubt. Further, the criminal courts cannot treat the nature of the offence u/s 304A IPC as attracting the benevolent provisions of s.4 of the Probation of Offenders Act, 1958. [para 10-11] [52-E-H]

Dalbir Singh vs. State of Haryana, **2000 (3) SCR 1000 = (2000) 5 SCC 82;** *B. Nagabhushanam vs. State of Karnataka***, 2008 (8) SCR 444 =2008 (5) SCC 730 - relied on.**

2.2. In the instant case, the reasoning of the High Court in reducing the sentence of imprisonment to the period already undergone, that is, 15 days cannot be accepted. Merely because the fine amount has been enhanced to Rs.25,000/- each, is also not a sufficient ground to drastically reduce the sentence, particularly, in a case where five persons died due to the negligent act of both the drivers of the bus and the truck. Accordingly, the order of the High Court is set aside and a sentence of rigorous imprisonment for six months with a fine of Rs. 5,000/- each is imposed on the accused. [para 12] [53-B-D]

Case Law Reference:

2000 (3) SCR 1000	**relied on**	**para 8**
2008 (8) SCR 444	**relied on**	**para 9**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 47-48 of 2012.

From the Judgment & Order dated 04.11.2009 of the High Court of Punjab & Haryana at Chandigarh in Crl. Revision Nos. 653 & 655 of 2000.

Ashok Aggarwal, (Gen. Punjab), Manjusha Wadhwa, R.K. Pandey, H.S. Sandhu, Mohit Mudgil, Kuldip Singh for the Appellant.

Sudhir Walia, Abhishek Atrey, K.G. Bhagat, Dattareya Vyas, Vineet Bhagat for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. These appeals are filed against the common final judgment and order dated 04.11.2009 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal

Revision Petition Nos. 653 and 655 of 2000 for nature of offence and quantum of sentence whereby the High Court partly allowed the revision petition and reduced the quantum of sentence awarded by the Judicial Magistrate, Ist Class, Amritsar as upheld by the Additional Sessions Judge, Amritsar under Sections 304A, 337 and 279 of Indian Penal Code, 1860 (in short 'IPC').

3. **Brief facts:**

(a) On 30.10.1992, one Dhian Singh-the Complainant (PW-3), after attending the last rites of one of his relatives at Village Mustabad, Amritsar was returning to Batala along with his family members in a Jhang Transport Bus bearing No. PB-02-D-9485. The bus was being driven at a very high speed by the driver-Respondent No. 1 herein. When the aforesaid bus reached the bus stand at Mudhal, at that time, a truck bearing No. PB-02-C-9665 which was being driven by Respondent No. 2 herein was coming from the opposite side at a very high speed. Both the drivers were driving their vehicle at a very high speed and in rash and negligent manner, as a result of which, both the vehicles collided with each other and two passengers, namely, Darshan Singh s/o Bela Singh and Banso w/o Ajit Singh died at the spot. The other passengers, namely, Sonia, Dalbir Singh and Ramandeep were taken to the Civil Hospital but later on they succumbed to their injuries.

(b) On the basis of the complaint of Dhian Singh, FIR No. 125/92 was registered under Sections 304A, 279 and 337 of IPC and after formal investigation the case was forwarded to the Court of Judicial Magistrate, Ist Class, Amritsar. The Judicial Magistrate, by order dated 14.12.1998, convicted both the accused persons and directed them to undergo rigorous imprisonment for 2 years each for the offence under Section 304A and to pay fine of Rs. 200/- each, in default, to further undergo rigorous imprisonment for two months and to also undergo rigorous imprisonment for a period of six months each

for the offence punishable under Sections 337 and 279 IPC.

(c) Aggrieved by the judgment and order dated 14.12.1998, the accused persons preferred an appeal before the Additional Sessions Judge, Amritsar. Vide judgment dated 20.05.2000, the Additional Sessions Judge upheld the judgment and order passed by the Judicial Magistrate, Ist Class, Amritsar.

(d) Questioning the same, the respondents herein filed Criminal Revision Petition being Nos. 653 and 655 of 2000 qua nature of offence and quantum of sentence before the High Court. The High Court, by order dated 04.11.2009, while confining to the question of quantum of sentence only, reduced the sentence of the accused persons to the period already undergone (15 days) and in addition thereto, enhanced the fine to an amount of Rs. 25,000/- each.

(e) Against the order of the High Court, the State of Punjab has filed these appeals before this Court by way of special leave petitions.

4. Heard Mr. Ashok Aggarwal, learned senior counsel for the appellant and Mr. Sudhir Walia and Mr. K.G. Bhagat, learned counsel for the respondents.

5. Before the High Court, the respondents, who preferred the revisions, did not dispute the finding relating to negligence rendered by the courts below and confined their submissions to the quantum of sentence only and prayed that the sentence be reduced to the period already undergone. In support of the above claim, they pointed out that they had suffered a protracted trial for about 17 years and had already undergone custody for 15 days, therefore, prayed for lenient view by modifying the sentence. On the other hand, on behalf of the State, it was submitted that inasmuch as the negligence was proved beyond reasonable doubt, therefore, no leniency should be shown to the accused. The High Court, without taking note

of the seriousness of the matter, namely, due to the negligence of the two drivers, five persons traveling in the bus died, merely because of protracted trial of about 17 years and both of them had served sentence for a period of 15 days, reduced the same to the period already undergone and enhanced the fine to an amount of Rs.25,000/- each.

6. It is not in dispute that the trial Court on appreciation of evidence and accepting the prosecution witnesses convicted the respondents for an offence under Section 304A. The said section reads as under:

> **304A. Causing death by negligence.-** Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

7. Section 304A was inserted in the Penal Code by the Indian Penal Code (Amendment) Act 27 of 1870 to cover those cases wherein a person cause the death of another by such acts as are rash or negligent but there is no intention to cause death and no knowledge that the act will cause death. The case should not be covered by Sections 299 and 300 only then it will come under this section. The section provides punishment of either description for a term which may extend to two years or fine or both in case of homicide by rash or negligent act. To bring a case of homicide under Section 304A IPC, the following conditions must exist, namely,

1) There must be death of the person in question;

2) the accused must have caused such death; and

3) that such act of the accused was rash or negligent and that it did not amount to culpable homicide.

8. Even a decade ago, considering the galloping trend in road accidents in India and its devastating consequences, this

Court in *Dalbir Singh vs. State of Haryana,* (2000) 5 SCC 82 held that, while considering the quantum of sentence to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence. A professional driver should not take a chance thinking that even if he is convicted, he would be dealt with leniently by the court. The following principles laid down in that decision are very relevant:

> "**1**. When automobiles have become death traps any leniency shown to drivers who are found guilty of rash driving would be at the risk of further escalation of road accidents. All those who are manning the steering of automobiles, particularly professional drivers, must be kept under constant reminders of their duty to adopt utmost care and also of the consequences befalling them in cases of dereliction. One of the most effective ways of keeping such drivers under mental vigil is to maintain a deterrent element in the sentencing sphere. Any latitude shown to them in that sphere would tempt them to make driving frivolous and a frolic.
>
> **13.** Bearing in mind the galloping trend in road accidents in India and the devastating consequences visiting the victims and their families, criminal courts cannot treat the nature of the offence under Section 304-A IPC as attracting the benevolent provisions of Section 4 of the Probation of Offenders Act. While considering the quantum of sentence to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence. A professional driver pedals the accelerator of the automobile almost throughout his working hours. He must constantly inform himself that he cannot afford to have a single moment of laxity or inattentiveness when his leg is on the pedal of a vehicle in locomotion. He cannot and should not take a chance thinking that a rash driving need

> not necessarily cause any accident; or even if any accident occurs it need not necessarily result in the death of any human being; or even if such death ensues he might not be convicted of the offence; and lastly, that even if he is convicted he would be dealt with leniently by the court. He must always keep in his mind the fear psyche that if he is convicted of the offence for causing death of a human being due to his callous driving of the vehicle he cannot escape from a jail sentence. This is the role which the courts can play, particularly at the level of trial courts, for lessening the high rate of motor accidents due to callous driving of automobiles."

9. The same principles have been reiterated in *B. Nagabhushanam vs. State of Karnataka,* 2008 (5) SCC 730.

10. It is settled law that sentencing must have a policy of correction. If anyone has to become a good driver, must have a better training in traffic laws and moral responsibility with special reference to the potential injury to human life and limb. Considering the increased number of road accidents, this Court, on several occasions, has reminded the criminal courts dealing with the offences relating to motor accidents that they cannot treat the nature of the offence under Section 304A IPC as attracting the benevolent provisions of Section 4 of the Probation of Offenders Act, 1958. We fully endorse the view expressed by this Court in *Dalbir Singh* (supra).

11. While considering the quantum of sentence to be imposed for the offence of causing death or injury by rash and negligent driving of automobiles, one of the prime considerations should be deterrence. The persons driving motor vehicles cannot and should not take a chance thinking that even if he is convicted he would be dealt with leniently by the Court. For lessening the high rate of motor accidents due to careless and callous driving of vehicles, the courts are expected to consider all relevant facts and circumstances

bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence if the prosecution is able to establish the guilt beyond reasonable doubt.

12. In the light of the above principles, we express our inability to accept the reasoning of the High Court in reducing the sentence of imprisonment to the period already undergone, that is, 15 days. Merely because the fine amount has been enhanced to Rs.25,000/- each, is also not a sufficient ground to drastically reduce the sentence, particularly, in a case where five persons died due to the negligent act of both the drivers of the bus and the truck. Accordingly, we set aside the impugned order of the High Court and impose a sentence of rigorous imprisonment for six months with a fine of Rs. 5,000/- each. The trial Court is directed to take appropriate steps for surrender of the accused in both the appeals to serve the remaining period of sentence. The appeals are allowed to the extent mentioned above.

R.P. Appeals allowed.

STATE OF M.P. & ANR.
v.
RAM PRAKASH SINGH & ANR.
(Criminal Appeal No. 104 of 2012)

JANUARY 10, 2012

[R.M. LODHA AND H.L. GOKHALE, JJ.]

Inquiry - Direction by High Court to CBI to enquire into the matter - Challenge to - Matter of escape of the criminals from the police custody and the role of various officers posted at the District - In a writ petition before the High Court, various directions issued from time to time to the State Government - Inaction/failure on part of the State Government in the matter - Order of High Court asking CBI to hold enquiry into the said matter - Appeal by State and Superintendent of Police before Supreme Court - Supreme Court stayed the order passed by the High Court and directed the Chief Secretary, State to appoint the Additional Chief Secretary to conclude the enquiry into the matter and submit the report - Pursuant thereto, President Board of Revenue was nominated by the Chief Secretary to hold the enquiry - Held: The direction given by the High Court to refer the matter to CBI to hold an enquiry into the matter has lost its relevance since the President Board of Revenue has already held the enquiry and submitted his report - Though the order of the High Court is set aside, the matter being grave, the State Government to take appropriate action against the erring official/s and to take all remedial measures - State Government directed to make amendment in the existing rules relating to the taking out of dangerous or sensitive prisoner to be transferred from one jail to another jail, for court appearance or on administrative grounds; as also State Government shall, in consultation with the High Court, take a decision about construction of single court room complexes for holding trial of dreaded criminals/dangerous prisoners in proximity to the Central Jails.

Four criminals escaped from the police custody with help and connivance of the police officers and/or negligence/inaction of the guards escorting them. Thereafter, they murdered 14 persons in the village. The police started torturing the persons from 'B' community. The first respondent filed writ petition alleging that after the escape of four dacoits from the police custody, the police had started torturing the persons from 'B' community in the District. It was prayed that the State and its functionaries be directed to refrain from causing torture to the people of the said community and directions be issued for their protection. The High Court issued various directions but the State Government failed to respond to the directions given by the High Court. Due to consistent inaction on the part of the State Government, the High Court asked the Central Bureau of Investigation to hold enquiry into the matter of escape of the criminals from the police custody and the role of the police officers posted in the District. Thus, the appellant-State Government and the Superintendent of Police filed the instant appeal.

This Court stayed the operation of the order of the High Court and directed the Chief Secretary, State to conclude the enquiry into the matter and submit the report. In pursuance thereof, President Board of Revenue conducted an enquiry and submitted report as regards the persons responsible for the said incident and also made suggestions in order to prevent repetition of such incident.

As regards the arrest of the said criminals who escaped from the custody, except one all are killed in the police encounters and the weapons snatched by the above criminals while escaping from the police custody have been recovered.

Disposing of the appeal, the Court

HELD: 1.1. Having regard to the fact that the order whereby the High Court directed the matter to be referred to CBI for holding enquiry into the matter of escape of the criminals from the police custody and the role of various officers posted at Gwalior has been stayed by this Court way back in the year 2004, and in 2007 the direction was given to the Chief Secretary, Madhya Pradesh to appoint the Additional Chief Secretary to conduct the enquiry into the said matter and pursuant thereto President Board of Revenue, Gwalior, was nominated by the Chief Secretary to hold the enquiry and he has already held the enquiry and submitted his report dated May 29, 2008, it is satisfied that the direction given by the High Court to refer the matter to CBI to hold an enquiry into the matter has lost its relevance, thus, the said direction is set aside. [Para 14] [62-A-C]

1.2. The escape of four dreaded criminals from the police custody and the murder of 14 innocent persons by these criminals after their escape are extremely serious matters. In the matter as grave as this, the State Government was expected to act promptly by taking action against the erring police officials but it failed to act, necessitating drastic order by the High Court. Though the order of the High Court impugned in the instant appeal is set aside, but the handling of the matter by the State Government and its functionaries has been far from satisfactory. The State Government should take appropriate action against the erring official/s without any further delay and also take all remedial measures to ensure that such things do not happen in future. [Para 15] [62-D-F]

1.3. The first appellant-State of Madhya Pradesh is directed, as suggested in the report submitted by the

President Board of Revenue, Gwalior (i) to make amendment in the existing rules and provide that dangerous prisoners shall not be taken out of jail for journey by public transport vehicles or private vehicles under any circumstances, and (ii) provide in the Jail Manual that whenever any dangerous or sensitive prisoner is to be transferred from one jail to another jail, for court appearance or on administrative grounds, the Jail Superintendent should inform the concerned Superintendent of Police and District Magistrate by a written communication as well as by meeting them. It is also directed that the State Government shall, in consultation with the High Court, take a decision about construction of single court room complexes for holding trial of dreaded criminals/dangerous prisoners in proximity to the Central Jails. The Action Taken Report about compliance of the above directions shall be submitted by the first appellant before the High Court. [Para 16 and 17] [62-G-H; 63-A-C]

CRININAL APPELLATE JURISDICTION : Criminal Appeal No. 104 of 2012.

From the Judgment & Order dated 08.11.2004 of the High Court of Madhya Pradesh Jabalpur Bench at Gwalior in I.A. No. 8405 of 2004 in W.P. No. 747 of 2001.

Vibha Datta Makhija for the Appellants.

Puneet Jain, Sambhav Sogani, Chirsti Jain, Rachitta P. Rai (for Pratibha Jain) for the Respondents.

The Judmgent of the Court was delivered by

R.M. LODHA, J. 1. Leave granted.

2. On March 23, 2001, a gang of four criminals comprising of Rambabu Gadariya, Dayaram, Pratap and Gopal, while returning from Dabra to Gwalior after attending court, escaped

from the police custody. Allegedly, these four criminals escaped with the help and connivance of the police officers and/or negligence/inaction of the guards escorting them. After escaping from the police custody, these four criminals murdered 14 persons in village Bhanwarpura. This led to harassment and torture of persons from gadariya (Baghel) caste by the police. They initially filed complaint with the District Judge, but later on the first respondent-Ram Prakash Singh filed a Writ Petition (being Writ Petition No. 747 of 2001) in the nature of Public Interest Litigation before the High Court of Madhya Pradesh, Bench at Gwalior.

3. In that Writ Petition, it was alleged that after escape of four dacoits noted above from police custody, the police has started torturing the persons from *Baghel* community in the Gwalior district. Accordingly, it was prayed that the State of Madhya Pradesh and its functionaries (respondents therein) be directed to refrain from causing torture to the people of *Baghel Samaj* in the district of Gwalior and directions be issued for protection of their life and liberty.

4. The matter came up for consideration before the High Court on various dates. As the matter was in the nature of public interest litigation and the grievance was raised that the above criminals after their escape were causing havoc and they have not been taken into custody by the police which has caused huge fear in the minds of the people of the area, the High Court issued various directions from time to time. The High Court asked the State Government to hold an enquiry into the escape of above criminals from the police custody and submit the report regarding action taken against the officers responsible for the lapse. Despite numerous opportunities, the State Government failed to respond to the directions given by the High Court satisfactorily which constrained the High Court to direct the Director General of Police, Madhya Pradesh, to remain present in the Court. It appears that the Advocate General of the State of Madhya Pradesh made a statement before the High Court

that the enquiry into the episode shall be conducted by a very senior office of the State and report submitted to the Court. However, nothing happened in the matter. The High Court then called the Principal Secretary (Home) in the Court. The Principal Secretary (Home) appeared and made a statement that the enquiry into the matter shall be conducted within a period of two months from March 9, 2004. On June 30, 2004, on behalf of the State Government, time was sought for submission of the enquiry report, but no enquiry report was submitted. In the backdrop of consistent inaction on the part of the State Government in the matter, on November 8, 2004, the High Court asked the Central Bureau of Investigation (CBI) to hold enquiry into the matter of escape of the above criminals from the police custody and the role of the officers posted at Gwalior, particularly the role of Superintendent of Police, Gwalior, Inspector General of Police, Gwalior, Superintendent, Central Jail, Gwalior, Jailor, Central Jail, Gwalior, District Magistrate, Gwalior, Town Inspector, Gwalior and Sub-Divisional Officer posted at Dabra. It is this order which has been challenged by the State of Madhya Pradesh and Superintendent of Police in this Appeal, by special leave.

5. On December 17, 2004, this Court issued notice to the respondents and stayed operation of the order of the High Court impugned in the Appeal.

6. On November 28, 2007, this Court directed the Chief Secretary, State of Madhya Pradesh, to appoint the Additional Chief Secretary to conclude the enquiry into the matter as expeditiously as possible and in any event within three months from the date of the order and submit a report to this Court.

7. In pursuance of the order dated November 28, 2007, an enquiry has been conducted by Shri Rakesh Bansal, IAS, President Board of Revenue, Gwalior.

8. In his report dated May 29, 2008, the President Board of Revenue, Gwalior, recorded his conclusions thus :-

> "10. ..., I reach to the conclusion that the then S.P. Shri Anvesh Manglam, can not be held responsible for the incident of escape of dacoits from police custody.
>
> 13. ...., I reach to the conclusion that Shri Yogesh Choudhary and Shri K.P. Sharma the then Deputy Superintendent of Police (Headquarters) can not be held responsible for this incident of escape of Gadaria gang from police custody.
>
> 14. ... For the whole chain of events, most responsible person is Reserve Inspector Ajay Tripathi only.
>
> 15. It is worth to mention here that Government has already dismissed/compulsorily retired from service two Head Constables and four constables deployed in the escort duty of dacoits for carrying them for appearance before court at the time of their escape."

9. It appears that the disciplinary proceedings initiated against the Reserve Inspector Ajay Tripathi have not been taken to logical conclusion in view of the stay order obtained by him in a judicial proceeding.

10. In his report, Shri Rakesh Bansal, IAS, President Board of Revenue, Gwalior has also made certain suggestions in order to prevent repetition of such incident. These suggestions are:-

> "16(1) It should be provided in the Rules that dangerous prisoners must not be taken out of jail for journey by public transport vehicles or private vehicles, under any circumstances.
>
> (2) Keeping in view the possibility of escape during transport of prisoners, it appear to be prudent that one

regular court room be constructed in proximity to the central Jails.

The suggestion of the same intent has also been mentioned by the then Commissioner of Gwalior Division in his enquiry report on the page 27.

(3) It must be provided in the Jail Manual, that whenever any dangerous or sensitive prisoner is to be transferred from one jail to another jail, for court appearance or on administrative grounds, the jail superintendent should inform the concerned Superintendent of Police and District Magistrate vide a demi-official letter and by meeting them personally."

11. No affidavit has been filed by the present appellants indicating whether the above suggestions of the President, Board of Revenue, have been accepted by the State Government or not. However, Ms. Vibha Datta Makhija, learned counsel for the appellants, submited that the State Government did not have any reservation in accepting the suggestions made by the President, Board of Revenue, in his report as noted above.

12. As regards the arrest of the above criminals who escaped from police custody on March 23, 2001, in the additional affidavit filed by U.R. Netam, I.G. of Police, Police Headquarters, Bhopal, Madhya Pradesh, dated April 01, 2007, it has been stated that 4 out of 5 dacoits of the gang have been killed in police encounters and only Rambabu Gadaria is believed to be alive. It has also been stated that all the weapons snatched by the above criminals while escaping from police custody have been recovered.

13. Ms. Vibha Datta Makhija, learned counsel for the appellants, stated that Criminal Writ Petition No. 747 of 2001 was still pending before the High Court.

14. Having regard to the fact that the order dated November 8, 2004 whereby the High Court directed the matter to be referred to CBI for holding enquiry into the matter of escape of above criminals from the police custody and the role of various officers posted at Gwalior has been stayed by this Court way back in the year 2004, and in 2007 the direction was given to the Chief Secretary, Madhya Pradesh to appoint the Additional Chief Secretary to conduct the enquiry into the above matter and pursuant thereto Shri Rakesh Bansal, IAS, President Board of Revenue, Gwalior, was nominated by the Chief Secretary to hold the enquiry and he has already held the enquiry and submitted his report dated May 29, 2008, we are satisfied that the direction given by the High Court to refer the matter to CBI to hold an enquiry into the matter has lost its relevance. We, accordingly, set aside the said direction.

15. The escape of four dreaded criminals from the police custody and the murder of 14 innocent persons by these criminals after their escape are extremely serious matters. In the matter as grave as this, the State Government was expected to act promptly by taking action against the erring police officials but it failed to act, necessitating drastic order by the High Court. Though we have set aside the order of the High Court impugned in this Appeal for the reasons noted above, but the handling of the matter by the State Government and its functionaries has been far from satisfactory. We would like the State Government to take appropriate action against the erring official/s without any further delay and also take all remedial measures to ensure that such things do not happen in future.

16. We direct the first appellant-State of Madhya Pradesh, as suggested in the report submitted by Shri Rakesh Bansal; (i) to make amendment in the existing rules and provide that dangerous prisoners shall not be taken out of jail for journey by public transport vehicles or private vehicles under any circumstances, and (ii) provide in the Jail Manual that whenever any dangerous or sensitive prisoner is to be transferred from

one jail to another jail, for court appearance or on administrative grounds, the Jail Superintendent should inform the concerned Superintendent of Police and District Magistrate by a written communication as well as by meeting them. We also direct that the State Government shall, in consultation with the High Court, take a decision about construction of single court room complexes for holding trial of dreaded criminals/dangerous prisoners in proximity to the Central Jails.

17. The Action Taken Report about compliance of the above directions shall be submitted by the first appellant before the High Court.

18. With the above directions, Appeal stands disposed of.

19. It shall be open to the High Court to issue further directions, if necessary, in Criminal Writ Petition No. 747 of 2001, which is said to be still pending before the High Court of Madhya Pradesh, Bench at Gwalior.

N.J. Appeal disposed of.

MOHD. HUSSAIN @ JULFIKAR ALI

v.

THE STATE (GOVT. OF NCT) DELHI

(Criminal Appeal No. 1091 of 2006)

JANUARY 11, 2012

[H.L. DATTU AND CHANDRAMAULI KR. PRASAD, JJ.]

Penal Code, 1860 - ss. 302/307 - Explosives Substances Act, 1908 - s. 3 - Explosion in bus - Death of 4 persons and 24 persons sustained serious injuries - Capital punishment - Conviction of appellant alongwith death sentence for offences u/ss. 302/307 and s. 3 of the 1908 Act by the courts below - Challenged, on the ground that he was not given the assistance of a lawyer to defend himself during the trial - Held: In view of difference of opinion as regards the issue whether the matter requires to be remanded for de novo trial of the appellant after giving him the assistance of a counsel, matter referred to the larger Bench.

An explosion took place inside a bus in which four passengers died and 24 persons sustained serious injuries. Investigations were carried out and on the basis of the information received suspicion arose as to involvement of the appellant, national of Pakistan in the incident. The appellant was convicted and sentenced to death for commission of offences under Sections 302/307 IPC and Section 3 of the Explosives Substances Act, 1908 by the trial court. The trial court filed a Reference for confirmation of death sentence. The High Court allowed the Reference and dismissed the appeal filed by the appellant.

The appellant pleaded before the trial court as also the High Court that he was not given a fair and impartial trial and was denied the right of a counsel. During the

committal proceedings before the Magistrate, the appellant was assisted by counsel 'V' employed by the State. When the case was committed to the Court of Sessions, counsel 'F' was employed by the State to assist the appellant but he disappeared from the scene before the conclusion of the trial. The court did not appoint any counsel to defend his case. Examination of 56 witnesses including the eye-witnesses and the investigating officer was done when accused was not represented by an advocate. None of the 56 witnesses were cross-examined by the appellant. During the last stages of the trial a counsel was appointed. She filed an application to cross-examine only one of the prosecution witnesses and the same was allowed.

Therefore, the appellant filed the instant appeal.

Referring the matter to the larger Bench, the Court

HELD:

Per Dattu J:

1.1. The records would disclose that during the committal proceedings before the Magistrate, the appellant was assisted by a counsel 'V' employed by the State. He continued till the case was committed to the Court of Sessions Judge. Before the said court, 'F' was employed by the State to assist the appellant. He participated in the proceedings before the Sessions Judge only on few days of the trial. After he stopped attending the proceedings, that too at the fag end of the trial, another counsel was appointed to assist the appellant. The record further discloses that immediately, on completion of the investigation, a charge sheet punishable under Section 302/307/120-B of the IPC read with Section 3/4/5 of the Explosive Substances Act was filed in the court of Metropolitan Magistrate against the

appellant and others by the prosecuting agency. After completing the necessary formalities, the case was committed to the Court of Sessions by the Metropolitan Magistrate. The Sessions Judge, after discharging the other accused persons, had framed charges against the appellant under Section 302/307 of the IPC read with Section 3/4 of the Explosive Substances Act, to which, the appellant denied his guilt and claimed to be tried. The appellant was initially assisted by a counsel employed by the Sessions Judge. However, in the mid way, the counsel disappeared from the scene, that is, before conclusion of the trial. It is apparent from the records that he was not asked whether he is able to employ counsel or wished to have counsel appointed. When the parties were ready for the trial, no one appeared for the accused. The Court did not appoint any counsel to defend the accused. Of course, if he had a defence counsel, it was not necessary for the court appointing anybody as a counsel. If he did not have a counsel, it is the mandatory duty of the court to appoint a counsel to represent him. The record reveals that the evidences of 56 witnesses, out of the 65 witnesses, examined by the prosecution in support of the indictment, including the eye witnesses and the Investigating Officer, were recorded by the trial court without providing a counsel to the appellant. The record also reveals that none of the 56 witnesses were cross-examined by the accused/appellant. It is only thereafter, the wisdom appears to have dawned on the trial court to appoint a counsel on 04.12.2003 to defend the appellant. The evidences of the prosecution witnesses from 57 to 65 were recorded in the presence of the freshly appointed counsel, who thought it fit not to cross-examine any of those witnesses. Before the conclusion of the trial, she had filed an application to cross-examine only one prosecution witness and that prayer in the application had been granted by the trial court and the counsel had performed the formality of

cross-examining this witness. In this casual manner, the trial, in a capital punishment case, was concluded by the trial court. It would, thus, be seen that the trial court did not think it proper to appoint any counsel to defend the appellant/accused, when the counsel engaged by him did not appear at the commencement of the trial nor at the time of recording of the evidence of the prosecution witnesses. The accused did not have the aid of the counsel in any real sense, although, he was as much entitled to such aid during the period of trial. The record indicates that the appointment of counsel and her appearance during the last stages of the trial was rather proforma than active. It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case, to confront the witnesses against him not only on facts but also to discredit the witness by showing that his testimony-in-chief was untrue and unbiased. [Paras 8 and 9] [97-D-H; 98-A-H; 99-A-B]

1.2. Every person has a right to a fair trial by a competent court in the spirit of the right to life and personal liberty. The object and purpose of providing competent legal aid to undefended and unrepresented accused persons are to see that the accused gets free and fair, just and reasonable trial of charge in a criminal case. [Para 11] [100-D-E]

1.3. The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result, the accused charged with a serious offence must not be stripped of his valuable right of a fair and impartial trial. To do that, would be negation of concept of due process of law, regardless of the merits of the appeal. The Cr.P.C. provides that in all criminal prosecutions, the accused has a right to have the assistance of a counsel and the Cr.P.C. also requires the court in all criminal cases, where

the accused is unable to engage counsel, to appoint a counsel for him at the expenses of the State. Howsoever guilty the appellant upon the inquiry might have been, he is until convicted, presumed to be innocent. It was the duty of the court, having these cases in charge, to see that he is denied no necessary incident of a fair trial. In the instant case, not only the accused was denied the assistance of a counsel during the trial and such designation of counsel, as was attempted at a late stage, was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. The court ought to have seen to it that in the proceedings before the court, the accused was dealt with justly and fairly by keeping in view the cardinal principles that the accused of a crime is entitled to a counsel which may be necessary for his defence, as well as to facts as to law. The same yardstick may not be applicable in respect of economic offences or where offences are not punishable with substantive sentence of imprisonment but punishable with fine only. The fact that the right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all the judicial proceedings. The necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of a counsel was a denial of due process of law. It is equally true that the absence of fair and proper trial would be violation of fundamental principles of judicial procedure on account of breach of mandatory provisions of Section 304 Cr.P.C. [Para 17] [111-H; 112-A-G]

1.4. After carefully going through the entire records of the trial court, it is found that the appellant/accused was not provided the assistance of a counsel in a substantial and meaningful sense. To hold and decide otherwise, would simply to ignore actualities and also

would be to ignore the fundamental postulates, already adverted to. [Para 18] [112-G-H; 113-A]

1.5. The submission that since no prejudice is caused to accused in not providing a defence counsel, this Court need not take exception to the trial concluded by the Sessions Judge and the conviction and sentence passed against the accused, cannot be accepted. The Cr.P.C. ensures that an accused gets a fair trial. It is essential that the accused is given a reasonable opportunity to defend himself in the trial. He is also permitted to confront the witnesses and other evidence that the prosecution is relying upon. He is also allowed the assistance of a lawyer of his choice, and if he is unable to afford one, he is given a lawyer for his defence. The right to be defended by a counsel is a principal part of the right to fair trial. If these minimum safeguards are not provided to an accused; that itself is "prejudice" to an accused. [Para 19] [113-B-E]

Rafiq Ahmad alias Rafi vs. State of U.P. **(2011) 8 SCC 300 - referred to.**

1.6. The judgments impugned cannot be sustained. The conviction and sentence imposed by the Additional Sessions Judge is set aside and the judgment and order passed by the High Court and remand the case to the trial court for fresh disposal in accordance with law with a specific direction that the trial court would assist the accused by employing a State counsel before the commencement of the trial till its conclusion, if the accused is unable to employ a counsel of his own choice. Since the incident is of the year 1997, the trial court is directed to conclude the trial as expeditiously as possible at any rate within an outer limit of three months from the date of communication of this order and report the same to this Court. [Para 21] [115-D-E]

Kartar Singh vs. State of Punjab **(1994) 3 SCC 569: 1994 (2) SCR 375;** *Jayendra Vishnu Thakur Vs. State of Maharashtra* **(2009) 7 SCC 104: 2009 (8) SCR 591;** *Zahira Habibullah Sheikh (5) vs. State of Gujarat* **(2006) 3 SCC 374: 2006 (2) SCR 1081;** *M.H. Hoskot vs. State of Maharashtra* **1978 (3) SCC 544: 1979 (1) SCR 192;** *Mohd. Sukur Ali vs. State of Assam* **(2011) 4 SCC 729: 2011 (3) SCR 209;** *Hussainara Khatoon and Ors. vs. Home Secy., State of Bihar* **(1980) 1 SCC 98 :1979 (3) SCR 532;** *Khatri Vs. State of Bihar* **(1981) 1 SCC 627: 1981 (2) SCR 408;** *Ram Awadh vs. State of U.P.* **1999 Cr.L.J. 4083 - referred to.**

Per Chandramauli Kr. Prasad, J:

1.1. The trial court, during all this long period, did not realize that the appellant was not represented by any counsel and it is on 4th December, 2003 the appellant brought to the notice of the trial court that for the last several dates, the counsel appointed by the court was not present and thus, a new counsel be appointed. It is on the appellant's prayer that 'SB', Advocate present in the court on the said date, was appointed to defend the appellant at the expenses of the State. Thereafter, on 22nd December, 2003, in the presence of said 'SB', counsel for the appellant, evidences of doctors-P.W.57 and 58; and P.W.59- ASI were recorded. Thereafter, the statements of the witnesses from P.Ws.60 to 65 were recorded in the presence of appellant's counsel, 'SB'. Ultimately the statement of the appellant was recorded on 6th October, 2004 and argument on behalf of prosecution was heard in part. Next hearing took place on 8th October, 2004 when the argument on behalf of the prosecution was concluded and the case was adjourned to 12th October, 2004 for defence argument. During all this period the appellant was in custody. It is only when the argument on behalf of the appellant was to be heard,

counsel representing him later i.e. 'SB' realized that the witnesses were examined and discharged without cross-examination in the absence of the defence counsel and accordingly, an application was filed for recall of P.W.1 for cross-examination. The said prayer was allowed and P.W.1 was cross-examined and discharged on 23rd October, 2004. The trial court recorded on said date that the accused had not prayed for cross-examination of any other witness and accordingly, it heard the argument and posted the case for judgment on 26th October, 2004. The appellant was held guilty and sentenced. [Para 7] [118-G-H; 119-A-F]

1.2. While holding the appellant guilty the trial court has not only relied upon the evidence of the witnesses who have been cross-examined but also relied upon the evidence of witnesses who were not cross-examined. The fate of the criminal trial depends upon the truthfulness or otherwise of the witnesses and, therefore, it is of paramount importance. To arrive at the truth, its veracity should be judged and for that purpose cross-examination is an acid test. It tests the truthfulness of the statement made by a witness on oath in examination-in-chief. Its purpose is to elicit facts and materials to establish that the evidence of witness is fit to be rejected. The appellant in the instant case was denied this right only because he himself was not trained in law and not given the assistance of a lawyer to defend him. Poverty also came in his way to engage a counsel of his choice. [Para 8] [119-G-H; 120-A-B]

1.3. The conviction and sentence can be inflicted only on culmination of the trial which is fair and just. There is no manner of doubt that in the adversary system of criminal justice, any person facing trial can be assured a fair trial only when the counsel is provided to him. Its roots are many and find places in manifold ways. It is

internationally recognized by covenants and Universal Declaration of Human Rights, constitutionally guaranteed and statutorily protected. [Para 9] [120-C-D]

1.4. Article 14 of the International Covenant on Civil and Political Rights guarantees to the citizens of nations signatory to that covenant various rights in the determination of any criminal charge and confers on them the minimum guarantees. Article 14(3)(d) entitles the person facing the criminal charge either to defend himself in person or through the assistance of a counsel of his choice and if he does not have legal assistance, to be informed of his right and provide him the legal assistance without payment in case he does not have sufficient means to pay for it. It is accepted in the civilized world without exception that the poor and ignorant man is equal to a strong and mighty opponent before the law. But it is of no value for a poor and ignorant man if there is none to inform him what the law is. In the absence of such information that courts are open to him on the same terms as to all other persons the guarantee of equality is illusory. The said International Covenant on Civil and Political Rights guarantees to the indigent citizens of the member countries the right to be defended and right to have legal assistance without payment. Not only this, the Universal Declaration on Human Rights ensures due process and Article 10 thereof provides that everyone is entitled in full equality to a fair hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charges against him. Article 11 of Universal Declaration of Human Rights guarantees everyone charged with a penal offence all the guarantees necessary for the defence. [Paras 10 and 11] [120-E-F; 121-D-H; 122-A-B]

1.5. Article 21 of the Constitution of India commands in emphatic terms that no person shall be deprived of his life or personal liberty except according to the procedure

established by law and Article 22 (1) thereof confers on the person charged to be defended by a legal practitioner of his choice. Article 39 A casts duty on the State to ensure that justice is not denied by reason of economic or other disabilities in the legal system and to provide free legal aid to every citizen with economic or other disabilities. [Para 12] [122-E-F]

1.6. Besides the International Covenants and Declarations and the constitutional guarantees Section 303 Cr.P.C. gives right to any person accused of an offence before a criminal court to be defended by a pleader of his choice. Section 304 Cr.P.C. contemplates legal aid to accused facing charge in a case triable by Court of Sessions at State expense. From a plain reading of Section 304 Cr.P.C., it is evident that in a trial before the Court of Sessions if the accused is not represented by a pleader and has not sufficient means, the court shall assign a pleader for his defence at the expense of the State. The entitlement to free legal aid is not dependent on the accused making an application to that effect, in fact, the court is obliged to inform the accused of his right to obtain free legal aid and provide him with the same. [Para 13] [122-G-H; 123-A, G-H; 124-A]

1.7. The right of a person charged with crime to have the services of a lawyer is fundamental and essential to fair trial. The right to be defended by a legal practitioner, flowing from Article 22 (1) of the Constitution has further been fortified by the introduction of the Directive Principles of State Policy embodied in Article 39 A of the Constitution by the 42nd Amendment Act of 1976 and enactment of sub-section 1 of Section 304 of the Code of Criminal Procedure. Legal assistance to a poor person facing trial whose life and personal liberty is in jeopardy is mandated not only by the Constitution and the Code of Criminal Procedure but also by International Covenants and Human Rights Declarations. If an accused

too poor to afford a lawyer is to go thorough the trial without legal assistance, such a trial cannot be regarded as reasonable, fair and just. The right to be heard in criminal trial would be inconsequential and of no avail if within itself it does not include right to be heard through counsel. One cannot lose sight of the fact that even intelligent and educated men, not trained in law, have more than often no skill in the science of law if charged with crime. Such an accused not only lacks both the skill and knowledge adequately to prepare his defence but many a time looses his equilibrium in face of the charge. A guiding hand of counsel at every step in the proceeding is needed for fair trial. If it is true of men of intelligence, how much true is it of the ignorant and the illiterate or those of lower intellect! An accused without the lawyer faces the danger of conviction because he does not know how to establish his innocence. [Para 14] [124-B-G]

1.8 The accused is a Pakistani and seems illiterate. He asked for engagement of a counsel to defend him at State expenditure which was provided but unfortunately for him the counsel so appointed remained absent and a large number of witnesses have been examined in the absence of the counsel. Those witnesses have not been cross-examined and many of them have been relied upon for holding the appellant guilty. The judge in seisin of the trial forgot that he has an overriding duty to maintain public confidence in the administration of justice, often referred to a duty to vindicate and uphold the majesty of law. He failed to realize that for an effective instrument in dispensing justice he must cease to be a spectator and a recording machine but a participant in the trial evincing intelligence and active interest so as to elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth and administer justice with fairness and impartiality both to the parties and to the community

itself. Fundamental principles based on reason and reflection in no uncertain term recognize that the appellant haled into court in the adversary system of criminal justice and ultimately convicted and sentenced without a fair trial. [Para 15] [124-H; 125-A-D]

Hussainara Khatoon & Ors. v. Home Secy. State of Bihar **(1980) 1 SCC 98:1979 (3) SCR 532- referred to.**

1.9. The direction for his de novo trial cannot be given at such a distance of time. For an occurrence of 1997, the appellant was arrested in 1998 and since then he is in judicial custody. The charge against him was framed on 18.02.1999 and it took more than five years for the prosecution to produce its witnesses. True it is that in the incident four persons have lost their lives and several innocent persons have sustained severe injuries. Further, the crime was allegedly committed by a Pakistani but these factors do not cloud the reason. After all, India is a democratic country and governed by rule of law. The appellant must be seeing the hangman's noose in his dreams and dying every moment while awake from the day he was awarded sentence of death, more than seven years ago. The right of speedy trial is a fundamental right and though a rigid time limit is not countenanced but in the facts of the instant case, after such a distance of time it would be travesty of justice to direct for the appellant's de novo trial. By passage of time, it is expected that many of the witnesses may not be found due to change of address and various other reasons and few of them may not be in this world. Thus, any time limit to conclude the trial would not be pragmatic. [Para 16] [126-B-F]

1.10. The conviction and sentence of the appellant is vitiated, not on merit but on the ground that his trial was not fair and just. [Para 17] [126-G]

1.11. Appellant admittedly is a Pakistani, he has admitted this during the trial and in the statement under Section 313 of the Code of Criminal Procedure. His conviction and sentence is found illegal and the natural consequence of that would be his release from the prison but in the facts and circumstances of the case, it is directed that he be deported to his country in accordance with law and till then he would remain in jail custody. Appellant's conviction and sentence is set aside with the aforesaid direction. [Paras 18 and 19] [126-H; 127-A-B]

Case Law Reference:

Per H.L. Dattu J		
1994 (2) SCR 375	**Referred to.**	**Para 9**
2009 (8) SCR 591	**Referred to.**	**Para 10**
2006 (2) SCR 1081	**Referred to.**	**Para 11**
1979 (1) SCR 192	**Referred to.**	**Para 12**
2011 (3) SCR 209	**Referred to.**	**Para 13**
1979 (3) SCR 532	**Referred to.**	**Para 14**
1981 (2) SCR 408	**Referred to.**	**Para 15**
1999 Cr.L.J. 4083	**Referred to.**	**Para 16**
(2011) 8 SCC 300	**Referred to.**	**Para 19**
Per Chandramauli Kr. Prasad J		
1979 (3) SCR 532	**Referred to.**	**Para 15**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1091 of 2006.

From the Judgment & Order dated 04.08.2006 of the High Court of Judicature at Delhi Bench in Criminal Appeal No. 41 of 2005.

Md. Mobin Akhtar, Arun Kumar Beriwal for the Appellant.

J.S. Atry, V.K. Biju, Rahul Kaushik, Anil Katiyar, D.S. Mahra for the Respondent.

The Judgments & order of the Court was delivered by

H. L. DATTU, J. 1. A convict, who is facing the threat of death gallows, is before us in this appeal. He is an illiterate foreign national and unable to engage a counsel to defend himself. He is tried, convicted and sentenced to death by the Additional Sessions Judge, Delhi in Sessions Case No.122 of 1998 dated 03.11.2004 without assignment of counsel for his defence. Such a result is confirmed by the High Court on a reference made by the Trial Court for confirmation of death sentence and has dismissed the appeal filed by the appellant vide its order dated 04.08.2006.

2. The convict, (hereinafter referred to as "appellant") is charged, convicted and sentenced under Sections 302/307 of Indian Penal Code (in short, "IPC") and also under Section 3 of The Explosive Substances Act, 1908. The case of the prosecution, as noticed by the High Court, which appears to be accurate statement of facts, proceeds on these lines :

> "2. On 30-12-1997 at about 6.20 p.m. one blueline bus No.DL-IP-3088 carrying passengers on its route to Nangloi from Ajmeri Gate stopped at the Ram Pura Bus Stand on Rohtak Road for passengers to get down. The moment that bus stopped there an explosion took place inside the bus because of which its floor got ripped apart. Four passengers of that bus, namely, Ms. Tapoti, Taj Mohd. Narain Jha and Rajiv Verma died and twenty four passengers including the conductor of that bus were injured due to that explosion. Two policemen (PWs 41 & 52) were on checking duty at that but stop at the time of blast. On their informing the local police station police

> team reached the spot. Crime team and bomb disposal squad were also called and the damaged bus was inspected and from the spot debris etc. were lifted and sealed.

3. On the basis of the statement of Head Constable Suresh (PW-41), who was one of the two policemen on duty at the bus stop of Rampura, a case under Section 307 IPC and Section 3, 4 and 5 of the Explosive Substances Act was registered at Punjabi Bagh police station. Investigation commenced immediately. With the death of some of the injured persons on the day of the incident itself Section 302 IPC was also added. Hunt for the culprits responsible for that macabre incident also started. However, for over two months nobody could be nabbed.

4. It appears that as a result of different incidents of bomb blasts in Delhi including the present one the intelligence agencies became more active and started gathering information about the incidents of bomb blasts in the city. It came to light that some persons belonging to terrorist organizations were actively operating in the city of Delhi for causing terror by killing innocent people and causing damage to public property by exploding bombs. On the basis of secret information the police raided some houses in different parts of Delhi on 27.02.1998 and from those houses hand grenades and material used for making bombs was recovered in large quantity. The chemicals recovered were sent to CFSL, which confirmed that the same were potassium chlorate and sulphuric acid and were opined to be constituents of low explosives. Some persons were arrested also and during interrogation they had disclosed to the police that they were members of a terrorist organization and their aim was to create terror and panic in different parts of the country by exploding bombs to take revenge for the killings of innocent muslims (sic.)

in India and further that they had come to India for Jehad. On 27.02.1998 itself the police had registered a case vide FIR No.49 of 1998 under Sections 121/121-A IPC and Sections 3, 4 & 5 of the Explosive Substances Act as well under Section 25 of the Arms Act at Main Delhi Railway Station. On the basis of information provided by the apprehended terrorists the police made more arrests including that of one Mohd. Hussain (who now is the appellant before us in Crl. A. No.41 of 2005 and reference to him will now onwards be made as 'the appellant'). The appellant was apprehended when his house in Lajpat Nagar was raided pursuant to the information given by other apprehended terrorists. As per the prosecution case the appellant himself had opened the door on being knocked by the police and on seeing the police party he had tried to fire at the policemen from the pistol which he was having in his hand at that time but could not succeed and was apprehended. His pistol was seized. It appears that during the interrogation by the police the appellant and three more persons, namely, Abdul Rehman, Mohd. Ezaz Ahmed and Mohd. Maqsood confessed about their involvement in the present incident of bomb blast in the bus on 30.12.1997. That information was then passed over to Punjabi Bagh police station on 18.03.1998 by the Crime Branch and accordingly all these four persons were formally arrested for the present case also on 21.3.1998 for which date the investigating officer of the present case had sought their production in court by getting issued production warrants from the court seized of the above referred case of FIR No.49/1998. The investigating officer moved an application before the concerned court on the same day for holding of Test Identification Parade (TIP) in respect of the appellant in view of the suspicion expressed by PW-1 Darshan Kumar, the conductor of the bus involved in the blast regarding one passenger who had boarded his bus from Paharganj bus stop along with a

rexine bag for going to Nangloi but instead of going upto Nangloi he had got down from the bus at Karol Bagh leaving his rexine bag underneath the seat which he had taken and which was near the seat of the conductor. The conductor had given the description of that passenger. As per the prosecution case the explosion had taken place below that seat which that passenger had occupied and underneath which he had kept his rexine bag. Although on 21-03-98 the appellant did not object to holding of identification parade but he refused to joint test identification parade which was fixed for 23-03-98 stating that police had taken his photographs.

5. During the investigation of the present case the debris collected from the place of bomb blast and some damaged pieces of the bus etc. were sent to Central Forensic Laboratory (CFSL) and after examination it was revealed that in the seized material contained explosive mixture of chlorate, Nitrate, Sulphate and sugar were detected. Mixture of these chemicals, as per CFSL, report Ex. PW-34/A, is used for making explosives/bombs and the mixture could have been initiated by the action of sulphuric acid and the mixture was "explosive substance".

6. On completion of investigation of the present case the police filed a charge-sheet in Court against four accused persons for the commission of offences under Sections 302/307/120-B IPC and Sections 3 and 4 of the Explosive Substances Act. In due course the four persons were committed to Sessions Court. The learned Additional Sessions Judge vide order dated 18.2.1999 discharged three accused persons namely, Abdul Rehman, Mohd. Maqsood and Ezaz Ahmed while against fourth accused Mohd. Hussain @ Julfikar (the appellant herein) charges under Sections 302/307 IPC and Section 3 and in the alternative u/s 4(b) of the Explosive Substances Act were framed. The appellant had pleaded not guilty to the

charges framed against him and claimed to be tried."

3. The prosecution had examined as many as 65 witnesses and on conclusion of prosecution evidence, statement of the appellant was recorded under Section 313 of the Code of Criminal Procedure (in short, "Cr.P.C"), who had denied his guilt and pleaded false implication. The Trial Court, upon appreciation of evidence of the prosecution witnesses, held the appellant guilty of the charges and accordingly, imposed death penalty. The conviction and sentence is affirmed by the High Court. At this stage itself, it is relevant to notice that the appellant had pleaded, both before the Trial Court and the High Court, that he was not given a fair and impartial trial and he was denied the right of a counsel. The High Court has noticed this contention and has answered against the appellant. In the words of the High Court :

"45. Faced with this situation Mr. Luthra came out with an arguments that this case, in fact, needs to be remanded back to the trial back for a fresh trial because the trial court record would reveal that the accused did not have a fair trial inasmuch as on most of the hearing when material witnesses were examined he was unrepresented and the trial court did not bother to provide him legal aid at State expense and by not doing that the Trial Court, in fact, failed to discharge its pious duty of ensuring that the accused was defended properly and effectively at all stages of the trial either by his private counsel or in the absence of private counsel by an experienced and responsible amicus curiae. Mr. Luthra also submitted that, in fact, the learned Additional Sessions Judge himself should have taken active part at the time of recording of evidence of prosecution witnesses by putting questions to the witnesses who had been examined in the absence of counsel for the accused. It was contended that the right of the accused ensured to him under Articles 21 and 22 of the Constitution of India for a fair trial has been, thus,

violated. In support of this argument which, in fact, appears to us to be the sheet anchor for the appellant, Mr. Siddharth Lutha cited some judgments also of the Hon'ble Supreme Court which are reproduced as AIR 1997 SC 1023, 1994 Supp. (3) SCC 321, AIR 1986 SC 991 and 1983 (III) SCC 307. One judgment of Gauhati High Court reported as 1987 (1) Crimes 133, *"Arjun Karmakar Vs. State of Assam"* was also relied upon by Mr. Luthra.

46. There can be no dispute about the legal proposition put forward by the learned counsel for the appellant that it is the duty of the Court to see and ensure that an accused in a criminal trial is represented with diligence by a defence counsel and in case an accused during the trial remains unrepresented because of poverty etc., it becomes the duty of the Court to provide him legal aid at State expense. We find from the judgment of the trial Court that this point was raised on behalf of the accused during the trial also by the amicus curiae provided to the accused when his private counsel stopped appearing for him. The learned trial Court dealt with this arguments in para no.101 of the judgment which is as under:-

"It is next submitted that material witnesses have not been cross examined by the accused and as such, their testimony cannot be read against him. I may add that from the very beginning of the trial, the accused has been represented by a counsel Sh. Riaz Mohd. and he had cross-examined some of the witnesses. Later on, when Sh. Riaz Mohd. did not appear in the Court on some dates, Mrs. Sadhna Bhatia was appointed as Amicus-Curiae to defend the accused at State expenses. If the accused did not choose to cross examine some witnesses, he cannot be forced to do so. Moreover, later one accused prayed for cross-examination of PW-1 Sh. Darshan Kumar, which was allowed though it was filed at a belated stage after a long period of time. The accused did not desire any other

witness to be cross examined. Not only this, statement of PW-1 Sh. Darshan Kumar was recorded on 18-05-1999 and he was also present on 3-6-1999 and 13-08-1999, but on all three dates, the cross-examination of this witness was deferred at the request of the accused, who was ultimately discharged with nil cross-examination. This shows that accused himself was not interested in cross-examining the witnesses. As such, this submission is also without merit."

47. We have ourselves also perused the trial court record and we are convinced that it is not a case where it can be said that the accused did not have a fair trial or that he had been denied legal aid. We are in full agreement with the above quoted views of the learned Additional Sessions Judge on this objection of the accused and we refuse to accept the plea of the appellant that this case should be remanded back for a re-trial."

4. I have heard learned counsel Mr. Mobin Akhtar for the appellant and Mr. J.S. Atri, learned senior counsel for the State.

5. In this Court, the judgments are assailed, apart from the merits, that the appellant is denied due process of law and the conduct of the trial is contrary to procedure prescribed under the provisions of Cr. P.C. and, in particular, that he was not given a fair and impartial trial and was denied the right of a counsel. Since the aforesaid issue is of vital importance, I have thought it fit to answer that issue before I discuss the merits of the appeal. Therefore, firstly, I will consider the issue; whether the appellant was given a fair and impartial trial and, whether he was denied the right of a counsel. To answer this issue, it may not be necessary to discuss the facts of the case or the circumstances surrounding the prosecution case except so far they reflect upon the aforesaid issue.

6. To answer the aforesaid issue, it is necessary to look at the proceedings of the Trial Court which are as under:

"6.7.98

Pr: APP

All accused in j/c.

All accused stated that they are not in position to engage any lawyer and be provided with a lawyer from legal aid.

Legal assistance be provided to all accused from legal aid.

All accused requested further time for making scrutiny of documents. Allowed. Put up on 20.7.98 for scrutiny..

Sd/-
MM/Delhi

20/7/98

Pr: APP

All accused in judicial custody with Sh. V.K. Jain,Adv.

Sh. Jain requested time for making scrutiny of documents.

Sh. Jain sates that he is applying for further time (illegible)_____.

Allowed.

Put up on 29/7/98 for scrutiny.

Sd./-
MM/Delhi
20.7.98

29/7/98

Pr: APP

All accused in j/c with Sh. V.K. Jain,Adv. from Legal Aid.

Shri Jain requests for further time.

Allowed. Put up on 6/8/98 for scrutiny.

Sd./-

MM/Delhi
29.7.98

6.8.98

Pr: APP

All accused in j/c with Sh. Vijay Kr. Jain,Adv.

Sh. Jain stated that all accused have been supplied with complete copies of documents filed alongwith the chargesheet. Hence provision of Sec. 207 Cr.P.C. are complied with.

Present case also pertains to offence punishable u/s. 302/ 307 IPC & 3, 4, 5 Explosive Substances Act which are exclusively triable by Court of Sessions. Present case is liable to be commit to court of sessions. I accordingly commit the present case to court of Sessions.

Accused are directed to appear before court of sessions on 20.8.98.

Ahlmad is directed to send the file complete in all respects to court of sessions.

Notice to PP be also issued.

Sd./-
MM/Delhi
6.8.98

18/5/99

Pr: Spl PP for State.

Accused in J/C.

PW.1 *partly examined and his cross-examination deferred at the request of accused as his counsel Firoz Khan has not put his appearance in the court.*

PW.1 is bound down for the next date of hearing.

PW.2 *examined and discharged.*

No other PW. Present except IO Satya Prakash present.

To come up for remaining evidence on 3/6/99.

Sd./-
ASJ/Delhi
18/5/99

3/6/99

Pr: Spl. PP for the State.

Accused present in j/c with counsel.

PW.3, *4 present, examined and discharged.*

PW.1, Darshan Kumar, Ganesh Sharma are present but they are not examined on the request of defence counsel as he has not gone through the statement.

Considering the request, both the witnesses are bound down for next date of hearing.

Inspector Satya Prakash IO is also and ischarged (sic.).

Now to come for P.E. on 20/7/99.

Sd/-
ASJ/Delhi
3/6/99

20.7.99

Pr: Spl PP for the State

Accused in J.C. with Sh. Feroz Khan, Adv., Amicus Curae (sic.)

PW 5, 6 & PW7 are examined and discharged. PW

Darshan Kumar served but absent despite service. Issue B/W in the sum of Rs.500/-. PW Satya Prakash, Insp. is reported to be on leave upto 26.7.99. Now to come up for remaining P.E. for 13.8.99.

Sd./-
ASJ
20.7.99

13.8.99

Present : Spl. PP for the State

Accused in j/c

PW1, 8 and 9 examined and discharged.

No other PW is present except IO of this case.

PW Santosh Kr. Jha has shifted to Vill. Ghagjai, Distt. Madhumani Panna, P.S. Mani Patti, Post Office Ghagjari, Bihar. He be summoned at his new address.

PW Ashok Kumar could not be served. He be served though IO. SI Ashok Kumar is served but he sent a request that he had gone to High Court.

To come up for RPE on 1.9.99.

Sd./-

ASJ/Delhi

4/10/99

Pr: Spl. PP for the State.

Accused in J/C.

PW. 10, 11, 12 & 13 present, examined and discharged.

PW. Santosh Kumar Jha is served but absent despite

service. PW. Ashok Kumar served but sent request that he had to attend a duty and may be exempted today.

IO present is discharged for today. Witnesses be summoned again.

List the matter for evidence on 2/11/99.

Sd./-
ASJ/Delhi
4/11/99 (sic.)

2.11.99

Present: As before.

PW 14 examined and discharged.

No other PW is present except IO Satya Prakash. Mother of Sunil Kr. Sharma is present and submits that he is not in a position to move from bed. Considering her request and there are other number of witnesses to prove the explosion in the bus. Let his name be dropped from the list of witness and need not be summoned.

List the matter for RPE on 3.12.99.

Sd./-
ASJ/Delhi

27/7/2000

Pr: Addl. PP for the State.

Accused in J/C.

PWs.15 to 17 examined and discharged.

PWs. SI Om Prakash and SI Satya Prakash, IOs have sent requests. PWs. Dr. K. Goyal and Dr. Ashok Jaiswal are unserved. Re-summon.

Now, List the case for RPE on 25/08/2000.

Sd./-
ASJ/Delhi

20/9/2000

Pr: Addl. PP for the State.

Accused in J/C.

PWs.18 & 19 examined, cross-examined and discharged.

No other witness served for today.

Now, list the matter for P.E. on 6/11/2000.

Sd./-
ASJ/Delhi

29.11.2000

Present: Addl. PP for the State.

Accused in j/c.

PW 20 examined and discharged.

No other PW is present. PW SI Om Prakash is served but absent despite service. Issue B/W in the sum of Rs.500/-. Entire remaining witnesses be summoned through IO on 10.1.2001.

Sd./-
ASJ/Delhi

10.1.2001

Present: Spl PP for State.

Accused in J/C.

PW-21 and 22 examined, cross-examined and discharged. No other PW is present except IO.

PW Rajinder Singh Bist is absent despite service. Issue B/W against him in the sum of Rs.500/-.

Now list the case for RPE on 14.2.2011.

Sd./-
ASJ/Delhi

14/2/2001

Pr: Addl. PP for the State.Accused in J/C.

PW. 23 & 24 examined, cross-examined and discharged.

No other witness served for today.

IO, SI Om Prakash is absent despite service. Issue B/Ws against him in the sum of Rs.500/-.

Now, put up the case for entire RPE on 14/3/2001.

Sd./-
ASJ/Delhi

14.3.2001

Present: Spl. PP for the State.

Accused in J/C with counsel.

PW-25, PW-26, PW-27 examined, cross-examined and discharged.

No other witness is present, as none else has been served.

Now list the case for P.E. on 11.4.2001.

Sd./-
ASJ/Delhi

11.4.2001

Present: Sp. PP for the State.

Accused in J/C.

PW-28 examined, cross-examined and discharged.

Witnesses Sunil Kumar, Md. Naria, Bhagirat Prasad and Raj Kumar Verma are reported to be not residing at the given addresses. They all be summoned through IO.

No other PW is present.

Last opportunity be granted to the prosecution to lead the entire R.P.E.

Now to come up for (sic.) 8.5.2001.

Sd./-
ASJ/Delhi

4/7/2001

Pr. Spl. PP for the State.

Accused in J/C.

PWs. 29, 30, 31 & 32 examined, cross-examined and discharged.

No other witness is served for today.

Now put up the case for entire RPE on 13/8/01.

Sd./-
ASJ/Delhi

11.2.2002

Present: Addl. PP for the State.

Accused is present in J/C.

PW-33 examined, cross-examined and discharged.

No other PW is present except the IO.

Now to come up for RPE on 26.3.2002.

Sd./-
ASJ/Delhi

26/3/02

Pr: Addl. PP for the State.

Accused in J/C.

PW.34, 35, 36 & 37 examined, cross-examined and discharged.

No other PW. is present.

Now to come up for RPE on 7/5/02.

Sd./-
ASJ/Delhi

24/09/02

Present: Spl. PP for the State.

Accused in J/C.

PW-42 & PW-43 examined, cross-examined and discharged.

No other PW is present.

Now to come up for entire R.P.E. on 18.10.02.

Sd./-
ASJ/Delhi

18/10/02

Pr. Sh. Jitender Kakkar, Addl. PP for the State.

Accused in J/C.

PW.44 & PW.45 examined, cross-examined and discharged.

No other PW. is present.

Now list the matter for entire RPE on 13/12/02.

Sd./-
ASJ/Delhi

13.12.02

Present: Accused in judicial custody.

Ld. _____ is on leave today.

Illigible__

17/1/2003 for RPE.

Sd./-
Reader
13.12.02

25/02/03

Pr: Sh. Bakshish Singh, Spl. PP for State.

Accused in J/C with counsel.

Two PWs. 46 & 47 have been examined, cross-examined and discharged.

No other witness is present.

Ld. Spl. PP seeks another opportunity for adducing evidence. In the interest of justice one more opportunity is granted to the prosecution to lead the entire evidence on 26.03.03.

Sd./-
ASJ/Delhi

26/3/2003

Pr. : Addl. PP Sh. Jitender Kakkar, for the State.

Accused in J/C.

PW-48 examined, cross examined and discharged.

No other PW is present.

PW Vinod Kumar has not been served.

PW Vinod Kumar along with all the public witnesses be summoned through IO for 22.4.2003.

In the interest of justice, one more opportunity is granted to the prosecution to lead its entire evidence for the date fixed.

ASJ/Delhi

22.4.03

Present : Addl. PP Sh. Jitender Kakkar for the State

Accused in J.C.

PW-49, PW-50 and PW-51 examined, cross-examined and discharged. Put up for RPE on 09.05.03. On the request of Ld. APP one more opportunity is given to the prosecution to lead entire remaining evidence. The witnesses be summoned through I.O. Put up for P.E. on 09.05.03.

ASJ/Delhi
22.04.03

09/05/03

Present Sh. Bakshish Singh Spl. PP for the state

Accused in JC

PW-52 has been examined, cross-examined and discharged. No other PW is present. None has been served. Both the remaining witnesses be summoned through I.O. In the interest of justice, one more opportunity is granted to the prosecution to read entire evidence on 15/07/03.

ASJ/Delhi
09/05/03

1102/97

15.07.03

Present : Accused in J.C.

Sh. Bakshish Singh, Ld. State Counsel is present

PW-53 Ins. Data Ram has been examined, cross-

examined and discharged. No other PW except the IO is present. PW Vinod Kumar is absent despite service. Issue B/w in the sum of Rs.500/-. PW Bhagirathi Prasad and Sunil Kumar are reported to be not residing at the given address. IO of the present case is directed to produce these witnesses on his own responsibility. Last opportunity is granted to the prosecution to lead the entire evidence on 13.8.03.

ASJ/Delhi
15.07.03

01/09/03

Present : Spl. P.P. for the State

Accused in J.C.

Ins. Satya Prakash, ZO is present.

PW-54 & PW-55 recorded and discharged.

No other PW is present or served.

IO is discharged for today only.

Put up for RPE on 01/10/03.

ASJ/Delhi
01/09/03

01/10/03

Present : Spl. P.P. for the State.
Accused in J.C. It is 2.35 PM. Heard.
PW-56 recorded and discharged.
Ins. Tandon and one more witness Vinod are present. However, they were discharged for today as they have some urgent work. Their prayer is allowed. Put up for RPE on 01/11/03. The accused is directed to bring his advocate on next date.

ASJ/Delhi
01/10/03

7. The recording in the order sheet of the trial Judge is not

accurate. I say so for the reason that examination of witnesses from 1 to 56 was done when accused was not represented by an advocate. I have come to this conclusion after carefully reading the evidence of these witnesses recorded by the learned trial Judge. By way of illustration, I have extracted evidence of some of the witnesses recorded on different dates :-

"PW 1

Darshan Kumar

S/o Fakir Chand, Age – 30 years, Driver, R/o B-48, Piragarhi, New Delhi - 43

I was working as conductor in blue line bus No. DL1P3088 and the said bus used to ply from Nangloi to Ajmeri Gate.

x x x x x x

deferred as defence counsel is not available.

PW2

Vijay Kumar

s/o Fakir Chand, Age about 28 years, Driver, R/o C-154 Pira Garhi, Relief Camp, Delhi.

I am working as driver in blue line bus DL1P 3088 and the sadi bus plies from Ajmeri Gate to Nangloi.

x x x x x x

Nil opportunity given.

PW3

Moin Khan

S/o Abdul Rashid Khan, Age – 22 years, service, R/o B-

104, Prem Nagar, Kirari Village, Delhi.

x x x x x x

by counsel Firoz Khan.

PW4

Imtiyaz Khan

S/o Rustam Khan, Age – 25 years, Machine Operator, R/o H-10, Man Sarover Park, Riti Road, Shahdrah.

x x x x x x

Nil Opportunity given."

8. The records would disclose that during the committal proceedings before the learned Magistrate, the appellant was assisted by one Sri. V.K. Jain, a learned counsel employed by the State. He continued till the case was committed to the Court of Sessions Judge. Before the said Court, one Mr. Feroze Khan was employed by the State to assist the appellant. He participated in the proceedings before the Sessions Judge only on few days of the trial. After he stopped attending the proceedings, that too at the fag end of the trial, another learned counsel was appointed to assist the appellant.

9. The record further discloses that immediately, on completion of the investigation, a charge sheet punishable under Section 302/307/120-B of the IPC read with Section 3/4/5 of The Explosive Substances Act was filed in the court of learned Metropolitan Magistrate against the appellant and others by the prosecuting agency. After completing the necessary formalities, the case was committed to the Court of Sessions by the learned Metropolitan Magistrate. The learned Sessions Judge, after discharging the other accused persons, had framed charges against the appellant under Section 302/307 of the IPC read with Section 3/4 of The Explosive

Substances Act, to which, the appellant denied his guilt and claimed to be tried. The appellant was initially assisted by a learned counsel employed by the learned Sessions Judge. However, in the mid way, the learned counsel disappeared from the scene, that is, before conclusion of the trial. It is apparent from the records that he was not asked whether he is able to employ counsel or wished to have counsel appointed. When the parties were ready for the trial, no one appeared for the accused. The Court did not appoint any counsel to defend the accused. Of course, if he had a defence counsel, I do not see the necessity of the court appointing anybody as a counsel. If he did not have a counsel, it is the mandatory duty of the court to appoint a counsel to represent him. The record reveals that the evidences of 56 witnesses, out of the 65 witnesses, examined by the prosecution in support of the indictment, including the eye witnesses and the Investigating Officer, were recorded by the Trial Court without providing a counsel to the appellant. The record also reveals that none of the 56 witnesses were cross-examined by the accused/appellant. It is only thereafter, the wisdom appears to have dawned on the Trial Court to appoint a learned counsel on 04.12.2003 to defend the appellant. The evidences of the prosecution witnesses from 57 to 65 were recorded in the presence of the freshly appointed learned counsel, who thought it fit not to cross-examine any of those witnesses. Before the conclusion of the trial, she had filed an application to cross-examine only one prosecution witness and that prayer in the application had been granted by the Trial Court and the learned counsel had performed the formality of cross-examining this witness. I do not wish to comment on the performance of the learned counsel, since I am of the view that 'less said the better'. In this casual manner, the trial, in a capital punishment case, was concluded by the Trial Court. It will, thus, be seen that the trial court did not think it proper to appoint any counsel to defend the appellant/accused, when the counsel engaged by him did not appear at the commencement of the trial nor at the time of recording of the evidence of the prosecution witnesses. The accused did not have the aid of the

counsel in any real sense, although, he was as much entitled to such aid during the period of trial. The record indicates, as I have already noticed, that the appointment of learned counsel and her appearance during the last stages of the trial was rather proforma than active. It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case, to confront the witnesses against him not only on facts but also to discredit the witness by showing that his testimony-in-chief was untrue and unbiased. The purpose of cross-examination of a witness has been succinctly explained by the Constitution Bench of this Court in *Kartar Singh Vs. State of Punjab* (1994) 3 SCC 569 :

> "278. Section 137 of the Evidence Act defines what cross-examination means and Sections 139 and 145 speak of the mode of cross-examination with reference to the documents as well as oral evidence. It is the jurisprudence of law that cross-examination is an acid-test of the truthfulness of the statement made by a witness on oath in examination-in-chief, the objects of which are :
>
> (1) to destroy or weaken the evidentiary value of the witness of his adversary;
>
> (2) to elicit facts in favour of the cross-examining lawyer's client from the mouth of the witness of the adversary party;
>
> (3) to show that the witness is unworthy of belief by impeaching the credit of the said witness;
>
> and the questions to be addressed in the course of cross-examination are to test his veracity; to discover who he is and what is his position in life; and to shake his credit by injuring his character."

10. The aforesaid view is reiterated by this Court in *Jayendra Vishnu Thakur Vs. State of Maharashtra* (2009) 7 SCC 104 wherein it is observed :

> " 24. A right to cross-examine a witness, apart from being a natural right is a statutory right. Section 137 of the Evidence Act provides for examination-in-chief, cross-examination and re-examination. Section 138 of the Evidence Act confers a right on the adverse party to cross-examine a witness who had been examined in chief, subject of course to expression of his desire to the said effect. But indisputably such an opportunity is to be granted. An accused has not only a valuable right to represent himself, he has also the right to be informed thereabout. If an exception is to be carved out, the statute must say so expressly or the same must be capable of being inferred by necessary implication. There are statutes like the Extradition Act, 1962 which excludes taking of evidence vis-à-vis opinion."

11. In my view, every person, therefore, has a right to a fair trial by a competent court in the spirit of the right to life and personal liberty. The object and purpose of providing competent legal aid to undefended and unrepresented accused persons are to see that the accused gets free and fair, just and reasonable trial of charge in a criminal case. This Court, in the case of *Zahira Habibullah Sheikh (5) Vs. State of Gujarat* (2006) 3 SCC 374 has explained the concept of fair trial to an accused and it was central to the administration of justice and the cardinality of protection of human rights. It is stated :

> "35. This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties, which affects the whole community as a community and is harmful to society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interest of society is not to be treated completely with disdain and as

persona non grata. The courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice—often referred to as the duty to vindicate and uphold the "majesty of the law". Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

36. The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson's

eye to the needs of society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.

37. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact in issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny."

12. In *M.H. Hoskot Vs. State of Maharashtra* 1978 (3) SCC 544, this Court has held :

"14. The other ingredient of fair procedure to a prisoner, who has to seek his liberation through the court process is lawyer's services. Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; and a failure of equal justice under the law is on the cards where such

supportive skill is absent for one side. Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law. Free legal services to the needy is part of the English criminal justice system. And the American jurist, Prof. Vance of Yale, sounded sense for India too when he said :

"What does it profit a poor and ignorant man that he is equal to his strong antagonist before the law if there is no one to inform him what the law is? Or that the courts are open to him on the same terms as to all other persons when he has not the wherewithal to pay the admission fee?"

13. In *Mohd. Sukur Ali Vs. State of Assam* (2011) 4 SCC 729, it is observed :

"9. In *Maneka Gandhi v. Union of India,* it has been held by a Constitution Bench of this Court that the procedure for depriving a person of his life or liberty should be fair, reasonable and just. We are of the opinion that it is not fair or just that a criminal case should be decided against an accused in the absence of a counsel. It is only a lawyer who is conversant with law who can properly defend an accused in a criminal case. Hence, in our opinion, if a criminal case (whether a trial or appeal/revision) is decided against an accused in the absence of a counsel, there will be violation of Article 21 of the Constitution.

10. The right to appear through counsel has existed in England for over three centuries. In ancient Rome there were great lawyers e.g. Cicero, Scaevola, Crassus, etc. who defended the accused. In fact the higher the human race has progressed in civilisation, the clearer and stronger has that right appeared, and the more firmly has

it been held and asserted. Even in the Nuremberg trials the Nazi war criminals, responsible for killing millions of persons, were yet provided counsel. Therefore when we say that the accused should be provided counsel we are not bringing into existence a new principle but simply recognising what already existed and which civilised people have long enjoyed. "

14. In the case of *Hussainara Khatoon and Others v. Home Secy., State of Bihar* (1980) 1 SCC 98, it is held:

"6. Then there are several undertrial prisoners who are charged with offences which are bailable but who are still in jail presumably because no application for bail has been made on their behalf or being too poor they are unable to furnish bail. It is not uncommon to find that undertrial prisoners who are produced before the Magistrates are unaware of their right to obtain release on bail and on account of their poverty, they are unable to engage a lawyer who would apprise them of their right to apply for bail and help them to secure release on bail by making a proper application to the Magistrate in that behalf. Sometimes the Magistrates also refuse to release the undertrial prisoners produced before them on their personal bond but insist on monetary bail with sureties, which by reason of their poverty the undertrial prisoners are unable to furnish and which, therefore, effectively shuts out for them any possibility of release from pre-trial detention. This unfortunate situation cries aloud for introduction of an adequate and comprehensive legal service programme, but so far, these cries do not seem to have evoked any response. We do not think it is possible to reach the benefits of the legal process to the poor, to protect them against injustice and to secure to them their constitutional and statutory rights unless there is a nation-wide legal service programme to provide free legal services to them. It is now well settled, as a result of the decision of this Court

in Maneka Gandhi v. Union of India that when Article 21 provides that no person shall be deprived of his life or liberty except in accordance with the procedure established by law, it is not enough that there should be some semblance of procedure provided by law, but the procedure under which a person may be deprived of his life or liberty should be "reasonable, fair and just". Now, a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as "reasonable, fair and just". It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the court's process that he should have legal services available to him. This Court pointed out in M.H. Hoskot v. State of Maharashtra : "Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side. Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law". Free legal services to the poor and the needy is an essential element of any "reasonable, fair and just" procedure. It is not necessary to quote authoritative pronouncements by Judges and Jurists in support of the view that without the service of a lawyer an accused person would be denied "reasonable, fair and just" procedure. Black, J., observed in Gideon v. Wainwright :

"Not only those precedents but also reason and reflection require us to recognise that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer cannot be assured a fair trial

unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both State and Federal quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime who fail to hire the best lawyers they can get to prepare and present their defences. That Government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but is in ours. From the very beginning, our State and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realised if the poor man charged with crime has to face his accusers without a lawyer to assist him."

The philosophy of free legal service as an essential element of fair procedure is also to be found in the passage from the judgment of Douglas, J. in Jon Richard Argersinger v. Raymond Hamlin :

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or

evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate or those of feeble intellect.

Both Powell and Gideon involved felonies. But their rationale has relevance to any criminal trial, where an accused is deprived of his liberty.

The court should consider the probable sentence that will follow if a conviction is obtained. The more serious the likely consequences, the greater is the probability that a lawyer should be appointed .... The court should consider the individual factors peculiar to each case. These, of course would be the most difficult to anticipate. One relevant factor would be the competency of the individual defendant to present his own case." (emphasis added)"

15. In the case of *Khatri Vs. State of Bihar* (1981) 1 SCC 627, this Court has held :

"5. That takes us to one other important issue which arises in this case. It is clear from the particulars supplied by the State from the records of the various judicial Magistrates dealing with the blinded prisoners from time to time that, neither at the time when the blinded prisoners were produced for the first time before the Judicial Magistrate nor at the time when the remand orders were passed, was any legal representation available to most of the blinded prisoners. The records of the Judicial Magistrates show that no legal representation was provided to the blinded prisoners, because none of them asked for it nor did the

Judicial Magistrates enquire from the blinded prisoners produced before them either initially or at the time of remand whether they wanted any legal representation at State cost. The only excuse for not providing legal representation to the blinded prisoners at the cost of the State was that none of the blinded prisoners asked for it. The result was that barring two or three blinded prisoners who managed to get a lawyer to represent them at the later stages of remand, most of the blinded prisoners were not represented by any lawyers and save a few who were released on bail, and that too after being in jail for quite some time, the rest of them continued to languish in jail. It is difficult to understand how this state of affairs could be permitted to continue despite the decision of this Court in Hussainara Khatoon (IV) case. This Court has pointed out in Hussainara Khatoon (IV) case which was decided as far back as March 9, 1979 that the right to free legal services is clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer. It is unfortunate that though this Court declared the right to legal aid as a fundamental right of an accused person by a process of judicial construction of Article 21, most of the States in the country have not taken note of this decision and provided free legal services to a person accused of an offence. We regret this disregard of the decision of the highest court in the land by many of the States despite the constitutional declaration in Article 141 that the law declared by this Court shall be binding throughout the territory of India. Mr K.G. Bhagat on behalf of the State agreed that in view of the decision of this Court the State was bound to provide free legal services to an indigent accused but he suggested that the State

might find it difficult to do so owing to financial constraints. We may point out to the State of Bihar that it cannot avoid its constitutional obligation to provide free legal services to a poor accused by pleading financial or administrative inability. The State is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigence and whatever is necessary for this purpose has to be done by the State. The State may have its financial constraints and its priorities in expenditure but, as pointed out by the court in Rhem v. Malcolm "the law does not permit any Government to deprive its citizens of constitutional rights on a plea of poverty" and to quote the words of Justice Blackmum in Jackson v. Bishop "humane considerations and constitutional requirements are not in this day to be measured by dollar considerations". Moreover, this constitutional obligation to provide free legal services to an indigent accused does not arise only when the trial commences but also attaches when the accused is for the first time produced before the Magistrate. It is elementary that the jeopardy to his personal liberty arises as soon as a person is arrested and produced before a Magistrate, for it is at that stage that he gets the first opportunity to apply for bail and obtain his release as also to resist remand to police or jail custody. That is the stage at which an accused person needs competent legal advice and representation and no procedure can be said to be reasonable, fair and just which denies legal advice and representation to him at this stage. We must, therefore, hold that the State is under a constitutional obligation to provide free legal services to an indigent accused not only at the stage of trial but also at the stage when he is first produced before the Magistrate as also when he is remanded from time to time.

6. But even this right to free legal services would be illusory for an indigent accused unless the Magistrate or

the Sessions Judge before whom he is produced informs him of such right. It is common knowledge that about 70 per cent of the people in the rural areas are illiterate and even more than that percentage of people are not aware of the rights conferred upon them by law. There is so much lack of legal awareness that it has always been recognised as one of the principal items of the programme of the legal aid movement in this country to promote legal literacy. It would make a mockery of legal aid if it were to be left to a poor ignorant and illiterate accused to ask for free legal services. Legal aid would become merely a paper promise and it would fail of its purpose. The Magistrate or the Sessions Judge before whom the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. Unfortunately, the Judicial Magistrates failed to discharge this obligation in the case of the blinded prisoners and they merely stated that no legal representation was asked for by the blinded prisoners and hence none was provided. We would, therefore, direct the Magistrates and Sessions Judges in the country to inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State. Unless he is not willing to take advantage of the free legal services provided by the State, he must be provided legal representation at the cost of the State. We would also direct the State of Bihar and require every other State in the country to make provision for grant of free legal services to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or incommunicable situation. The only qualification would be that the offence charged against the accused is such that, on conviction, it would result in a sentence of imprisonment

and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free legal representation. There may be cases involving offences such as economic offences or offences against law prohibiting prostitution or child abuse and the like, where social justice may require that free legal services need not be provided by the State."

16. In *Ram Awadh v. State of U.P.* 1999 Cr.L.J. 4083, the Allahabad High Court held :

"14. The requirement of providing counsel to an accused at the State expense is not an empty formality which may be not by merely appointing a counsel whatever his calibre may be. When the law enjoins appointing a counsel to defend an accused, it means an effective counsel, a counsel in real sense who can safeguard the interest of the accused in best possible manner which is permissible under law. An accused facing charge of murder may be sentenced to death or imprisonment for life and consequently his case should be handled by a competent person and not by a novice or one who has no professional expertise. A duty is cast upon the Judges before whom such indigent accused are facing trial for serious offence and who are not able to engage a counsel, to appoint competent persons for their defence. It is needless to emphasis that a Judge is not a prosecutor and his duty is to discern the truth so that he is able to arrive at a correct conclusion. A defence lawyer plays an important role in bringing out the truth before the Court by cross-examining the witnesses and placing relevant materials or evidence. The absence of proper cross-examination may at times result in miscarriage of justice and the Court has to guard against such an eventuality."

17. The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result, the accused charged with a serious offence must not be stripped

of his valuable right of a fair and impartial trial. To do that, would be negation of concept of due process of law, regardless of the merits of the appeal. The Cr.P.C. provides that in all criminal prosecutions, the accused has a right to have the assistance of a counsel and the Cr.P.C. also requires the court in all criminal cases, where the accused is unable to engage counsel, to appoint a counsel for him at the expenses of the State. Howsoever guilty the appellant upon the inquiry might have been, he is until convicted, presumed to be innocent. It was the duty of the Court, having these cases in charge, to see that he is denied no necessary incident of a fair trial. In the present case, not only the accused was denied the assistance of a counsel during the trial and such designation of counsel, as was attempted at a late stage, was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. The Court ought to have seen to it that in the proceedings before the court, the accused was dealt with justly and fairly by keeping in view the cardinal principles that the accused of a crime is entitled to a counsel which may be necessary for his defence, as well as to facts as to law. The same yardstick may not be applicable in respect of economic offences or where offences are not punishable with substantive sentence of imprisonment but punishable with fine only. The fact that the right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our judicial proceedings. The necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of a counsel was a denial of due process of law. It is equally true that the absence of fair and proper trial would be violation of fundamental principles of judicial procedure on account of breach of mandatory provisions of Section 304 of Cr.P.C.

18. After carefully going through the entire records of the trial court, I am convinced that the appellant/accused was not

provided the assistance of a counsel in a substantial and meaningful sense. To hold and decide otherwise, would simply to ignore actualities and also would be to ignore the fundamental postulates, already adverted to.

19. The learned counsel for the respondent-State, Sri Atri contends that since no prejudice is caused to accused in not providing a defence counsel, this Court need not take exception to the trial concluded by the learned Sessions Judge and the conviction and sentence passed against the accused. I find it difficult to accept the argument of the learned senior counsel. The Cr. P.C. ensures that an accused gets a fair trial. It is essential that the accused is given a reasonable opportunity to defend himself in the trial. He is also permitted to confront the witnesses and other evidence that the prosecution is relying upon. He is also allowed the assistance of a lawyer of his choice, and if he is unable to afford one, he is given a lawyer for his defence. The right to be defended by a learned counsel is a principal part of the right to fair trial. If these minimum safeguards are not provided to an accused; that itself is "prejudice" to an accused. It is worth to notice the observations made by this Court in the case of Rafiq Ahmad alias Rafi vs. State of U.P. (2011) 8 SCC 300, wherein it is observed:

> "35. When we speak of prejudice to an accused, it has to be shown that the accused has suffered some disability or detriment in the protections available to him under the Indian criminal jurisprudence. It is also a settled canon of criminal law that this has occasioned the accused with failure of justice. One of the other cardinal principles of criminal justice administration is that the courts should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage, as this expression is perhaps too pliable. With the development of law, Indian courts have accepted the following protections to and rights of the accused during investigation and trial:

(a) The accused has the freedom to maintain silence during investigation as well as before the court. The accused may choose to maintain silence or make complete denial even when his statement under Section 313 of the Code of Criminal Procedure is being recorded, of course, the court would be entitled to draw an inference, including adverse inference, as may be permissible to it in accordance with law;

(b) Right to fair trial;

(c) Presumption of innocence (not guilty);

(d) Prosecution must prove its case beyond reasonable doubt.

36. Prejudice to an accused or failure of justice, thus, has to be examined with reference to these aspects. That alone, probably, is the method to determine with some element of certainty and discernment whether there has been actual failure of justice. "Prejudice" is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial and not matters falling beyond their scope. Once the accused is able to show that there is serious prejudice to either of these aspects and that the same has defeated the rights available to him under the criminal jurisprudence, then the accused can seek benefit under the orders of the court.

37. Right to fair trial, presumption of innocence until pronouncement of guilt and the standards of proof i.e. the prosecution must prove its case beyond reasonable doubt are the basic and crucial tenets of our criminal jurisprudence. The courts are required to examine both the contents of the allegation of prejudice as well as its extent in relation to these aspects of the case of the accused. It will neither be possible nor appropriate to state such

principle with exactitude as it will always depend on the facts and circumstances of a given case. Therefore, the court has to ensure that the ends of justice are met as that alone is the goal of criminal adjudication."

20. In view of the above discussion, I cannot sustain the judgments impugned and they must be reversed and the matter is to be remanded to the Trial Court with a specific direction that the Trial Court would assist the accused by employing a State counsel before the commencement of the trial till its conclusion, if the accused is unable to employ a counsel of his own choice. Since I am remanding the matter for fresh disposal, I clarify that I have not expressed any opinion regarding the merits of the case.

21. In view of the above, I allow the appeal and set aside the conviction and sentence imposed by the Additional Sessions Judge in Sessions Case No.122 of 1998 dated 03.11.2004 and the Judgment and Order passed by the High Court in Crl. Appeal No. 41 of 2005 dated 04.08.2006 and remand the case to the Trial Court for fresh disposal in accordance with law and in the light of the observations made by me as above. Since the incident is of the year 1997, I direct the Trial Court to conclude the trial as expeditiously as possible at any rate within an outer limit of three months from the date of communication of this order and report the same to this Court.

CHANDRAMAULI KR. PRASAD, J. 1. I have gone through the judgment prepared by my noble and learned Brother, H.L.Dattu, J. and I concur that the conviction and sentence of the appellant is fit to be set aside as he was not given the assistance of a lawyer to defend himself during trial but, with profound respect, I find it difficult to persuade myself that it is a fit case which deserves to be remanded to the Trial Court for fresh trial.

2. Facts which are necessary for the decision of this appeal are that the appellant, Mohd. Hussain @ Julfikar Ali is a national of Pakistan and he was put on trial for offences under Section 302 and 307 of the Indian Penal Code and Section 3 and 4 of the Explosives Substances Act. He was held guilty under Section 302 and 307 of the Indian Penal Code and Section 3 of Explosives Substances Act and sentenced to undergo imprisonment for life each under Section 307 of Indian Penal Code and Section 3 of the Explosives Substances Act. The trial court, however, punished him with death for offence under Section 302 of the Indian Penal Code and submitted the proceeding for confirmation to the High Court. The appellant preferred appeal before the High Court against his conviction and sentence. Both the appeal and the reference were heard together and by an impugned common judgment the High Court has dismissed the appeal and confirmed the death sentence.

3. This is how the appellant is before us with the leave of the Court. He challenges his conviction and sentence inter alia on the ground that he was not given a fair trial, which alone vitiates his conviction and sentence. India is the world's largest and most vibrant democracy and the judiciary is to ensure the rule of law. This Court being the Court of last resort cannot brush aside the claim without scrutiny only because the crime is serious and allegedly committed by the citizen of a country with which this country has no cordial relation.

4. According to the prosecution, as usual in a winter evening of 30th December, 1997 at 6.20 P.M., a Blue-line bus carrying passengers was on way to Nangloi from Ajmeri Gate, Delhi and when stopped at Rampura bus stand on Rohtak Road to drop the passengers, an explosion took place inside the bus in which four passengers died and 24 persons sustained serious injuries.

5. A case under Section 302, 307 and 120-B of Indian Penal Code and Section 3 and 4 of the Explosives Substances

Act was registered on the same day. During the course of investigation, one Darshan Kumar, the conductor of the aforesaid blue line bus disclosed to the investigating agency that one passenger boarded the bus from Paharganj with a rexine-bag saying that he would go to Nangloi. He kept the rexine-bag underneath the seat where he was sitting but got down at Karol Bagh leaving the rexine-bag. Further investigation brought to light that some persons belonging to terrorist organizations are operating in the Capital and their object is to create an atmosphere of terror, insecurity and instability in the country by killing innocent citizens. This information prompted raids at different parts of the city in which hand grenades and materials used for making bombs were recovered. Some persons were also arrested and during the interrogation they admitted their association with terrorist organizations. They also admitted to have come to this country for 'JEHAD'. This information received in bits and pieces pointed the needle of suspicion on the appellant in the crime in question and he was apprehended with pistol from his house at Lajpat Nagar. In order to ascertain his role, the Investigating Agency decided to hold test identification parade for which the appellant did not object in the beginning but later on refused to join in the test identification parade.

6. After usual investigation, the Police submitted charge-sheet under Section 302, 307 and 120-B of the Indian Penal Code and under Section 3 and 4 of the Explosives Substances Act. The charge-sheet along with the police papers were laid before the Metropolitan Magistrate for commitment. The appellant was in jail and produced before the Committal Magistrate on 6th July, 1998. He disclosed to the learned Magistrate that he was "not in a position to engage a lawyer and be provided with a lawyer through legal aid". It seems that the assistance of one Mr. V.K.Jain, Advocate was made available to the appellant who appeared before the Committing Court on 20th July, 1998 and prayed for time for scrutiny of

documents. Ultimately, the appellant was committed to the Court of Session on 6th August, 1998. The appellant was produced before the Trial Court from time to time and on 18th February, 1999 was represented by Mr.Firoz Khan and Mr. Riyaj Ahmed, Advocates. On that date, the argument on framing of charge was heard and the Trial Court framed charges under Section 302 and 307 of the Indian Penal Code and under Section 3 and 4 of the Explosives Substances Act against the appellant to which he pleaded not guilty and the prosecution was directed to produce its witnesses to substantiate the charge. On 18th May, 1999, the appellant was produced before the Trial Court but his counsel did not put in his appearance. Despite that, P.W.l- Darshan Kumar, the conductor of the bus was examined in part and his cross- examination was deferred at the request of the appellant. However, on the same day, P.W.2- Vijay Kumar was examined and discharged. On the next date fixed in the case i.e. 3rd June, 1999 two witnesses namely; P.W.3- Moin Khan and P.W.4- Imtiaz Khan were examined and discharged. But cross-examination of P.W.1-Darshan Kumar did not take place at the request of the defence counsel. The next date relevant is 20th July, 1999 when the appellant was represented by his counsel and on that date, P.W.5- Ganesh Sharma, P.W.6- Basant Verma and P.W.7-Manohar Lal were examined and discharged. Thereafter, the case was adjourned to 30th August, 1999 and from that date till 1st October, 2003, though the appellant was not represented by any counsel, altogether 56 prosecution witnesses were examined to prove the charges against him. Obviously in the absence of the counsel the truthfulness or otherwise of their evidences were not tested by cross-examination.

7. It is relevant to note that the Trial Court, during all this long period, did not realize that the appellant was not represented by any counsel and it is on 4th December, 2003 the appellant brought to the notice of the Trial Court that for the last several dates, the counsel appointed by the Court was not

present and hence a new counsel be appointed. It is on the appellant's prayer that one Ms. Sadhana Bhatia, Advocate present in the Court on the said date, was appointed to defend the appellant at the expenses of the State. Thereafter, on 22nd December, 2003, in the presence of said Ms. Sadhana Bhatia, counsel for the appellant, evidences of P.W.57- Dr.Mamtesh, P.W.58- Dr.Narendra Bhambri and P.W.59- ASI Mahender Singh were recorded. Thereafter, the statements of the witnesses from P.Ws.60 to 65 were recorded in the presence of appellant's counsel, Ms. Sadhana Bhatia. Ultimately the statement of the appellant was recorded on 6th October, 2004 and argument on behalf of prosecution was heard in part. Next hearing took place on 8th October, 2004 when the argument on behalf of the prosecution was concluded and the case was adjourned to 12th October, 2004 for defence argument. It is relevant here to state that during all this period the appellant was in custody. It is only when the argument on behalf of the appellant was to be heard, counsel representing him later i.e. Ms. Bhatia realized that the witnesses have been examined and discharged without cross-examination in the absence of the defence counsel and accordingly, an application was filed for recall of P.W.1- Darshan Kumar for cross-examination. The said prayer was allowed and P.W.1- Darshan Kumar was cross-examined and discharged on 23rd October, 2004. It is worth mentioning here that the Trial Court has recorded on said date that the accused has not prayed for cross-examination of any other witness and accordingly, it heard the argument and posted the case for judgment on 26th October, 2004. The appellant was held guilty and sentenced as above.

8. While holding the appellant guilty the trial court has not only relied upon the evidence of the witnesses who have been cross-examined but also relied upon the evidence of witnesses who were not cross-examined. The fate of the criminal trial depends upon the truthfulness or otherwise of the witnesses and, therefore, it is of paramount importance. To arrive at the

truth, its veracity should be judged and for that purpose cross-examination is an acid test. It tests the truthfulness of the statement made by a witness on oath in examination-in-chief. Its purpose is to elicit facts and materials to establish that the evidence of witness is fit to be rejected. The appellant in the present case was denied this right only because he himself was not trained in law and not given the assistance of a lawyer to defend him. Poverty also came in his way to engage a counsel of his choice.

9. Having said so, it needs consideration as to whether assistance of the counsel would be necessary for fair trial. It needs no emphasis that conviction and sentence can be inflicted only on culmination of the trial which is fair and just. I have no manner of doubt that in our adversary system of criminal justice, any person facing trial can be assured a fair trial only when the counsel is provided to him. Its roots are many and find places in manifold ways. It is internationally recognized by covenants and Universal Declaration of Human Rights, constitutionally guaranteed and statutorily protected.

10. Article 14 of the International Covenant on Civil and Political Rights guarantees to the citizens of nations signatory to that covenant various rights in the determination of any criminal charge and confers on them the minimum guarantees. Article 14 (2) and (3) of the said covenant read as under:

"Article 14.

xxx xxx xxx

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;……."

Article 14 (3) (d) entitles the person facing the criminal charge either to defend himself in person or through the assistance of a counsel of his choice and if he does not have legal assistance, to be informed of his right and provide him the legal assistance without payment in case he does not have sufficient means to pay for it. It is accepted in the civilized world without exception that the poor and ignorant man is equal to a strong and mighty opponent before the law. But it is of no value for a poor and ignorant man if there is none to inform him what the law is. In the absence of such information that courts are open to him on the same terms as to all other persons the guarantee of equality is illusory. The aforesaid International Covenant on Civil and Political Rights guarantees to the indigent citizens of the member countries the right to be defended and right to have legal assistance without payment.

11. Not only this, the Universal Declaration on Human Rights ensures due process and Article 10 thereof provides that

everyone is entitled in full equality to a fair hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charges against him. Article 11 of Universal Declaration of Human Rights guarantees everyone charged with a penal offence all the guarantees necessary for the defence, the same reads as under:

"(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

12. These salutary features forming part of the International Covenants and Universal Declaration on Human Rights are deep rooted in our constitutional scheme. Article 21 of the Constitution of India commands in emphatic terms that no person shall be deprived of his life or personal liberty except according to the procedure established by law and Article 22 (1) thereof confers on the person charged to be defended by a legal practitioner of his choice. Article 39 A of the Constitution of India casts duty on the State to ensure that justice is not denied by reason of economic or other disabilities in the legal system and to provide free legal aid to every citizen with economic or other disabilities.

13. Besides the International Covenants and Declarations and the constitutional guarantees referred to above, Section 303 of the Code of Criminal Procedure gives right to any person accused of an offence before a criminal court to be defended by a pleader of his choice. Section 304 of the Code

of Criminal Procedure contemplates legal aid to accused facing charge in a case triable by Court of Sessions at State expense and the same reads as follows:

> "**304. Legal aid to accused at State expense in certain cases**.
>
> (1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the court that the accused has not sufficient means to engage a pleader, the court shall assign a pleader for his defence at the expense of the State.
>
> (2) The High Court may, with the previous approval of the State Government make rule providing for-
>
> (a) The mode of selecting pleaders for defence under sub-section (2);
>
> (b) The facilities to be allowed to such pleaders by the courts;
>
> (c) The fee payable to such pleaders by the Government, and generally, for carrying out the purposes of sub-section (1).
>
> (3) The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub-sections (1) and (2) shall apply in relation to any class of trials before other courts in the State as they apply in relation to trials before the Courts of Session."

From a plain reading of the aforesaid provision it is evident that in a trial before the Court of Sessions if the accused is not represented by a pleader and has not sufficient means, the court shall assign a pleader for his defence at the expense of the State. The entitlement to free legal aid is not

dependent on the accused making an application to that effect, in fact, the court is obliged to inform the accused of his right to obtain free legal aid and provide him with the same.

14. In my opinion, the right of a person charged with crime to have the services of a lawyer is fundamental and essential to fair trial. The right to be defended by a legal practitioner, flowing from Article 22 (1) of the Constitution has further been fortified by the introduction of the Directive Principles of State Policy embodied in Article 39 A of the Constitution by the 42nd Amendment Act of 1976 and enactment of sub-section 1 of Section 304 of the Code of Criminal Procedure. Legal assistance to a poor person facing trial whose life and personal liberty is in jeopardy is mandated not only by the Constitution and the Code of Criminal Procedure but also by International Covenants and Human Rights Declarations. If an accused too poor to afford a lawyer is to go thorough the trial without legal assistance, such a trial cannot be regarded as reasonable, fair and just. The right to be heard in criminal trial would be inconsequential and of no avail if within itself it does not include right to be heard through counsel. One cannot lose sight of the fact that even intelligent and educated men, not trained in law, have more than often no skill in the science of law if charged with crime. Such an accused not only lacks both the skill and knowledge adequately to prepare his defence but many a time looses his equilibrium in face of the charge. A guiding hand of counsel at every step in the proceeding is needed for fair trial. If it is true of men of intelligence, how much true is it of the ignorant and the illiterate or those of lower intellect! An accused without the lawyer faces the danger of conviction because he does not know how to establish his innocence.

15. Bearing in mind the aforesaid principles, I proceed to examine the facts of the present case. In the case in hand the accused is a Pakistani and seems illiterate. He asked for engagement of a counsel to defend him at State expenditure which was provided but unfortunately for him the counsel so

appointed remained absent and a large number of witnesses have been examined in the absence of the counsel. Those witnesses have not been cross-examined and many of them have been relied upon for holding the appellant guilty. The learned Judge in seisin of the trial forgot that he has an overriding duty to maintain public confidence in the administration of justice, often referred to a duty to vindicate and uphold the majesty of law. He failed to realize that for an effective instrument in dispensing justice he must cease to be a spectator and a recording machine but a participant in the trial evincing intelligence and active interest so as to elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth and administer justice with fairness and impartiality both to the parties and to the community itself. Fundamental principles based on reason and reflection in no uncertain term recognize that the appellant haled into court in our adversary system of criminal justice and ultimately convicted and sentenced without a fair trial. There are high authorities of this Court which take this view and I do not deem it expedient to multiply and burden this judgment with those authorities as the same have been referred in the judgment of my learned Brother Dattu, J. except to refer to a judgment of this Court in the case of *Hussainara Khatoon & Others v. Home Secy., State of Bihar,* (1980) 1 SCC 98, in which it has been held as follows:

> "**6. ……**Now, a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as "reasonable, fair and just". It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the court's process that he should have legal services available to him……"

16. Having found that the appellant has been held guilty

and sentenced to death in a trial which was not reasonable, fair and just, the next question is as to whether it is a fit case in which direction be given for the de novo trial of the appellant after giving him the assistance of a counsel. I have given my most anxious consideration to this aspect of the matter and have no courage to direct for his de novo trial at such a distance of time. For an occurrence of 1997, the appellant was arrested in 1998 and since then he is in judicial custody. The charge against him was framed on 18.02.1999 and it took more than five years for the prosecution to produce its witnesses. True it is that in the incident four persons have lost their lives and several innocent persons have sustained severe injuries. Further, the crime was allegedly committed by a Pakistani but these factors do not cloud my reason. After all, we are proud to be a democratic country and governed by rule of law. The appellant must be seeing the hangman's noose in his dreams and dying every moment while awake from the day he was awarded sentence of death, more than seven years ago. The right of speedy trial is a fundamental right and though a rigid time limit is not countenanced but in the facts of the present case I am of the opinion that after such a distance of time it shall be travesty of justice to direct for the appellant's de novo trial. By passage of time, it is expected that many of the witnesses may not be found due to change of address and various other reasons and few of them may not be in this world. Hence, any time limit to conclude the trial would not be pragmatic.

17. Accordingly, I am of the opinion that the conviction and sentence of the appellant is vitiated, not on merit but on the ground that his trial was not fair and just.

18. Appellant admittedly is a Pakistani, he has admitted this during the trial and in the statement under Section 313 of the Code of Criminal Procedure. I have found his conviction and sentence illegal and the natural consequence of that would be

his release from the prison but in the facts and circumstances of the case, I direct that he be deported to his country in accordance with law and till then he shall remain in jail custody.

19. In the result the appeal is allowed, appellant's conviction and sentence is set aside with the direction aforesaid.

ORDER

In view of the difference of opinion with regard to the issue whether the matter requires to be remanded for *de novo* trial in accordance with law or not, let the appeal papers be placed before Hon'ble the chief Justice of India for being assigned to appropriate Bench.

N.J. Matter referred to Larger Bench.

N.C. DAS

v.

GAUHATI HIGH COURT THR. REGISTRAR & ORS.

(Writ Petition (Civil) No(s). 31 of 2004)

JANUARY 11, 2012

[R.M. LODHA AND H.L. GOKHALE, JJ.]

SERVICE LAW:

Promotion - Denial of - Judicial service - Member of Tripura Judicial Service (Grade-II) - Critaria for promotion being merit-cum-seniority - Held: In view of the remarks in the ACRs of the officer for three years immediately preceding the date of consideration of the officer's promotion, that he was not found fit for promotion, it cannot be said that he was wrongly denied promotion to Grade-I - Tripura Judicial Service Rules, 1974 - r.7.

Retirement - Judicial service - Member of Tripura Judicial Service - On completion of 58 years of age, service not extended upto 60 years - Held: Clause (B) has overriding effect over Clause (A) of the amended r.20 of the Tripura Judicial Service Rules, 2003 - Petitioner is not entitled to the relief - Tripura Judicial Service Rules, 2003 - r. 20(A) and (B)..

In the instant writ petition and the interlocutory application filed by a member of Tripura Judicial Service (Grade-II) and holding the post of Civil Judge (Senior Division), the issue for consideration before the Court was the propriety of: (i) denial of promotion to the petitioner to Grade-I; and (ii) not extending the service of the petitioner upto the age of sixty years under r. 20(B) of the Tripura Judicial Service Rules, 2003.

Dismissing the writ petition and the interlocutory application, the Court

HELD: 1. According to r.7(1) of the Tripura Judicial Service Rules, 1974, appointment to the post of Grade-I and Grade-II by promotion from the next grade below shall be made on the ground of merit-cum-seniority. In the petitioner's ACRs for the last three years, i.e., 2000, 2001 and 2002, immediately preceding the date of consideration of his case for promotion, it has been recorded that he was not found fit for promotion. Based on these remarks in the ACRs, if the petitioner has been denied promotion in July 2003, such action can hardly be faulted. The remarks in ACRs do enable the authority to assess comparative merit once the question of promotion arises when the criteria for promotion is merit-cum-seniority. Thus, it cannot be said that the petitioner has been wrongly denied promotion to Grade-I. [para 6] [131-E-H; 132-A-C]

2.1. The mode and manner of assessment and evaluation of the potential of continued utility is prescribed in r. 20(B)(I) of the Tripura Judicial Service Rules, 2003. Clause (B) of r. 20 of the 2003 Rules, as amended in 2006, makes it clear that the High Court is empowered to assess and evaluate the record of a judicial officer for continued utility in service upto 60 years. Clause (B) has overriding effect over Clause (A) of the said rule. This is clear from the expression "Notwithstanding anything contained in Clause (A)" with which Clause (B) begins. [para 10] [134-E-F]

2.2. No legal flaw has been pointed out to the exercise undertaken by the High Court in respect of the assessment and evaluation of the petitioner's service for continued utility in service upto 60 years. [para 10] [134-F-G]

All India Judges' Association & Ors. Vs. Union of India & Ors., **2002 (2) SCR 712 =2002 (4) SCC 247 - referred to.**

Case Law Reference:

2002 (2) SCR 712 referred to para 4

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 31 of 2004.

Under Article 32 of the Constitution of India.

Manoj Swarup, Hiren Dasan, Uday Gupta, Harish Dasan, Suvendu S. Das, Preshit Surshe, Salra Chandra for the Petitioner.

Vijay Hansaria, P.I. Jose, Sneha Kalita, Anupam Mishra, Rituraj Biswas (for Gopal Singh) for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. The petitioner on the date of filing the Writ Petition under Article 32 of the Constitution of India was a member of Tripura Judicial Service (Grade II) and was holding the post of Civil Judge (Senior Division) and Assistant Sessions Judge, North Tripura. He has prayed for diverse reliefs in the Writ Petition, including the direction to the High Court to incorporate “court suitability test” in the Tripura Judicial Service Rules, 2003 (for short, ‘2003 Rules’) and further direction that the petitioner should be considered for promotion on the post of Grade-I.

2. On February 3, 2004 this Court issued limited notice on the question of not making any provision for judging the suitability of Judicial Officers for the purposes of promotion in the 2003 Rules and relaxation in the age of qualifying service.

3. The petitioner has retired from service on December 31, 2006, during the pendency of the Writ Petition, as Civil Judge (Senior Division) and Assistant Sessions Judge, Grade-II.

4. The petitioner made application being Interlocutory Application No. 3 of 2005 and prayed to quash the Memo dated June 7, 2005 issued by the Gauhati High Court and for direction to the Gauhati High Court to consider the case of the petitioner for the benefits of Assured Career Progress in accordance with the recommendations of Shetty Commission Report which was accepted by this Court in *All India Judges' Association & Ors. Vs. Union of India & Ors.,* 2002 (4) SCC 247.

5. On October 7, 2010, while disposing of Interlocutory Application No. 3 of 2005, the matter was adjourned to enable the petitioner to challenge the order dated June 7, 2005 by which the benefits under Assured Career Progress were denied to him in appropriate proceedings. We are informed that the petitioner has not challenged the order dated June 7, 2005 pursuant to the above liberty.

6. Mr. Manoj Swarup, learned counsel for the petitioner, submitted that the petitioner was wrongly denied promotion in July 2003 although his juniors were accorded promotion. He further submitted that in July 2003, the petitioner's case for promotion ought to have been considered under the Tripura Judicial Service Rules, 1974 (for short, '1974 Rules'). In this regard, he referred to Rule 7(1) of the 1974 Rules. Rule 7(1) of the 1974 Rules provides for qualifications for recruitment to the service in Grade-I and Grade-II. According to this Rule, appointment to the post of Grade-I and Grade-II by promotion from the next grade below shall be made on the ground of merit-cum-seniority. In the petitioner's ACR of the year 2000, it has been recorded that he was not yet fit for promotion. Similar remarks have been recorded in 2001 and 2002 ACRs. Thus, in last three years immediately preceding the date of consideration of the petitioner's case for promotion, his ACRs show that he was not found fit for promotion. Based on the remarks in the ACRs of the years 2000, 2001 and 2002 if the petitioner has been denied promotion in July 2003, such action

can hardly be faulted. The remarks in ACRs do enable the authority to assess comparative merit once the question of promotion arises when the criteria for promotion is merit-cum-seniority. It is pertinent to notice that the adverse remarks in the ACRs of 2000 and 2001 were communicated to the petitioner on November 28, 2002 and the adverse remarks for the year 2002 were communicated to him on May 19, 2003. The adverse remarks were thus communicated to the petitioner before July 29, 2003 and these remarks continued to remain on record though the petitioner had submitted his representation/reply thereto. Be that as it may, in view of the petitioner's service record of the years 2000, 2001 and 2002, it cannot be said that he has been wrongly denied promotion to Grade-I.

7. Mr. Manoj Swarup, learned counsel for the petitioner, also raised the grievance that the petitioner has been made to retire on December 31, 2006 on attaining the age of 58 years although the superannuation age stood enhanced to 60 years. He invited our attention to the prayer made in Interlocutory Application No. 5 of 2006.

8. From the communication dated January 7, 2006 sent by the Registrar, Gauhati High Court to the Secretary, Law Department, Government of Tripura, it appears that the matter pertaining to extension of services of the petitioner under the 2003 Rules was considered by the Gauhati High Court and the High Court was satisfied that the extension of petitioner's services upto the age of 60 years did not deserve to be recommended. The only ground raised in the Interlocutory Application No. 5 of 2006 is that the amended Rule 20 of the 2003 Rules has enhanced the age of superannuation upto the age of 60 years which is not subject to any discretion to be applied by the High Court. We are unable to accept the contention of the petitioner in this regard. Rule 20 of the 2003 Rules prior to amendment reads as follows :-

"RETIREMENT

(A) Except as otherwise provided in these Rules, every Judicial Officer shall retire from the service on the afternoon of the last date of the month in which he attains the age of 58 years.

Provided that all Judicial Officers whose date of birth is the 1st day of a month shall retire from service on the afternoon of the last day of the preceding month on attaining the age of 58 years.

(B) Notwithstanding anything contained in Clause (A) above, a Judicial Officer, who in the opinion of the High Court, have the potential to continue with his service, shall be retained in service up to 60 years.

(I) The potential for continued utility shall be assessed and evaluated by appropriate Committee of Judges of the High Court, constituted and headed by the Chief Justice and the evaluation shall be made on the basis of the Officer's past record of service, character roll, quality of judgments and other relevant matters.

(II) The High Court should undertake and complete the exercise well within time before the Officer attains the age of 58 years and take a decision whether the benefit of extended service is to be given to the officer or not.

(III) In case he is found fit for being given the benefit of extended age of superannuation, the Governor shall, on the recommendation of the High Court, issue necessary order."

9. Rule 20 of the 2003 Rules came to be amended with effect from May 19, 2006. In Clause (A) of Rule 20 for the figure

'58' at both the places, the figure '60' was substituted. For Clause (B), the following was substituted :-

"Clause (B) Notwithstanding anything contained in Clause (A) above, the High Court shall have power to assess and evaluate the record of the Judicial Officer for his continued utility in service upto 60 years.

(I) The potential for continued utility shall be assessed and evaluated by appropriate Committee of Judges of the High Court, constituted and headed by the Chief Justice and the evaluation shall be made on the basis of the Officer's past record of service, character roll, quality of judgments and other relevant matters.

(II) The High Court shall undertake and complete the exercise well within time before the Officer attains the age of 58 years."

10. A bare perusal of the Clause (B) of amended Rule 20 leaves no manner of doubt that the High Court is empowered to assess and evaluate the record of a judicial officer for continued utility in service upto 60 years. Clause (B) has overriding effect over Clause (A) of Rule 20. This is clear from the expression "Notwithstanding anything contained in Clause (A)" with which Clause (B) begins. The mode and manner of assessment and evaluation of the potential of continued utility is prescribed in Rule 20(B)(I) of the 2003 Rules. No legal flaw has been pointed out to the exercise undertaken by the High Court in respect of the assessment and evaluation of the petitioner's service for continued utility in service upto 60 years. We are satisfied that the petitioner is not entitled to the relief claimed in Interlocutory Application No. 5 of 2006. Interlocutory Application No. 5 of 2006 is, accordingly, dismissed.

11. It is not necessary to consider the other prayers in the Writ Petition as Mr. Manoj Swarup, learned counsel for the

petitioners, did not press for prayers 1 to 4 made in the Writ Petition.

12. Accordingly, Writ Petition has no merit and deserves to be dismissed and is dismissed.

13. We record the statement of Mr. Vijay Hansaria, learned senior counsel for the respondent No. 1-Gauhati High Court-that the petitioner has been paid all his retiral benefits, including accumulated pension.

R.P. Writ Petition dismissed.

MEDICAL COUNCIL OF INDIA
v.
JSS MEDICAL COLLEGE & ANR.
(Civil Appeal No. 274 of 2012)

JANUARY 11, 2012

[H.L. DATTU AND CHANDRAMAULI KR. PRASAD, JJ.]

Interim order: Maintainability of - Writ petition by medical college seeking increase of seats for MBBS course from 150 to 200 for the academic year 2011-12 - High Court passing an interim order granting permission to increase the intake of MBBS students from 150 to 200 for the academic year 2011-12 - Correctness of - Held: High Court erred in permitting increase in seats by interim order - It ought to have realized that granting such permission by an interim order would have a cascading effect - By virtue of such order, students are admitted and though many of them would take the risk knowingly but few may be ignorant - In most of such cases when finally the issue is decided against the college, the welfare of the students is seriously effected - If on ultimate analysis it is found that the college's claim for increase of seats is untenable, in such an event the admission of students with reference to the increased seats shall be illegal - There cannot be anything more destructive of the rule of law than a direction by the court to allow continuance of such students, whose admissions is found illegal in the ultimate analysis - Courts cannot by its fiat increase the seats, a task entrusted to the Board of Governors, a body vested with the power to carry out the functions and duties of Medical Council of India and that too by interim order - The interim order passed by the High Court is set aside - Education.

The Board of Governors, a body vested with the power to carry out the functions and duties of Medical Council of India rejected the application filed by the

respondent-medical college for increasing the seats for MBBS course from 150 to 200 for the academic year 2011-12. The respondent-college filed a writ petition before the High Court. The High Court passed an interim order granting permission to increase the intake of MBBS students from 150 to 200 for the academic year. The instant appeal was filed challenging the interim order of the High Court.

Allowing the appeal, the Court

HELD: 1. The High Court erred in permitting increase in seats by interim order. In normal circumstances the High Court should not issue interim order granting permission for increase of the seats. The High Court ought to realize that granting such permission by an interim order has a cascading effect. By virtue of such order students are admitted as in the instant case and though many of them had taken the risk knowingly but few may be ignorant. In most of such cases when finally the issue is decided against the College the welfare and plight of the students are ultimately projected to arouse sympathy of the Court. It results in very awkward and difficult situation. If on ultimate analysis it is found that the College's claim for increase of seats is untenable, in such an event the admission of students with reference to the increased seats shall be illegal. There cannot be anything more destructive of the rule of law than a direction by the court to allow continuance of such students, whose admissions is found illegal in the ultimate analysis. This Court is entrusted with the task to administer law and uphold its majesty. Courts cannot by its fiat increase the seats, a task entrusted to the Board of Governors and that too by interim order. In a matter like the present one, decisions on issues have to be addressed at the interlocutory stage and they can not be deferred or dictated later when serious complications

might ensue from the interim order itself. The interim order passed by the High Court is unsustainable. [Paras 10, 11] [143-B-F; 144-D]

Medical Council of India v. Rajiv Gandhi University of HealthSciences, **(2004) 6 SCC 76 : 2004 (3) SCR 1119 - relied on.**

Case Law Reference:

2004 (3) SCR 1119	**referred to** **Para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 274 of 2012.

From the Judgment & Order dated 24.08.2011 of the High Court of Karnataka at Bangalore in Writ Petition (Civil) No. 31587 of 2007.

Nidesh Gupta, Amit Kumar, Rekha Bakshi, Ashish Kumar, Avijit Mani Tripathi, Jawahar Narang for the Appellant.

K.K. Venugopal, Vishvanath Shetty, S. Udaya Kumar Sagar, Bina Madhavan, Sashikiran Shetty, Vinita Sasidharan, Praseena E. Joseph, Lawyer's Knit & Co. for the Respondents.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. Medical Council of India, aggrieved by the interim order dated 24th August, 2011 passed by a Division Bench of the Karnataka High Court in Writ Petition No. 31587 of 2011 whereby it had permitted JSS Medical College, Respondent No. 1 herein, to increase the seats for MBBS Course from 150 to 200 for the academic year 2011-2012, has preferred this special leave petition.

2. Leave granted.

3. In view of the order which we propose to pass in this appeal it is inexpedient to give in detail the facts of the case.

Suffice it to say that JSS Medical College, Respondent No. 1 herein (hereinafter referred to as 'the College'), is recognized for imparting MBBS education with intake capacity of 150 students. On 27th of November, 2010, the College submitted an application for increase of intake capacity for the MBBS Course from the academic year 2011-2012 from 150 to 250. The Board of Governors, the body to which power has been vested to carry out the functions and duties of the Medical Council of India (hereinafter referred to as 'the Board of Governors') appointed assessor by order dated 23rd of February, 2011 to assess the physical and other teaching facilities available for grant of letter of permission for the increase of MBBS seats from 150 to 250 to the College for the academic year 2011-2012.

4. In the light of the aforesaid order the assessor visited the College and made assessment of the physical and other teaching facilities available for grant of letter of permission for increase of MBBS seats from 150 to 250 and submitted its report. The assessment report was considered by the Board of Governors which decided not to issue letter of permission for increase of seats as the infrastructure facilities, clinical material and faculty were inadequate. It also found deficiency in equipments and other deficiencies as pointed out in the assessment report. Accordingly, the Board of Governors by its letter dated 5th of May, 2011 called upon the College to submit its response as to why its proposal for increase of seats be not disapproved and returned. The College by its letter dated 21st May, 2011 submitted its response and claimed that it has adequate infrastructure, clinical material and teaching facilities to meet the teaching and training requirement for the enhanced intake of 250 students and, at the same time, wrote that in the event of the Board of Governors finding that the same are not adequate for granting increase of seats to 250, the request may be considered for enhanced intake from 150 to 200 seats. The compliance report submitted by the College along with assessment reports of the assessor were forwarded by the

Board of Governors to the assessor by letter dated 1st of June, 2011 for their perusal and for carrying out the assessment for increase of MBBS seats from 150 to 250. It is relevant here to state that the College by its letter dated 3rd of June, 2011 wrote to the Coordinator of the assessment team "to revise the assessment for increase of MBBS seats from 150 to 200 admissions instead of 250 seats". By the said letter the College claimed that it had infrastructure facilities, clinical materials and teaching facilities including the instruments for 200 admissions for MBBS Course.

5. The claim for increase of seats from 150 to 250 was considered and the Board of Governors decided "to return the applications as disapproved for increase of seats from 150 to 250" for the academic year 2011-2012 by its letter dated 30th of June, 2011. The College by its letter dated 8th of July, 2011 made request for reconsideration of increase of seats from 150 to 200 inter alia stating that "the team of assessors who visited the College on 3rd of June, 2011 after assessing the seats have not only recommended for continuation of 150 seats but also have recommended for additional 50 seats intake taking into account adequacy of additional facilities, book space, equipment and other facilities". The Board of Governors reconsidered the claim of the College with regard to increase of seats in MBBS Course from 150 seats to 200/250 seats and decided to reiterate its earlier decision as the cut of date for issuance of letter of permission, i.e., 30th of June, 2011 is already over.

6. Aggrieved by the same, the College filed the writ petition inter alia praying for quashing the decision of the Board of Governors dated 30th of June, 2011 and 5th of August, 2011 by issuance of a writ in the nature of certiorari or any other appropriate writ and further prayed for issuance of a writ in the nature of mandamus directing the Medical Council of India for issuance of letter of permission for increase of intake in its MBBS Course from 150 to 200 for the year 2011-2012 as also

to admit 200 students. By way of interim relief the petitioner made the following prayer :

> "Pending disposal of the above writ petition, it is prayed that this Hon'ble Court may be pleased to permit the petitioner institution to admit to an intake of 200 students for its MBBS course as per recommendation of its expert body, subject to further orders of this Hon'ble Court in the interest of justice and equity"

By the order impugned the High Court passed the following interim order :

> "The petitioner institution is permitted to increase the intake of MBBS students from 150 to 200 for the academic year 2011-2012. Medical Council of India is at liberty to indicate any deficiency if it comes across for the intake of 200 seats in MBBS for the academic year 2011-2012 and direct compliance of the same within three months from the receipt of their communication.
>
> This order is subject to final result in the writ petition".

7. Mr. Nidesh Gupta, Senior Advocate appears on behalf of the appellant whereas Respondent No. 1 is represented by Mr. K.K. Venugopal, Senior Advocate. To put the record straight Senior Counsel representing the parties had addressed us in detail and invited us to finally pronounce the judgment on all issues. At one stage we were inclined to do that but finding that the present appeal is against an interim order and the High Court is yet to finally pronounce the judgment on merits, we declined to take the final call and intend to decide the validity of the interim order only.

8. Power to grant final relief implies within itself power to grant interim relief unless it is specifically prohibited by law. However, in the facts and circumstances of the case we are of the opinion that the High Court erred in permitting the increase of the seats by an interim order. It is not in dispute that the Board

of Governors for exercise of its statutory power under Section 10.A of the Medial Council of India Act, 1956 has fixed various schedules including last date for submission of the application for increase in the seats as also the date till when the Board of Governors had to take the decision. It is an admitted position that the College had made request for increase of seats from 150 to 250 within the time prescribed. It had not filled application for increase from 150 seats to 200 seats within the time stipulated but made request for increase of 200 seats after the assessor's report. It is not on prescribed format but by means of a letter. By that time the schedule fixed for increase of seats by the Board of Governors had already expired.

9. In view of these facts, following questions arise for consideration:

1. Whether or not the application filed by the College later on for consideration of its claim for the reduced seat of 200 after the expiry of period will date back to the date of original application?

2. Whether or not the application for increase filed after the scheduled date is required to be considered?

3. Whether or not the assessors exceeded in its jurisdiction to consider the claim of the College for increase of 200 seats, when undisputedly they were assigned the task of assessing the College's claim for increase of 250 seats?

4. Whether or not the Board of Governors was right in rejecting the claim of the College on the expiry of the outer limit by which the decision to increase the number of seats was to be taken by it?

5. Whether or not the High Court while exercising the power under Article 226 and 227 of the Constitution of India could straightaway permit increase of seats

or direct for consideration of the claim by the competent authority?

10. Without adverting to the aforesaid issues and many other issues which may arise for determination, the High Court, in our opinion, erred in permitting increase in seats by interim order. In normal circumstances the High Court should not issue interim order granting permission for increase of the seats. High Court ought to realize that granting such permission by an interim order has a cascading effect. By virtue of such order students are admitted as in the present case and though many of them had taken the risk knowingly but few may be ignorant. In most of such cases when finally the issue is decided against the College the welfare and plight of the students are ultimately projected to arouse sympathy of the Court. It results in very awkward and difficult situation. If on ultimate analysis it is found that the College's claim for increase of seats is untenable, in such an event the admission of students with reference to the increased seats shall be illegal. We cannot imagine anything more destructive of the rule of law than a direction by the court to allow continuance of such students, whose admissions is found illegal in the ultimate analysis. This Court is entrusted with the task to administer law and uphold its majesty. Courts cannot by its fiat increase the seats, a task entrusted to the Board of Governors and that too by interim order. In a matter like the present one, decisions on issues have to be addressed at the interlocutory stage and they can not be deferred or dictated later when serious complications might ensue from the interim order itself. There are large number of authorities which take this view and instead of burdening this judgment with all those authorities it would be sufficient to refer to a three Judge Bench decision of this Court in the case of *Medical Council of India v. Rajiv Gandhi University of Health Sciences,* (2004) 6 SCC 76, in which it has been held as follows:

"14. In the normal circumstances, the High Court ought not to issue an interim order when for the earlier year

itself permission had not been granted by the Council. Indeed, by grant of such interim orders students who have been admitted in such institutions would be put to serious jeopardy, apart from the fact whether such institutions could run the medical college without following the law. Therefore, we make it clear that the High Court ought not to grant such interim orders in any of the cases where the Council has not granted permission in terms of Section 10-A of the Medical Council Act. If interim orders are granted to those institutions which have been established without fulfilling the prescribed conditions to admit students, it will lead to serious jeopardy to the students admitted in these institutions."

11. For all these reasons we are of the opinion that the interim order passed by the High Court is unsustainable. Any observation made by us in this judgment is for disposal of the present appeal and shall have no bearing on the merits of the case. Further, as the matter pertains to increase in seats in educational institution, we deem it expedient that the High Court considers and disposes of the case on merit expeditiously.

12. Resultantly, we allow this appeal, set aside the impugned interim order of the High Court with the observation aforesaid. However, there shall be no order as to costs.

D.G. Appeal allowed.

ALISTER ANTHONY PAREIRA
v.
STATE OF MAHARASHTRA
(Criminal Appeal No. 1318-1320 of 2007)

JANUARY 12, 2012

[R.M. LODHA AND JAGADISH SINGH KHEHAR, JJ.]

PENAL CODE, 1860:

ss.304 (Part-II) and 338 - Causing of death and grievous hurt by rash and negligent driving - Permissibility of trial and conviction of a person for both offences for a single act of the same transaction - Held: Indictment of an accused u/ss 304 (Part II) and 338 can co-exist in a case of single rash or negligent act where such an act is done with the knowledge of likelihood of its dangerous consequences - It cannot be said that two charges are mutually destructive - If the act is done with the knowledge of the dangerous consequences which are likely to follow and if death is caused, then not only that the punishment is for the act but also for the resulting homicide and a case may fall within s. 299 or s. 300 depending upon the mental state of the accused viz., as to whether the act was done with one kind of knowledge or the other or the intention -There is no impediment in law for an offender being charged with the offence punishable u/s 304 (Part II) and also u/ss 337 and 338 IPC - A person, doing an act of rash or negligent driving, if aware of a risk that a particular consequence is likely to result and that result occurs, may be held guilty not only of the act but also of the result.

s.304 (Part-II) r/w s.299 (last clause) - Seven labourers, while asleep killed and 8 others suffered grievous injuries by rash and negligent driving - Nature of the offence - Held: Rash or negligent driving on a public road with the knowledge of the dangerous character and the likely effect of the act and

resulting in death may fall in the category of culpable homicide not amounting to murder - A person, responsible for a reckless or rash or negligent act that causes death which he had knowledge as a reasonable man that such act was dangerous enough to lead to some untoward thing and the death was likely to be caused, may be attributed with the knowledge of the consequence, and may be fastened with culpability of homicide not amounting to murder punishable u/s 304 (Part II) - In the instant case, the essential ingredients of s. 304 (Part II) have been successfully established by the prosecution against the accused - The view of the High Court being consistent with the evidence on record and law, upheld - Judicial notice.

ss.304 (Part-II), 337 and 338 - Death of seven labourers while asleep and grievous injuries to 8 others caused by rash and negligent driving - Sentence - Held: The facts and circumstances of the case which have been proved by the prosecution in bringing home the guilt of the accused for the offence punishable u/s 304(Part II) undoubtedly show despicable aggravated offence warranting punishment proportionate to the crime - Seven precious human lives were lost by the act of the accused - For an offence like this which has been proved against the accused, sentence of three years awarded by the High Court is too meagre and not adequate, but since no appeal has been preferred by the State, the Court refrains from considering the matter for enhancement.

SENTENCE/SENTENCING

Sentence u/s 304-A IPC - Held: The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence - As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer - Court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence - In view of the large number of accidental deaths

due to speeding and drunk driving , it is high time that law makers revisit the sentencing policy reflected in s. 304 A IPC.

Framing of charge - Accused charged with the offences punishable u/ss.304 (Part-II) and s.338 IPC for causing death of 7 labourers and injuries to 8 others by rash and negligent driving - Words 'drunken condition' not stated in the charge - Charge neither framed with the offence punishable u/s 185, Motor Vehicles Act nor u/s 66 (1) (b) of Bombay Prohibition Act - Held: Omission of the words 'in drunken condition' in the charge is not very material and, in any case, such omission has not at all resulted in prejudice to the accused as he was fully aware of the prosecution evidence which consisted of his drunken condition at the time of incident.

CODE OF CRIMINAL PROCEDURE, 1973:

s. 313 - Examination of accused - Explained - Held: Burden is on the accused to establish that by not apprising him of the incriminating evidence and the inculpatory materials that had come in the prosecution evidence against him, a prejudice has been caused resulting in miscarriage of justice - During investigation, the police concluded that the rash and negligent driving of the accused by consuming alcohol killed seven persons and caused injuries to eight others - The conclusion drawn on the completion of investigation was also put to him - Neither the doctor, who examined the accused immediately after the incident and reported him to be in drunken condition, nor the Investigating Officer, who deposed of having received the chemical examination report, were cross-examined in this respect - It cannot be said that the accused was not made fully aware of the prosecution evidence that he had driven the car rashly or negligently in a drunken condition - He had full opportunity to say what he wanted to say with regard to the prosecution evidence.

The appellant was charged with offences punishable

u/ss 304 (Part II) and 338 IPC for causing death of 7 labourers and grievous injuries to 8 others who were sleeping on footpath, by running a speeding car over them. The trial court convicted the appellant of the offences punishable u/ss 304 A and 337 IPC and sentenced him to simple imprisonment for six months with a fine of Rs. 5 lakh u/s 304 A and simple imprisonment for 15 days u/s 337 IPC. The High Court convicted the accused u/ss 304 (Part II), 338 and 337 IPC and sentenced him to undergo rigorous imprisonment for 3 years u/s 304 (Part II) with a fine of Rs. 5 Lakh, rigorous imprisonment for one year u/s 338, and rigorous imprisonment for six months u/s 337 IPC.

In the appeals filed by the accused the questions for consideration before the Court were:

(i) "Whether it is permissible to try and convict a person for the offence punishable under Section 304 (Part II) IPC and the offence punishable under Section 338 IPC for a single act of the same transaction?"

(ii) Whether by not charging the appellant of `drunken condition' and not putting to him the entire incriminating evidence let in by the prosecution, particularly the evidence relating to appellant's drunken condition, at the time of his examination u/s 313 of the Code, the trial and conviction of the appellant got affected?

(iii) Whether prosecution evidence established beyond reasonable doubt the commission of the offences by the appellant punishable u/ss 304 (Part II), 338 and 337 IPC?

(iv) Whether sentence awarded to the appellant by the High Court for the offence punishable u/s

304 (Part II) IPC required any modification?

Dismissing the appeals, the Court

HELD: 1.1. There is no impediment in law for an offender being charged for the offences punishable u/s 304 (Part II) IPC and also u/ss 337 and 338 IPC. The two charges u/ss 304 (Part II) and 338 can legally co-exist in a case of single rash or negligent act where a rash or negligent act is done with the knowledge of likelihood of its dangerous consequences. It cannot be said that two charges are mutually destructive. [para 39 and 43] [170-F; 171-H; 172-A]

1.2. Rash or negligent driving on a public road with the knowledge of the dangerous character and the likely effect of the act and resulting in death may fall in the category of culpable homicide not amounting to murder. A person, doing an act of rash or negligent driving, if aware of a risk that a particular consequence is likely to result and that result occurs, may be held guilty not only of the act but also of the result. As a matter of law - in view of the provisions of the IPC - the cases which fall within last clause of s. 299, but not within clause 'fourthly' of s.300, may cover the cases of rash or negligent act done with the knowledge of the likelihood of its dangerous consequences and may entail punishment u/s 304 (Part II) IPC. A person, responsible for a reckless or rash or negligent act that causes death which he had knowledge as a reasonable man that such act was dangerous enough to lead to some untoward thing and the death was likely to be caused, may be attributed with the knowledge of the consequence and may be fastened with culpability of homicide not amounting to murder and punishable u/s 304 (Part II) IPC. [para 40-41] [171-B-F]

1.3. Section 304A IPC takes out of its ambit the cases of death of any person by doing any rash or negligent

act amounting to culpable homicide of either description. Applicability of s. 304A IPC is limited to rash or negligent acts which cause death but fall short of culpable homicide amounting to murder or culpable homicide not amounting to murder. An essential element to attract s. 304A IPC is death caused due to rash or negligent act. The three things which are required to be proved for an offence punishable u/s 304A are : (1) death of human being; (2) the accused caused the death and (3) the death was caused by the doing of a rash or negligent act, though it did not amount to culpable homicide of either description. Like s. 304A, ss. 279, 336, 337 and 338 IPC are attracted for only the negligent or rash act.[para 31, 37 and 38] [168-E-F; 170-A-D]

Empress of India v. Idu Beg **1881(3) All 776 - referred to.**

1.4. By charging the appellant for the offence punishable u/ s 304 (Part II) and 338 IPC, no prejudice has been caused to him. The appellant was made fully aware of the charges against him and there is no failure of justice. [para 44] [172-B-C]

In Prabhakaran Vs. State of Kerala **2007 (7) SCR 1141 = 2007 (14) SCC 269 - distinguished**

2.1. It is a fact that no charge u/s 185 of the Motor Vehicles Act, 1988 and s. 66(1)(b) of the Bombay Prohibition Act, 1949 was framed against the appellant. It is also a fact that in the charge framed against the appellant for offence u/s 304 (Part II) IPC, the words 'drunken condition' are not stated. However, if the charge u/s 304 Part II IPC framed against the appellant is seen, it would be clear that the ingredients of s.304 Part II IPC are implicit in that charge. The omission of the words 'in drunken condition' in the charge is not very material and, in any case, such omission has not at all resulted in

prejudice to the appellant as he was fully aware of the prosecution evidence which consisted of drunken condition of the appellant at the time of incident. [para 47 and 50] [174-B-D; 176-B-C]

Anna Reddy Sambasiva Reddy & Ors. vs. State of Andhra Pradesh **2009 (6) SCR 755 = 2009 (12) SCC 546;** *Jai Dev Vs. State of Punjab* **1962 SCR 489 = AIR 1963 612; and** *Shivaji Sahabrao Bobade and Anr. Vs. State of Maharashtra* **2008 (10) SCR 1115 = 2008 (1) SCC 328 - relied on**

Asraf Ali Vs. State of Assam **2005 Suppl. (1) SCR 562 = 2005 (5) SCC 554 -referred to.**

2.2. As regards the examination of the accused u/s 313 CrPC, from the decided cases, the legal position appears to be this : the accused must be apprised of incriminating evidence and materials brought in by the prosecution against him to enable him to explain and respond to such evidence and material. Failure in not drawing the attention of the accused to the incriminating evidence and inculpatory materials brought in by prosecution specifically, distinctly and separately may not by itself render the trial against the accused void and bad in law; firstly, if having regard to all the questions put to him, he was afforded an opportunity to explain what he wanted to say in respect of prosecution case against him and, secondly, such omission has not caused prejudice to him resulting in failure of justice. The burden is on the accused to establish that by not apprising him of the incriminating evidence and the inculpatory materials that had come in the prosecution evidence against him, a prejudice has been caused resulting in miscarriage of justice. [para 57] [179-E-H]

2.3. In the instant case, the accused, in his statement u/s 313, was informed about the evidence relating to the

incident. During investigation, the police concluded that the rash and negligent driving of the appellant by consuming alcohol caused the death of seven persons and injury to the eight persons. The conclusion drawn on the completion of investigation was also put to him. The appellant's attention was also invited to the materials such as photographs, mechanical inspections of the car, seized articles, liquor bottle, etc. Neither PW-1, the doctor, who examined the accused immediately after the incident and found him in drunken condition, nor PW 18, the investigating officer, who deposed having received the chemical examiner's report, were cross examined by the defence in this respect. Thus, it cannot be said that the appellant was not made fully aware of the prosecution evidence that he had driven the car rashly or negligently in a drunken condition. He had full opportunity to say what he wanted to say with regard to the prosecution evidence. [para 51,53,54 and 58] [176-D; 180-A, F; 177-B; 180-G-H; 181-A]

3.1. The High Court has held: (1) the accused at the time of driving the car was under the influence of liquor; (2) he drove the car in drunken condition at a very high speed; and (3) he failed to control the vehicle and the vehicle could not be stopped before it ran over the people sleeping on the pavement. The High Court took judicial notice of the fact that in Mumbai people do sleep on pavements. The accused was also aware of the fact that at the place of occurrence people sleep, as he was a resident of that area. The High Court took note of the fact that the accused had admitted the accident and his explanation was that the accident occurred due to mechanical failure and the defect that was developed in the vehicle but found his explanation improbable and unacceptable. The High Court held that the accused could be attributed to have a specific knowledge of the

event that happened. It, thus, concluded that the accused had knowledge and in any case such knowledge would be attributable to him that his actions were dangerous or wanton enough to cause injuries which may even result into death of persons. [para 65] [184-E-H; 185-A-D]

3.2. There is no justifiable ground to take a view different from that of the High Court. The evidence and materials on record prove beyond reasonable doubt that the appellant can be attributed with knowledge that his act of driving the vehicle at a high speed in the rash or negligent manner was dangerous enough and he knew that one result would very likely be that people who were asleep on the pavement may be hit, should the vehicle go out of control. The essential ingredients of s. 304 (Part II) IPC have been successfully established by the prosecution against the appellant. The High Court noticed that two injured persons, namely, PW-6 and PW-8 had sustained injuries as covered by the 'grievous' hurt u/s 320 IPC. Charge u/s 338 IPC against the appellant is, thus, clearly established. This Court upholds the view of the High Court being consistent with the evidence on record and law. [para 66-67] [185-E-H; 186-A]

3.3. Insofar as charge u/s 337 IPC is concerned, it is amply established from the prosecution evidence that PW-5, PW-7, PW-9 and PW-10 received various injuries; they suffered simple hurt. The trial court as well as the High Court were justified in convicting the appellant of the offence punishable u/s 337 IPC as well. [para 68] [186-E]

4.1. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. The courts have evolved certain principles: twin

objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence. [para 70-71] [187-B-E]

State of Karnataka v. Krishnappa **2000 (2) SCR 761 = 2000 (4) SCC 75 - relied on**

Dhananjoy Chatterjee alias Dhana v. State of W.B. **1994 (1) SCR 37 = 1994 (2) SCC 220 ;** *Ravji alias Ram Chandra v. State of Rajasthan* **1995 (6) Suppl. SCR 195 = 1996 (2) SCC 175;** *State of M.P. v. Ghanshyam Singh* **2003 (3) Suppl. SCR 618 = 2003 (8) SCC 13,** *Surjit Singh v. Nahara Ram & Anr.* **2004 Suppl. (3) SCR 356 = 2004 (6) SCC 513,** *State of M.P. v. Munna Choubey* **2005 (1) SCR 781 = 2005 (2) SCC 710;** *Hari Singh v. Sukhbir Singh & Ors.* **1988 (2) Suppl. SCR 571 = 1988 (4) SCC 551 ;** *Sarwan Singh & Ors. v. State of Punjab* **1979 (1) SCR 383 = 1978 (4) SCC 111; and** *Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd. & Anr.* **2007 (4) SCR 1122 = 2007 (6) SCC 528 - distinguished.**

4.2. The facts and circumstances of the instant case which have been proved by the prosecution in bringing home the guilt of the accused u/s 304 (Part II) IPC undoubtedly show despicable aggravated offence warranting punishment proportionate to the crime. Seven precious human lives were lost by the act of the accused. For an offence like this which has been proved against the appellant, sentence of three years awarded by the

High Court is too meagre and not adequate but since no appeal has been preferred by the State, this Court refrain from considering the matter for enhancement. The facts and circumstances of the case do not justify benefit of probation to the appellant for good conduct or for any reduction of sentence. [para 79-80] [194-C-G]

4.3. In view of the large number of accidental deaths due to speeding and drunk driving, it is high time that law makers revisit the sentencing policy reflected in s. 304 A IPC. [para 78] [193-H; 194-A-B]

Ghulam Din Buch .vs. State of J &K **1996 (3) SCR 1121 = 1996 (9) SCC 239;** *Kuldip Singh & Ors. vs. State of Delhi 2003(12) SCC 528; Jai Prakash v. State (Delhi Administration)* **1991 (1) SCR 202 = 1991 (2) SCC 32 and** *Joti Parshad v. State of Haryana* **1993 (2) Suppl. SCC 497;** *Willie (William) Slaney v. State of Madhya Pradesh* **1955 SCR 1140 =1956 AIR 116** *Dalbir Singh v. State of U.P.* **2004 (5) SCC 334;** *Shivaji Sahabrao Bobade and another v. State of Maharashtra* **1974 (1) SCR 489 = 1973 (2) SCC 793;** *Dalbir Singh v. State of Haryana* **2000 (3) SCR 1000 = 2000 (5) SCC 82,** *Shailesh Jasvantbhai and another v. State of Gujarat and others* **2006 (1) SCR 477 = 2006 (2) SCC 359 and** *Manish Jalan v. State of Karnataka* **2008 (8) SCC 225 - cited.**

Case Law Reference:

1996 (3) SCR 1121	**cited**	**para 16**
2003(12) SCC 528	**cited**	**para 16**
1991 (1) SCR 202	**cited**	**para 21**
1993 (2) Suppl. SCC 497	**cited**	**para 21**
1955 SCR 1140	**cited**	**para 21**
2004 (5) SCC 334	**cited**	**para 21**

2009 (6) SCR 755	**relied on**	**para 21 and 49**
1974 (1) SCR 489	**cited**	**para 22**
2000 (2) SCR 761	**cited**	**para 22**
2000 (3) SCR 1000	**cited**	**para 23**
2006 (1) SCR 477	**cited**	**para 23**
2008 (8) SCC 225	**cited**	**para 23**
1881(3) All 776	**referred to**	**para 35**
2007 (7) SCR 1141	**relied on**	**para 45**
1962 SCR 489	**relied on**	**para 54**
2008 (10) SCR 1115	**relied on**	**para 55**
2005 Suppl. (1) SCR 562	**referred to**	**para 75**
1994 (1) SCR 37	**distinguished**	**para 76**
1995 (6) Suppl. SCR 195	**distinguished**	**para 76**
2003 (3) Suppl. SCR 618	**distinguished**	**para 76**
2004 (3) Suppl. SCR 356	**distinguished**	**para 76**
2005 (1) SCR 781	**distinguished**	**para 76**
1988 (2) Suppl. SCR 571	**distinguished**	**para 77**
1979 (1) SCR 383	**distinguished**	**para 77**
2007 (4) SCR 1122	**distinguished**	**para 77**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1318-1320 of 2007.

From the Judgment & Order dated 06.09.2007 of the High Court of Judicature at Bombay in Crl. Appeal Nos. 430, 566 & 475 of 2007.

U.U. Lalit, Manjula Rao, Nitin Sangra, Satyajeet Saha, V.D. Khanna for the Appellant.

Sanjay Kharde, Sachin Patil (for Asha Gopalan Nair) for the Respondent.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. On the South-North Road at the East side of Carter Road, Bandra (West), Mumbai in the early hours of November 12, 2006 between 3.45 - 4.00 a.m., a car ran into the pavement killing seven persons and causing injuries to eight persons. The appellant – Alister Anthony Pareira – was at the wheels. He has been convicted by the High Court for the offences punishable under Sections 304 Part II, 338 and 337 of the Indian Penal Code, 1860 (IPC).

2. The prosecution case against the appellant is this: the repair and construction work of the Carter Road, Bandra (West) at the relevant time was being carried out by New India Construction Company. The labourers were engaged by the construction company for executing the works. The temporary sheds (huts) were put up for the residence of labourers on the pavement. In the night of November 11, 2006 and November 12, 2006, the labourers were asleep in front of their huts on the pavement. Between 3.45 to 4.00 a.m., that night, the appellant while driving the car (corolla) bearing Registration No. MH-01-R-580 rashly and negligently with knowledge that people were asleep on footpath rammed the car over the pavement; caused death of seven persons and injuries to eight persons. At the time of incident, the appellant was found to have consumed alcohol. A liquor bottle was recovered from the appellant's car. On his medical examination, he was found to have 0.112% w/v liquor (ethyl alcohol) in his blood. The appellant was fully familiar with the area being the resident of Carter Road.

3. The contractor—Panchanadan Paramalai Harijan (PW-2) – who had engaged the labourers and witnessed the incident

reported the matter immediately to the Khar Police Station. His statement (Ex. 13) was recorded and based on that a first information report (No. 838) was registered under Section 304, 279, 336, 337, 338 and 427 IPC; Section 185 of the Motor Vehicles Act, 1988 and Section 66 (1)(b) of Bombay Prohibition Act, 1949.

4. On completion of investigation, the charge sheet was submitted against the appellant by the Investigating Officer in the court of Magistrate having jurisdiction. The appellant was committed to the Court of Sessions and was tried by 2nd Adhoc Additional Sessions Judge, Sewree, Mumbai.

5. The indictment of the appellant was on two charges. The two charges read:-

> "(i) that on November 12, 2006 between 3.45 to 4.00 a.m. you have driven the car bearing No. MH-01-R-580 rashly and negligently with knowledge that people are sleeping on footpath and likely to cause death of those persons slept over footpath and thereby caused the death of seven persons who were sleeping on footpath on Carter Road and thereby committed an offence punishable under Section 304 Part II IPC.
>
> (ii) on above date, time and place you have driven the vehicle in rashly and negligent manner and thereby caused grievous injury to seven persons who were sleeping on footpath and thereby committed an offence punishable under Section 338 IPC."

6. The prosecution, to prove the above charges against the appellant, tendered oral as well as documentary evidence. In all, 18 witnesses, namely, Dr. Nitin Vishnu Barve (PW-1), Panchanadan Paramalai Harijan (PW-2), Ramchandra Chakrawarti (PW-3), Pindi Ramu (PW-4), Sriniwas Raman Pindi (PW-5), Smt. Mariamma Shingamana (PW-6), Smt.

Prema Chingaram (PW-7), Jagan Singaram (PW-8), Sigamani Shankar Pani (PW-9), Mallikarjun Bajappa Motermallappa (PW-10), J.C. Cell Mendosa (PW-11), Praveen Sajjan Mohite (PW-12), Limbaji Samadhan Ingle (PW-13), Dr. Sharad Maniklal Ruia (PW-14), Rajendra Nilkanth Sawant (PW-15), Basraj Sanjeev Mehetri (PW-16), Meenakshi Anant Gondapatil (PW-17) and Somnath Baburam Phulsunder (PW-18) were examined. The complaint, spot panchnama along with sketch map, C.A. Reports and other documents were also proved.

7. The statement of the appellant under Section 313 of the Criminal Procedure Code, 1973 (for short, 'the Code') was recorded. He admitted that he was driving the car no. MH-01-R-580 at the relevant time and the accident did occur but his explanation was that it happened on account of failure of engine and mechanical defect in the car and there was no negligence or rashness on his part.

8. The 2nd Adhoc Additional Sessions Judge, Sewree, Mumbai, on April 13, 2007 convicted the appellant for the offences punishable under Sections 304A and 337 IPC. The court sentenced him to suffer simple imprisonment of six months with fine of Rs. 5 lakhs for the offence under Section 304A IPC and in default further suffer simple imprisonment of one month and simple imprisonment of 15 days for the offence under Section 337 IPC. Both the sentences were ordered to run concurrently.

9. On April 19, 2007, the Bombay High Court took suo motu cognizance of the judgment and order dated April 13, 2007 passed by the 2nd Adhoc Additional Sessions Judge, Sewree and issued notice to the State of Maharashtra, the appellant and to the heirs of the deceased and also to the injured persons.

10. The State of Maharashtra preferred criminal appeal (No. 566 of 2007) under Section 378(3) of the Code challenging the acquittal of the appellant under Sections 304 Part II and 338

IPC. Another criminal appeal (No. 430 of 2007) was also preferred by the State of Maharashtra seeking enhancement of sentence awarded to the appellant for the offence under Section 304A and Section 337 IPC by the trial court.

11. The appellant also preferred criminal appeal (No. 475/2007) for setting aside the judgment and order dated April 13, 2007 passed by the trial court convicting him under Section 304A and Section 337 IPC and the sentence awarded to him by the trial court.

12. All these matters were heard together by the High Court and have been disposed of by the common judgment on September 6, 2007. The High Court set aside the acquittal of the appellant under Section 304 IPC and convicted him for the offences under Section 304 Part II, Section 338 and Section 337 IPC. The High Court sentenced the appellant to undergo rigorous imprisonment for three years for the offence punishable under Section 304 Part II IPC with a fine of Rs. 5 lakhs. On account of offence under Section 338 IPC, the appellant was sentenced to undergo rigorous imprisonment for a term of one year and for the offence under Section 337 IPC rigorous imprisonment for six months. The High Court noted that fine amount as per the order of the trial court had already been distributed to the families of victims.

13. It is from the above judgment of the High Court that the present appeals have been preferred by the appellant.

14. A great deal of argument in the hearing of the appeals turned on the indictment of the appellant on the two charges, namely, the offence punishable under Section 304 Part II IPC and the offence punishable under Section 338 IPC and his conviction for the above offences and also under Section 337 IPC. Mr. U.U. Lalit, learned senior counsel for the appellant argued that this was legally impermissible as the charges under Section 304 Part II IPC and Section 338 IPC were mutually destructive and the two charges under these Sections cannot

co-exist. His submission was that the appellant was charged for the above offences for committing a single act i.e., rash or negligent for causing injuries to eight persons and at the same time committed with knowledge resulting in death of seven persons which is irreconcilable and moreover that has caused grave prejudice to the appellant resulting in failure of justice.

15. Mr. U.U. Lalit, learned senior counsel also argued that no question was put to the appellant in his statement under Section 313 of the Code about his drunken condition or that he was under the influence of alcohol and, thus, had knowledge that his act was likely to result in causing death. CA Report (Ex. 49) that blood and urine of the appellant had alcohol content and the evidence of PW-1 that he found the appellant in drunken condition and his blood sample was taken were also not put to the appellant. These incriminating evidences, learned senior counsel submitted, cannot form basis of conviction. The conclusion arrived at by the Investigating Officers (PW-17 and PW-18) regarding drunken condition of the appellant which was put to the appellant in his statement under Section 313 of the Code was of no legal use. Moreover, PW-17 and PW-18 have not deposed before the court that the appellant was found in drunken condition much less under the influence of liquor. Learned senior counsel would thus submit that the sole basis of the appellant's conviction under Section 304 Part-II IPC that the appellant had knowledge that his reckless and negligent driving in a drunken condition could result in serious consequences of causing a fatal accident cannot be held to have been established. In this regard, learned senior counsel relied upon two decisions of this Court, namely, (i) *Ghulam Din Buch & Ors. v. State of J & K*[1] and (ii) *Kuldip Singh & Ors. v. State of Delhi*[2].

16. Mr. U.U. Lalit vehemently contended that no charge was framed that the appellant had consumed alcohol. Moreover,

1. 1996 (9) SCC 239.
2. 2003 (12) SCC 528.

he submited that no reliance could be placed on C.A. Report (Ex. 49) as the evidence does not satisfactorily establish that the samples were kept in safe custody until they reached the CFSL. Moreover, no charge was framed by the court against the appellant under Section 185 of the Motor Vehicles Act, 1988 and Section 66(1)(b) of the Bombay Prohibition Act, 1949.

17. Learned senior counsel argued that appellant's conviction under Section 304A, 338 and 337 IPC was not legally sustainable for more than one reason. First, no charge under Section 304A IPC was framed against the appellant as he was charged only under Section 304 Part II IPC and Section 338 IPC which are not the offences of the same category. In the absence of charge under Section 304A IPC, the appellant cannot be convicted for the said offence being not a minor offence of Section 304 Part II IPC. The charge under Section 338 IPC does not help the prosecution as by virtue of that charge the appellant cannot be convicted under Section 304A IPC being graver offence than Section 338 IPC. Secondly, the accident had occurred not on account of rash or negligent act of the appellant but on account of failure of the engine. He referred to the evidence of Rajendra Nilkanth Sawant (PW-15) who deposed that he could not state if the accident took place due to dislodging of right side wheel and dislodging of the engine from the foundation. In the absence of any firm opinion by an expert as regards the cause of accident, the possibility of the accident having occurred on account of mechanical failure cannot be ruled out. Thirdly, in the absence of medical certificate that the persons injured received grievous injuries, charge under Section 338 IPC was not established.

18. Learned senior counsel lastly submitted that in case the charges against appellant are held to be proved, having regard to the facts, namely, the age of the appellant at the time of the accident; the appellant being the only member to support his family - mother and unmarried sister – having lost his father during the pendency of the present appeals; the fine and

compensation of Rs. 8.5 lakhs having been paid and the sentence of two months already undergone, the appellant may be released on probation of good conduct and behavior or, in the alternative, the sentence may be reduced to the period already undergone by the appellant.

19. On the other hand, Mr. Sanjay Kharde, learned counsel for the State of Maharashtra stoutly defended the judgment of the High Court. He argued that the fact that labourers were asleep on the footpath has gone unchallenged by the defence. He would submit that the drunken condition of the appellant is fully proved by the evidence of PW-1. Further, PW-1 has not at all been cross-examined on this aspect. The recovery of liquor bottle is proved by the evidence of spot panchas (PW-11 and PW-16). They have not been cross examined in this regard. PW-17 collected blood sample of the appellant from PW-1 and then PW-18 forwarded the blood sample to the chemical analyzer along with the forwarding letter. The appellant has not challenged C.A. Report (Ex. 49) in the cross-examination of PW-18.

20. Learned counsel for the State submitted that the involvement of the appellant in the incident has been fully established by the evidence of PW-13 who was an eye-witness and working as a watchman at construction site. Moreover, the appellant was apprehended immediately after the incident. There is no denial by the appellant about occurrence of the accident. The defence of the appellant was that the accident happened due to engine and mechanical failure but the appellant has failed to probablise his defence. He referred to the evidence of PW-15 – motor vehicle inspector – to show that the brake and the gear of the car were operative.

21. Learned counsel for the State referred to the evidence of injured witnesses and also the evidence of PW-12 and PW-14 who issued medical certificates and submitted that the prosecution has established beyond reasonable doubt that the knowledge was attributable to the accused as he was driving

the car in a drunken condition at a high speed. The accused had the knowledge, as he was resident of the same area, that the labourers sleep at the place of occurrence. Learned counsel submitted that the evidence on record and the attendant circumstances justify attributability of actual knowledge to the appellant and the High Court rightly held so. In this regard, the learned counsel for the State placed reliance upon two decisions of this Court in *Jai Prakash v. State (Delhi Administration)*[3] and *Joti Parshad v. State of Haryana*[4]. He disputed that there was any error in the framing of charge. He would contend that in any case an error or omission in framing of charge or irregularity in the charge does not invalidate the conviction of an accused. The omission about the drunken condition of the accused in the charge at best can be said to be an irregularity but that does not affect the conviction. In this regard, he relied upon Section 464 of the Code and the decisions of this Court in *Willie (William) Slaney v. State of Madhya Pradesh*[5], *Dalbir Singh v. State of U.P.*[6] and *Annareddy Sambasiva Reddy and others v. State of Andhra Pradesh*[7].

22. Mr. Sanjay Kharde submitted that by not putting C.A. Report (Ex. 49) to the appellant in his statement under Section 313 of the Code, no prejudice has been caused to him as he admitted in his statement under Section 313 of the Code that he was fully aware about the statement of the witnesses and exhibits on record. In this regard, learned counsel relied upon decision of this Court in *Shivaji Sahabrao Bobade and another v. State of Maharashtra*[8].

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3. 1991 (2) SCC 32.
4. 1993 SUPP (2) SCC 497.
5. AIR 1956 SC 116.
6. 2004 (5) SCC 334.
7. 2009 (12) SCC 546.
8. 1973 (2) SCC 793.

23. Lastly, learned counsel for the State submitted that the circumstances pointed out by the learned senior counsel for the appellant do not justify the benefit of probation to the appellant or reduction of the sentence to the period already undergone. He submitted that seven innocent persons lost their lives and eight persons got injured due to the act of the appellant and, therefore, no sympathy was called for. He submitted that sentence should be proportionate to the gravity of offence. He relied upon the decisions of this Court in *State of Karnataka v. Krishnappa*[9], *Dalbir Singh v. State of Haryana*[10], *Shailesh Jasvantbhai and another v. State of Gujarat and others*[11] and *Manish Jalan v. State of Karnataka*[12].

24. On the contentions of the learned senior counsel for the appellant and the counsel for the respondent, the following questions arise for our consideration :

(i) Whether indictment on the two charges, namely, the offence punishable under Section 304 Part II IPC and the offence punishable under Section 338 IPC is mutually destructive and legally impermissible? In other words, whether it is permissible to try and convict a person for the offence punishable under Section 304 Part II IPC and the offence punishable under Section 338 IPC for a single act of the same transaction?

(ii) Whether by not charging the appellant of `drunken condition' and not putting to him the entire incriminating evidence let in by the prosecution, particularly the evidence relating to appellant's drunken condition, at the time of his examination under Section 313 of the Code, the trial and conviction of the appellant got affected?

(iii) Whether prosecution evidence establishes beyond reasonable doubt the commission of the offences by the appellant under Section 304 Part II, IPC, Section 338 IPC and Section 337 IPC?

(iv) Whether sentence awarded to the appellant by the High Court for the offence punishable under Section 304 Part II IPC requires any modification?

9. 2000 (4) SCC 75.
10. 2000 (5) SCC 82.
11. 2006 (2) SCC 359.
12. 2008 (8) SCC 225.

re: question (i)

25. Section 304 IPC provides for punishment for culpable homicide not amounting to murder. It reads as under:

> **"S.304. - Punishment for culpable homicide not amounting to murder** - Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death".

26. The above Section is in two parts. Although Section does not specify Part I and Part II but for the sake of convenience, the investigators, the prosecutors, the lawyers, the judges and the authors refer to the first paragraph of the Section as Part I while the second paragraph is referred to as Part II. The constituent elements of Part I and Part II are different and, consequently, the difference in punishment. For punishment under Section 304 Part I, the prosecution must prove: the death

of the person in question; that such death was caused by the act of the accused and that the accused intended by such act to cause death or cause such bodily injury as was likely to cause death. As regards punishment for Section 304 Part II, the prosecution has to prove the death of the person in question; that such death was caused by the act of the accused and that he knew that such act of his was likely to cause death. In order to find out that an offence is 'culpable homicide not amounting to murder' - since Section 304 does not define this expression - Sections 299 and 300 IPC have to be seen. Section 299 IPC reads as under:

> **"S.-299. - Culpable homicide.**—Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

27. To constitute the offence of culpable homicide as defined in Section 299 the death must be caused by doing an act: (a) with the intention of causing death, or (b) with the intention of causing such bodily injury as is likely to cause death, or (c) with the knowledge that the doer is likely by such act to cause death.

28. Section 300 deals with murder and also provides for exceptions. The culpable homicide is murder if the act by which the death is caused is done: (1) with the intention of causing death, (2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or (3) with the intention of causing such bodily injury as is sufficient in the ordinary course of nature to cause death, or (4) with the knowledge that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid. The exceptions provide that the

culpable homicide will not be murder if that act is done with the intention or knowledge in the circumstances and subject to the conditions specified therein. In other words, the culpable homicide is not murder if the act by which death is caused is done in extenuating circumstances and such act is covered by one of the five exceptions set out in the later part of Section 300.

29. It is not necessary in the present matter to analyse Section 299 and Section 300 in detail. Suffice it to say that the last clause of Section 299 and clause 'fourthly' of Section 300 are based on the knowledge of the likely or probable consequences of the act and do not connote any intention at all.

30. Reference to few other provisions of IPC in this regard is also necessary. Section 279 makes rash driving or riding on a public way so as to endanger human life or to be likely to cause hurt or injury to any other person an offence and provides for punishment which may extend to six months, or with fine which may extend to Rs. 1000/-, or with both.

31. Causing death by negligence is an offence under Section 304A. It reads :

> **"S.304A. - Causing death by negligence.**—Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

32. Section 336 IPC says that whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to Rs. 250/-, or with both.

33. Section 337 IPC reads as follows :

"S. 337. - Causing hurt by act endangering life or personal safety of others.—Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both."

34. Section 338 IPC is as under :

"S. 338. - Causing grievous hurt by act endangering life or personal safety of others.—Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both."

35. In *Empress of India v. Idu Beg*[13], Straight J., explained the meaning of criminal rashness and criminal negligence in the following words: criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.

36. The above meaning of criminal rashness and criminal negligence given by Straight J. has been adopted consistently by this Court.

13. 1881 (3) All 776.

37. Insofar as Section 304A IPC is concerned, it deals with death caused by doing any rash or negligent act where such death is caused neither intentionally nor with the knowledge that the act of the offender is likely to cause death. The applicability of Section 304A IPC is limited to rash or negligent acts which cause death but fall short of culpable homicide amounting to murder or culpable homicide not amounting to murder. An essential element to attract Section 304A IPC is death caused due to rash or negligent act. The three things which are required to be proved for an offence under Section 304A are : (1) death of human being; (2) the accused caused the death and (3) the death was caused by the doing of a rash or negligent act, though it did not amount to culpable homicide of either description.

38. Like Section 304A, Sections 279, 336, 337 and 338 IPC are attracted for only the negligent or rash act.

39. The scheme of Sections 279, 304A, 336, 337 and 338 leaves no manner of doubt that these offences are punished because of the inherent danger of the acts specified therein irrespective of knowledge or intention to produce the result and irrespective of the result. These sections make punishable the acts themselves which are likely to cause death or injury to human life. The question is whether indictment of an accused under Section 304 Part II and Section 338 IPC can co-exist in a case of single rash or negligent act. We think it can. We do not think that two charges are mutually destructive. If the act is done with the knowledge of the dangerous consequences which are likely to follow and if death is caused then not only that the punishment is for the act but also for the resulting homicide and a case may fall within Section 299 or Section 300 depending upon the mental state of the accused viz., as to whether the act was done with one kind of knowledge or the other or the intention. Knowledge is awareness on the part of the person concerned of the consequences of his act of omission or commission indicating his state of mind. There may be

knowledge of likely consequences without any intention. Criminal culpability is determined by referring to what a person with reasonable prudence would have known.

40. Rash or negligent driving on a public road with the knowledge of the dangerous character and the likely effect of the act and resulting in death may fall in the category of culpable homicide not amounting to murder. A person, doing an act of rash or negligent driving, if aware of a risk that a particular consequence is likely to result and that result occurs, may be held guilty not only of the act but also of the result. As a matter of law – in view of the provisions of the IPC – the cases which fall within last clause of Section 299 but not within clause 'fourthly' of Section 300 may cover the cases of rash or negligent act done with the knowledge of the likelihood of its dangerous consequences and may entail punishment under Section 304 Part II IPC. Section 304A IPC takes out of its ambit the cases of death of any person by doing any rash or negligent act amounting to culpable homicide of either description.

41. A person, responsible for a reckless or rash or negligent act that causes death which he had knowledge as a reasonable man that such act was dangerous enough to lead to some untoward thing and the death was likely to be caused, may be attributed with the knowledge of the consequence and may be fastened with culpability of homicide not amounting to murder and punishable under Section 304 Part II IPC.

42. There is no incongruity, if simultaneous with the offence under Section 304 Part II, a person who has done an act so rashly or negligently endangering human life or the personal safety of the others and causes grievous hurt to any person is tried for the offence under Section 338 IPC.

43. In view of the above, in our opinion there is no impediment in law for an offender being charged for the offence

under Section 304 Part II IPC and also under Sections 337 and 338 IPC. The two charges under Section 304 Part II IPC and Section 338 IPC can legally co-exist in a case of single rash or negligent act where a rash or negligent act is done with the knowledge of likelihood of its dangerous consequences.

44. By charging the appellant for the offence under Section 304 Part II IPC and Section 338 IPC – which is legally permissible – no prejudice has been caused to him. The appellant was made fully aware of the charges against him and there is no failure of justice. We are, therefore, unable to accept the submission of Mr. U.U. Lalit that by charging the appellant for the offences under Section 304 Part II IPC and Section 338 IPC for a rash or negligent act resulting in injuries to eight persons and at the same time committed with the knowledge resulting in death of seven persons, the appellant has been asked to face legally impermissible course.

45. In *Prabhakaran Vs. State of Kerala*[14], this Court was concerned with the appeal filed by a convict who was found guilty of the offence punishable under Section 304 Part II IPC. In that case, the bus driven by the convict ran over a boy aged 10 years. The prosecution case was that bus was being driven by the appellant therein at the enormous speed and although the passengers had cautioned the driver to stop as they had seen children crossing the road in a queue, the driver ran over the student on his head. It was alleged that the driver had real intention to cause death of persons to whom harm may be caused on the bus hitting them. He was charged with offence punishable under Section 302 IPC. The Trial Court found that no intention had been proved in the case but at the same time the accused acted with the knowledge that it was likely to cause death, and, therefore, convicted the accused of culpable homicide not amounting to murder punishable under Section 304 Part II IPC and sentenced him to undergo rigorous imprisonment for five years and pay a fine of Rs.15,000/- with

14. 2007 (14) SCC 269.

a default sentence of imprisonment for three years. The High Court dismissed the appeal and the matter reached this Court. While observing that Section 304A speaks of causing death by negligence and applies to rash and negligent acts and does not apply to cases where there is an intention to cause death or knowledge that the act will in all probability cause death and that Section 304A only applies to cases in which without any such intention or knowledge death is caused by a rash and negligent act, on the factual scenario of the case, it was held that the appropriate conviction would be under Section 304A IPC and not Section 304 Part II IPC. Prabhakaran14 does not say in absolute terms that in no case of an automobile accident that results in death of a person due to rash and negligent act of the driver, the conviction can be maintained for the offence under Section 304 Part II IPC even if such act (rash or negligent) was done with the knowledge that by such act of his, death was likely to be caused. *Prabhakaran[14] t*urned on its own facts. Each case obviously has to be decided on its own facts. In a case where negligence or rashness is the cause of death and nothing more, Section 304A may be attracted but where the rash or negligent act is preceded with the knowledge that such act is likely to cause death, Section 304 Part II IPC may be attracted and if such a rash and negligent act is preceded by real intention on the part of the wrong doer to cause death, offence may be punishable under Section 302 IPC.

re: question (ii)

46. On behalf of the appellant it was strenuously urged that the conviction of the appellant by the High Court for the offence under Section 304 Part II IPC rests solely on the premise that the appellant had knowledge that his reckless or negligent driving in a drunken condition could result in serious consequences of causing fatal accident . It was submitted that neither in the charge framed against the appellant, the crux of the prosecution case that the appellant was in a drunken condition was stated nor incriminating evidences and

circumstances relating to rashness or negligence of the accused in the drunken condition were put to him in the statement under Section 313 of the Code.

47. It is a fact that no charge under Section 185 of the Motor Vehicles Act, 1988 and Section 66(1)(b) of the Bombay Prohibition Act, 1949 was framed against the appellant. It is also a fact that in the charge framed against the appellant under Section 304 Part II IPC, the words 'drunken condition' are not stated and the charge reads; 'on November 12, 2006 between 3.45 to 4.00 a.m. he was driving the car bearing Registration No. MH-01-R-580 rashly and negligently with knowledge that people are sleeping on footpath and likely to cause death of those persons rammed over the footpath and thereby caused death of 8 persons who were sleeping on footpath on Carter Road, Bandra (West), Mumbai and thereby committed an offence punishable under Section 304 Part II IPC'. The question is whether the omission of the words, 'in drunken condition' after the words 'negligently' and before the words 'with knowledge' has caused any prejudice to the appellant.

48. Section 464 of the Code reads as follows:

"S.464. - Effect of omission to frame, or absence of, or error in, charge.-

(1) No finding sentence or order by a court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-

(a) In the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge.

(b) In the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

Provided that if the court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

49. The above provision has come up for consideration before this Court on numerous occasions. It is not necessary to refer to all these decisions. Reference to a later decision of this Court in the case of *Anna Reddy Sambasiva Reddy*[7] delivered by one of us (R.M. Lodha, J.) shall suffice. In paras 55-56 of the Report in *Anna Reddy Sambasiva Reddy*[7] it has been stated as follows:

"55. In unmistakable terms, Section 464 specifies that a finding or sentence of a court shall not be set aside merely on the ground that a charge was not framed or that charge was defective unless it has occasioned in prejudice. Because of a mere defect in language or in the narration or in form of the charge, the conviction would not be rendered bad if accused has not been adversely affected thereby. If the ingredients of the section are obvious or implicit, conviction in regard thereto can be sustained irrespective of the fact that the said section has not been mentioned.

56. A fair trial to the accused is a sine quo non in our criminal justice system but at the same time procedural law contained in the Code of Criminal Procedure is designed to further the ends of justice and not to frustrate them by introduction of hyper-technicalities. Every case must

depend on its own merits and no straightjacket formula can be applied; the essential and important aspect to be kept in mind is: has omission to frame a specific charge resulted in prejudice to the accused."

50. In light of the above legal position, if the charge under Section 304 Part II IPC framed against the appellant is seen, it would be clear that the ingredients of Section 304 Part II IPC are implicit in that charge. The omission of the words 'in drunken condition' in the charge is not very material and, in any case, such omission has not at all resulted in prejudice to the appellant as he was fully aware of the prosecution evidence which consisted of drunken condition of the appellant at the time of incident.

51. PW-1 is the doctor who examined the appellant immediately after the incident. In his deposition he stated that he had taken the blood of the accused as he was found in drunken condition. On behalf of the appellant PW-1 has been cross examined but there is no cross-examination of PW-1 on this aspect.

52. It is a fact that evidence of PW-1, as noticed above, has not been put to the appellant in his statement under Section 313 of the Code but that pales into insignificance for want of cross examination of PW-1 in regard to his deposition that the appellant was found in drunken condition and his blood sample was taken.

53. CA Report (Ex. 49) too has not been specifically put to the appellant at the time of his examination under Section 313 of the Code but it is pertinent to notice that PW-18 (Investigating Officer) deposed that he had forwarded blood sample of the accused and the bottle found in the car to the chemical analyzer (CA) on 14.11.2006 and 15.11.2006 respectively. He further deposed that he collected the medical certificate from Bhabha Hospital and he had received the CA report (Ex. 49). PW-18 has also not been cross examined by

the defence in respect of the above. In the examination under Section 313 of the Code the following questions were put to the appellant: Question 9: "What you want to say about the further evidence of above two witnesses that police while drawing spot panchanama seized one ladies chappal, remote, lighter, cigarette perfume and so called liquor bottle from the vehicle i.e. MH-01-R-580?" The appellant answered 'I do not know' Question 16: " What you want to say about the evidence of Meenakshi Patil who has stated that initial investigation as carried out by her and further investigation was entrusted to PI Phulsunder from 13.11.2006 and on due investigation police concluded themselves that your rash and negligence driving caused the death of seven persons and injury to the eight persons by vehicle No. MH-01-R-580 by consuming alcohol so police have charge sheeted you?" He answered, 'It is false'.

54. The above questions in his examination under Section 313 of the Code show that the appellant was fully aware of the prosecution evidence relating to his rash and negligent driving in the drunken condition. In the circumstances, by not putting to the appellant expressly the CA report (Ex. 49) and the evidence of PW 1, no prejudice can be said to have been caused to the appellant. The words of P.B. Gajendragadkar, J. (as he then was) in *Jai Dev Vs. State of Punjab*[15] speaking for three-Judge Bench with reference to Section 342 of the Code (corresponding to Section 313 of the 1973 Code) may be usefully quoted:

> "21 . . . . . the ultimate test in determining whether or not the accused has been fairly examined under Section 342 would be to enquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity..".

15. AIR 1963 SC 612.

55. In *Shivaji Sahabrao Bobade and Anr. Vs. State of Maharashtra*[8] a 3-Judge Bench of this Court stated:

> "16. ……..It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the court must ordinarily eschew such material from consideration. It is also open to the appellate court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate court any plausible or reasonable explanation of such circumstances, the court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction".

56. The above decisions have been referred in *Asraf Ali Vs. State of Assam*[16]. The Court stated:

> "21. Section 313 of the Code casts a duty on the court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as a necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically,

16. 2008 (16) SCC 328.

distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.

22. The object of Section 313 of the Code is to establish a direct dialogue between the court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice.

24. In certain cases when there is perfunctory examination under Section 313 of the Code, the matter is remanded to the trial court, with a direction to retry from the stage at which the prosecution was closed".

57. From the above, the legal position appears to be this : the accused must be apprised of incriminating evidence and materials brought in by the prosecution against him to enable him to explain and respond to such evidence and material. Failure in not drawing the attention of the accused to the incriminating evidence and inculpatory materials brought in by prosecution specifically, distinctly and separately may not by itself render the trial against the accused void and bad in law; firstly, if having regard to all the questions put to him, he was afforded an opportunity to explain what he wanted to say in respect of prosecution case against him and secondly, such omission has not caused prejudice to him resulting in failure of justice. The burden is on the accused to establish that by not apprising him of the incriminating evidence and the inculpatory materials that had come in the prosecution evidence against him, a prejudice has been caused resulting in miscarriage of justice.

58. Insofar as present case is concerned, in his statement under Section 313, the appellant was informed about the evidence relating to the incident that occurred in the early hours (between 3.45 a.m. to 4.00 a.m.) of November 12, 2006 and the fact that repairs were going on the road at that time. The appellant accepted this position. The appellant was also informed about the evidence of the prosecution that vehicle No. MH-01-R-580 was involved in the said incident. This was also accepted by the appellant. His attention was brought to the evidence of the eye-witnesses and injured witnesses, namely, PW-2, PW-3, PW-4, PW-5, PW-6, PW-7, PW-8, PW-9 and PW-10 that at the relevant time they were sleeping on the pavement of Carter Road, Bandra (West) outside the temporary huts and there was an accident in which seven persons died and eight persons got injured. The attention of the appellant was also drawn to the evidence of the spot panchas (PW-11 and PW-16) that they had noticed that the car no. MH-01-R-580 at the time of preparation of spot panchnama was in a heavily damaged condition with dislodged right side wheel and some blood was found on the earth and the huts were found damaged. The prosecution evidence that the appellant was seen driving car no. MH-01-R-580 at high speed from Khar Danda side and that rammed over the footpath and crushed the labourers sleeping there was also brought to his notice. The evidence of the mechanical expert (PW-15) that he checked the vehicle and found no mechanical defect in the car was also brought to his notice. During investigation, the police concluded that the rash and negligent driving of the appellant by consuming alcohol caused the death of seven persons and injury to the eight persons. The conclusion drawn on the completion of investigation was also put to him. The appellant's attention was also invited to the materials such as photographs, mechanical inspections of the car, seized articles, liquor bottle, etc. Having regard to the above, it cannot be said that the appellant was not made fully aware of the prosecution evidence that he had driven the car rashly or negligently in a drunken

condition. He had full opportunity to say what he wanted to say with regard to the prosecution evidence.

59. The High Court in this regard held as under :

"29……..The salutary provision of section 313 of the Code have been fairly, or at least substantially, complied with by the trial court, in the facts and circumstances of this case. The real purpose of putting the accused at notice of the incriminating circumstances and requiring him to offer explanation, if he so desires, has been fully satisfied in the present case. During the entire trial, copies of the documents were apparently supplied to the accused, even prior to the framing of the charge. After such charge was framed, all the witnesses were examined in the presence of the accused and even limited questions regarding incriminating material put by the court to the accused in his statement under Section 313 of the Code shows that the entire prosecution case along with different exhibits was put to the accused. He in fact did not deny the suggestions that the witnesses had been examined in his presence and he was aware about the contents of their statements. All this essentially would lead to only one conclusion that the contention raised on behalf of the accused in this regard deserves to be rejected. While rejecting this contention we would also observe that the admission or confession of the accused in his statement under section 313 of the Code, in so far as it provides support or even links to, or aids the case of the prosecution proved on record, can also be looked into by the court in arriving at its final conclusion. It will be more so when explanation in the form of answers given by the accused under Section 313 of the Code are apparently untrue and also when no cross examination of the crucial prosecution witnesses was conducted on this line."

We are in agreement with the above view of the High Court.

re: question (iii)

60. The crucial question now remains to be seen is whether the prosecution evidence establishes beyond reasonable doubt the commission of offence under Section 304 Part II IPC, Section 338 IPC and Section 337 IPC against the appellant.

61. The appellant has not denied that in the early hours of November 12, 2006 between 3.45-4.00 a.m. on the South-North Road at the East side of Carter Road, Bandra (West), Mumbai, the car bearing registration no. MH-01-R-580 met with an accident and he was at the wheels at that time. PW-13 was working as a watchman at the construction site. He witnessed the accident. He deposed that he noticed that in the night of November 11, 2006 and November 12, 2006 at about 4.00 a.m., the vehicle bearing no. MH-01-R-580 came from Khar Danda side; the vehicle was in high speed and rammed over the pavement and crushed the labourers. He deposed that 14-15 persons were sleeping at that time on the pavement. He stated that he used to take rounds during his duty hours. His evidence has not at all been shaken in the cross-examination.

62. PW-2 is the complainant. He lodged the complaint of the incident at the Khar Police Station. In his deposition, he has stated that he was contractor with New India Construction Co. and nine labourers were working under him. At Carter Road, the work of road levelling was going on. He and other persons were sleeping in a temporary hutment near railway colony. The labourers were sleeping on the pavement. When he was easing himself, at about 3.30 a.m. of November 12, 2006, he heard the commotion and saw the smoke coming out of the vehicle that rammed over the footpath. Six persons died on the spot; one expired in the hospital and eight persons sustained injuries. He confirmed that the police recorded his complaint and the complaint (Ex. 13) was read over to him by the police and was correct. He has been cross-examined by the defence but there is no cross examination in respect of his statement that he had

got up to ease himself at about 3.30 a.m. on November 12, 2006 and he heard the commotion and saw smoke coming out of the vehicle. He has denied the suggestion of the defence that road was blocked to some extent for construction purpose. He denied that he had filed false complaint so as to avoid payment of compensation to the workers.

63. The first Investigating Officer (PW-17), who proceeded along with the staff no sooner the message was received from Khar 1 Mobile Van that accident had taken place at Carter Road, near Railway Officers Quarters and reached the spot, has deposed that on her arrival at the spot, she came to know that the labourers who were sleeping on footpath were run over by the vehicle bearing No. MH-01-R-580. She shifted the injured to the Bhabha Hospital; went to the Khar police station for recording the complaint and then came back to the site of accident and prepared Panchnama (Ex. 28) in the presence of Panchas PW-11 and PW-16. Exhibit 28 shows that the accident spot is towards south of railway quarters gate and is at a distance of about 110 feet. The length of footpath between railway quarters gate and Varun Co-operative Housing Society gate is about 160 feet. The accident spot is about 50 feet from the Varun Co-operative Housing Society gate. On the footpath, between railway quarters gate and Varun Co-operative Housing Society gate, the temporary sheds were set up. The vehicle (Toyota Corolla) bearing No. MH-01-R-580 was lying in the middle of the road between road divider and footpath on Carter Road at about 50 feet from the north side of Varun Co-operative Housing Society gate and about 110 feet from railway quarters gate on the south side. The front wheel of the car was broken and mudguard was pressed. The spot panchnama shows 70 feet long brake marks in a curve from west side of the road divider towards footpath on eastern side. It is further seen from the spot panchnama that a tempo, mud digger and two trucks were parked on the road between Railway Quarters gate and Varun Cooperative Housing Society gate near the accident spot. The spot panchnama is duly

proved by PW-11 and PW-16. There is nothing in the cross-examination of these witnesses to doubt their presence or veracity. The long brake marks in curve show that vehicle was being driven by the appellant at the high speed; the appellant had lost control of the speeding vehicle resulting in the accident and, consequently, seven deaths and injury to eight persons.

64. PW-15 is a motor vehicle inspector. He deposed that he was summoned by the control room to check the vehicle MH 01-R-580 involved in the accident. At the time of inspection, right side wheel of the vehicle was found dislodged from the body of the vehicle and the engine was dislodged from the foundation; though the steering wheel was intact and brake lever and gear lever were operative. There was no air in the front wheel of the vehicle. He opined that accident might have happened on account of dash. He has been briefly cross-examined and the only thing he said in the cross-examination was that he could not say whether the accident took place due to dislodging of right side wheel and dislodging of engine from foundation.

65. The above evidence has been considered by the High Court quite extensively. The High Court, on consideration of the entire prosecution evidence and having regard to the deficiencies pointed out by the defence, reached the conclusion that (1) the accused at the time of driving the car was under the influence of liquor; (2) he drove the car in drunken condition at a very high speed; and (3) he failed to control the vehicle and the vehicle could not be stopped before it ran over the people sleeping on the pavement. The High Court observed that the accused could not concentrate on driving as he was under the influence of liquor and the vehicle was being driven with loud noise and a tape recorder being played in high volume. The High Court held that the accused had more than 22 feet wide road for driving and there was no occasion for a driver to swing to the left and cover a distance of more than 55 feet; climb over the footpath and run over the persons sleeping on the footpath. The High Court took judicial notice of the fact

that in Mumbai people do sleep on pavements. The accused was also aware of the fact that at the place of occurrence people sleep as the accused was resident of that area. The High Court took note of the fact that the accused had admitted the accident and his explanation was that the accident occurred due to mechanical failure and the defect that was developed in the vehicle but found his explanation improbable and unacceptable. The High Court also observed that the factum of high and reckless speed was evident from the brake marks at the site. The speeding car could not be stopped by him instantaneously. In the backdrop of the above findings, the High Court held that the accused could be attributed to have a specific knowledge of the event that happened. The High Court, thus concluded that the accused had knowledge and in any case such knowledge would be attributable to him that his actions were dangerous or wanton enough to cause injuries which may even result into death of persons.

66. We have also carefully considered the evidence let in by prosecution – the substance of which has been referred to above – and we find no justifiable ground to take a view different from that of the High Court. We agree with the conclusions of the High Court and have no hesitation in holding that the evidence and materials on record prove beyond reasonable doubt that the appellant can be attributed with knowledge that his act of driving the vehicle at a high speed in the rash or negligent manner was dangerous enough and he knew that one result would very likely be that people who were asleep on the pavement may be hit, should the vehicle go out of control. There is a presumption that a man knows the natural and likely consequences of his acts. Moreover, an act does not become involuntary act simply because its consequences were unforeseen. The cases of negligence or of rashness or dangerous driving do not eliminate the act being voluntary. In the present case, the essential ingredients of Section 304 Part II IPC have been successfully established by the prosecution against the appellant. The infirmities pointed out by Mr. U.U. Lalit, learned senior counsel for the appellant, which have been noticed above are not substantial and in no way affect the legality of the trial and the conviction of the appellant under Section 304 Part II IPC. We uphold the view of the High Court being consistent with the evidence on record and law.

67. The trial court convicted the accused of the offence under Section 337 IPC but acquitted him of the charge under Section 338 IPC. The High Court noticed that two injured persons, namely, PW-6 and PW-8 had injuries over the right front temporal parietal region of the size of 5x3 cms. with scar deep with bleeding (Ex. 37 and 33 respectively). The High Court held that these were not simple injuries and were covered by the grievous hurt under Section 320 IPC. We agree. Charge under Section 338 IPC against the appellant is clearly established.

68. Insofar as charge under Section 337 IPC is concerned, it is amply established from the prosecution evidence that PW-5, PW-7, PW-9 and PW-10 received various injuries; they suffered simple hurt. The trial court as well as the High Court was justified in convicting the appellant for the offence punishable under Section 337 IPC as well.

re: question (iv)

69. The question now is whether the maximum sentence of three years awarded to the appellant by the High Court for the offence under Section 304 Part II IPC requires any modification? It was argued on behalf of the appellant that having regard to the facts : (i) the appellant has already undergone sentence of two months and has paid Rs. 8,50,000/- by way of fine and compensation; (ii) the appellant is further willing to pay reasonable amount as compensation/fine as may be awarded by this Court; (iii) the appellant was about 20 years of age at the time of incident; and (iv) the appellant lost his father during the pendency of the appeal and presently being the only member to support his family which comprises of mother and

unmarried sister, he may be released on probation of good conduct and behaviour or the sentence awarded to him be reduced to the period already undergone.

70. Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.

71. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

72. This Court has laid down certain principles of penology from time to time. There is long line of cases on this aspect. However, reference to few of them shall suffice in the present case.

73. In the case of Krishnappa9, though this Court was concerned with the crime under Section 376 IPC but with reference to sentencing by courts, the Court made these weighty observations :

> "18. …….. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The

> sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. Courts must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender years, as in this case, and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the court. There are no extenuating or mitigating circumstances available on the record which may justify imposition of any sentence less than the prescribed minimum on the respondent. To show mercy in the case of such a heinous crime would be a travesty of justice and the plea for leniency is wholly misplaced. ……."

74. In the case of Dalbir Singh10, this Court was concerned with a case where the accused was held guilty of the offence under Section 304A IPC. The Court made the following observations (at Pages 84-85 of the Report):

> "1. When automobiles have become death traps any leniency shown to drivers who are found guilty of rash driving would be at the risk of further escalation of road accidents. All those who are manning the steering of automobiles, particularly professional drivers, must be kept under constant reminders of their duty to adopt utmost care and also of the consequences befalling them in cases of dereliction. One of the most effective ways of keeping such drivers under mental vigil is to maintain a deterrent element in the sentencing sphere. Any latitude shown to them in that sphere would tempt them to make driving frivolous and a frolic."

Then while dealing with Section 4 of the Probation of Offenders Act, 1958, it was observed that Section 4 could be resorted to when the court considers the circumstances of the case, particularly the nature of the offence, and the court forms its

opinion that it is suitable and appropriate for accomplishing a specified object that the offender can be released on the probation of good conduct. For application of Section 4 of the Probation of Offenders Act, 1958 to convict under Section 304A IPC, the court stated in paragraph 11 of the Report (at Pg. 86) thus:-

> "Courts must bear in mind that when any plea is made based on Section 4 of the PO Act for application to a convicted person under Section 304-A IPC, that road accidents have proliferated to an alarming extent and the toll is galloping day by day in India, and that no solution is in sight nor suggested by any quarter to bring them down……."

Further, dealing with this aspect, in paragraph 13 (at page 87) of the Report, this Court stated :

> "Bearing in mind the galloping trend in road accidents in India and the devastating consequences visiting the victims and their families, criminal courts cannot treat the nature of the offence under Section 304-A IPC as attracting the benevolent provisions of Section 4 of the PO Act. While considering the quantum of sentence to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence. A professional driver pedals the accelerator of the automobile almost throughout his working hours. He must constantly inform himself that he cannot afford to have a single moment of laxity or inattentiveness when his leg is on the pedal of a vehicle in locomotion. He cannot and should not take a chance thinking that a rash driving need not necessarily cause any accident; or even if any accident occurs it need not necessarily result in the death of any human being; or even if such death ensues he might not be convicted of the offence; and lastly, that even if he is convicted he would be dealt with leniently by the court. He must always keep

> in his mind the fear psyche that if he is convicted of the offence for causing death of a human being due to his callous driving of the vehicle he cannot escape from a jail sentence. This is the role which the courts can play, particularly at the level of trial courts, for lessening the high rate of motor accidents due to callous driving of automobiles."

75. In *State of M.P. v. Saleem alias Chamaru & Anr.*[17], while considering the case under Section 307 IPC this Court stated in paragraphs 6-10 (pages 558-559) of the Report as follows :

> "6. Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed, etc. . . . . .
>
> 7. After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in Dennis Councle McGautha v. State of California (402 US 183) that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of

17. 2005 (5) SCC 554.

crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished.

8. The object should be to protect society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be.

9. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result wise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by a string of deterrence inbuilt in the sentencing system.

10. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal"."

76. In the case of *Shailesh Jasvantbhai*[11], the Court referred to earlier decisions in *Dhananjoy Chatterjee alias Dhana v. State of W.B.*[18], *Ravji alias Ram Chandra v. State of Rajasthan*[19], *State of M.P. v. Ghanshyam Singh*[20], *Surjit Singh v. Nahara Ram & Anr.*[21], *State of M.P. v. Munna Choubey*[22]. In *Ravji*[19], this Court stated that the court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal".

77. In *Manish Jalan*[12], this Court considered Section 357 of the Code in a case where the accused was found guilty of the offences punishable under Sections 279 and 304A IPC. After noticing Section 357, the Court considered earlier decision of this Court in *Hari Singh v. Sukhbir Singh & Ors.*[23] wherein it was observed, 'it may be noted that this power of courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system". Then the court noticed another decision of this Court in *Sarwan Singh & Ors. v. State of Punjab*[24] in which it was

18. (1994) 2 SCC 220.
19. (1996) 2 SCC 175.
20. (2003) 8 SCC 13.
21. (2004) 6 SCC 513.
22. (2005) 2 SCC 710.
23. (1998) 4 SCC 551.
24. (1978) 4 SCC 111.

observed that in awarding compensation, it was necessary for the court to decide if the case was a fit one in which compensation deserved to be granted. Then the court considered another decision of this Court in *Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd. & Anr.*[25] wherein the court held at Page 545 of the Report as under:

> "38. The purpose of imposition of fine and/or grant of compensation to a great extent must be considered having the relevant factors therefor in mind. It may be compensating the person in one way or the other. The amount of compensation sought to be imposed, thus, must be reasonable and not arbitrary. Before issuing a direction to pay compensation, the capacity of the accused to pay the same must be judged. A fortiori, an enquiry in this behalf even in a summary way, may be necessary. Some reasons, which may not be very elaborate, may also have to be assigned; the purpose being that whereas the power to impose fine is limited and direction to pay compensation can be made for one or the other factors enumerated out of the same; but sub-section (3) of Section 357 does not impose any such limitation and thus, power thereunder should be exercised only in appropriate cases. Such a jurisdiction cannot be exercised at the whims and caprice of a Judge."

Having regard to the above legal position and the fact that the mother of the victim had no grievance against the appellant therein and she prayed for some compensation, this Court held that a lenient view could be taken in the matter and the sentence of imprisonment could be reduced and, accordingly, reduced the sentence to the period already undergone and directed the appellant to pay compensation of Rs. One lakh to the mother of the victim.

78. World Health Organisation in the Global Status Report on Road Safety has pointed out that speeding and drunk driving

25. (2007) 6 SCC 528.

are the major contributing factors in road accidents. According to National Crime Records Bureau (NCRB), the total number of deaths due to road accidents in India every year is now over 1,35,000. NCRB Report also states drunken driving as a major factor for road accidents. Our country has a dubious distinction of registering maximum number of deaths in road accidents. It is high time that law makers revisit the sentencing policy reflected in Section 304A IPC.

79. The facts and circumstances of the case which have been proved by the prosecution in bringing home the guilt of the accused under Section 304 Part II IPC undoubtedly show despicable aggravated offence warranting punishment proportionate to the crime. Seven precious human lives were lost by the act of the accused. For an offence like this which has been proved against the appellant, sentence of three years awarded by the High Court is too meagre and not adequate but since no appeal has been preferred by the State, we refrain from considering the matter for enhancement. By letting the appellant away on the sentence already undergone i.e. two months in a case like this, in our view, would be travesty of justice and highly unjust, unfair, improper and disproportionate to the gravity of crime. It is true that the appellant has paid compensation of Rs. 8,50,000/- but no amount of compensation could relieve the family of victims from the constant agony. As a matter of fact, High Court had been quite considerate and lenient in awarding to the appellant sentence of three years for an offence under Section 304 Part II IPC where seven persons were killed.

80. We are satisfied that the facts and circumstances of the case do not justify benefit of probation to the appellant for good conduct or for any reduction of sentence.

81. The appeals are, accordingly, dismissed. Appellant's bail bonds are cancelled. He shall forthwith surrender for undergoing the remaining sentence as awarded by the High Court in the Judgment and Order dated September 6, 2007.

R.P. Appeal dismissed.

AZIJA BEGUM
v.
STATE OF MAHARASHTRA & ANR.
(Criminal Appeal No. 126 of 2012)

JANUARY 12, 2012

[ASOK KUMAR GANGULY AND T. S. THAKUR, JJ.]

Code of Criminal Procedure, 1973:

s.173 (8) - Further investigation in a murder case - Held: When the Magistrate himself had expressed serious reservations about the investigation and had directed further investigation, it was expected of the High Court to look into the matter with greater care and caution - Additional Director of Police, State CID, directed to order a proper investigation in the matter by deputing a senior officer and furnish a report to trial court.

Constitution of India, 1950:

Art. 14 - Held: Every citizen has a right to get his or her complaint properly investigated - The issue is akin to ensuring equal access to justice.

In a murder case, the wife of the deceased lodged an FIR implicating the two sons of the appellant. The case of the appellant was that, prior to that, she herself had lodged an FIR about missing of the deceased. She filed a petition u/s 173(8) CrPC before the Magistrate whereupon a further investigation was directed. The appellant approached the High Court stating that when the Magistrate prima facie was not satisfied with the investigation, further investigation should have been handed over to some other agency. The High Court disposed of the petition giving liberty to the complainant

to bring some more witnesses which he felt necessary, to the investigator.

Allowing the appeal, the Court

HELD: 1.1. Every citizen has a right to get his or her complaint properly investigated. This is a question of equal protection of laws and is covered by the guarantee under Article 14 of the Constitution. The issue is akin to ensuring an equal access to justice. [para 13] [199-F-G]

1.2. In the instant case, the order of the High Court is very cryptic. It has not looked into the material facts of the case. It was expected of the High Court to look into the matter with greater care and caution, as a very serious offence had taken place followed by an investigation in respect of which the Magistrate himself had expressed serious reservations but failed to give proper direction. [para 11] [199-C-D]

1.3. The Additional Director General of Police, State CID is directed to order a proper investigation in the matter by deputing a senior officer from his organization to undertake a thorough investigation and examine in detail the facts and circumstances of the case and then furnish a report to the trial court. [para 14] [200-B-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 126 of 2012.

From the Judgment and Order dated 12.01.2011 of the High Court of Bombay at Aurangabad in Criminal Writ Petition No. 356 of 2010.

Uday B. Dube for the Appellant.

Shankar Chillarge and Asha Gopalan Nair for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. Heard learned counsel for the parties.

2. Leave granted.

3. The subject matter of challenge in this appeal is a rather cryptic order of the High court by which the High Court, with respect, disposed of a petition under Article 227 of the Constitution without adverting to the questions involved.

4. The material facts of the case which are necessary for us to consider for the purpose of disposal of the issues are that one Imran S/o Anwar Khan was found murdered under mysterious circumstances. His dead body was found on 22nd February, 2009 at the entrance of the Government hospital. Prior to that Imran was found missing and the appellant herein went to the police station to lodge her First Information Report over that but the police sent the appellant back after recording a mere 'missing report'. Even though at that point of time, the appellant was said to have informed the police that Imran was allegedly kidnapped by one Ijani Khan, but, the police recorded a 'missing' report only.

5. After that as the appellant came to know that the dead body of Imran was lying near the entry of the Government hospital, she immediately went to the police station again and informed the police of this fact also. According to the appellant's version, the police, instead of recording her statement and registering an F.I.R. passed on the said information to one Ijani Khan.

6. Two days thereafter, the wife of the deceased lodged an F.I.R. and on that basis, investigation was undertaken and two sons of the appellant, namely, Jaffar Khan and Sherkhan, were arrested.

7. The appellant not being satisfied with the aforesaid state

of investigation, filed a petition before the learned Magistrate under Section 173(8) of Code of Criminal Procedure. The learned Magistrate, after considering the materials on record, passed a detailed order, the concluding part of which reads as under:

> "As the serious allegations have been made against police authorities as well as the present accused, in my opinion, further investigation is required because once police investigated the offence, then for the same offence separate crime as well as case number is not required. Therefore, in my opinion, further investigation is necessary. Hence I pass following order:
>
> ORDER
>
> P1 Jinsi is hereby directed to make the further investigation in the present offence and submit the report within time.

8. The main grievances of the appellant are that even though the Magistrate was not satisfied with the way in which the investigation was proceeded and wanted further investigation to be conducted, but strangely handed over the investigation to the same police authorities about whose investigation the Magistrate was not satisfied.

9. The appellant's contention is that once the Magistrate was prima facie satisfied that the matter was not properly investigated and required further investigation, the investigation should have been handed over to some other investigating agency.

10. When the order of the Magistrate was challenged by the appellant before the High Court on the basis of a petition under Article 227 of the Constitution, the said petition came to be disposed of by the High Court by an unusually laconic order:

"1. Heard. At the instance of the applicant, since he felt that statements of witnesses are not recorded, police officer has recorded statement of Shaikh Rafik Shaikh Daud, copy whereof is annexed to the report. If the complainant feels that few more witnesses are still left, he can bring such witnesses to the investigator and to ensure to facilitate recording of statement.

2. Purpose of the writ petition is achieved. Consequently nothing survives. Petition disposed of."

11. We are of the considered opinion that the order of the High Court is very cryptic and the High Court has not looked into the material facts of the case. It was expected of the High Court to look into the matter with greater care and caution as a very serious offence had taken place followed by an investigation in respect of which the Magistrate himself had expressed serious reservations but failed to give proper direction.

12. Learned counsel for the appellant submits before us that the appellant wanted the investigation to be fairly conducted by an independent agency and urged before us for an order for the investigation to be conducted not by the same police authorities which had undertaken the investigation earlier but by any other independent investigating agency.

13. In the facts and circumstances of this case, we find that every citizen of this country has a right to get his or her complaint properly investigated. The legal framework of investigation provided under our laws cannot be made selectively available only to some persons and denied to others. This is a question of equal protection of laws and is covered by the guarantee under Article 14 of the Constitution. The issue is akin to ensuring an equal access to justice. A fair and proper investigation is always conducive to the ends of justice and for establishing rule of law and maintaining proper balance in law and order. These

are very vital issues in a democratic set up which must be taken care of by the Courts.

14. Considering the aforesaid vital questions, we dispose of this appeal by directing the second respondent, the Additional Director General of Police, State CID, Pune Division, Pune, Maharashtra to order a proper investigation in the matter by deputing a senior officer from his organization to undertake a thorough investigation and examine in detail the facts and circumstances of the case and then furnish a report to the trial Court within a period of three months from the date of taking charge of the investigation. The investigation is to be taken up within two weeks from the date of service of this order on the second respondent. The matter shall thereafter proceed in accordance with law. We hope and expect an impartial investigation of the case will take place.

15. The appeal is accordingly allowed to the extent indicated above.

R.P. Appeal allowed.

JILE SINGH
v.
STATE OF U.P. & ANR.
(Criminal Appeal No. 121 of 2012)

JANUARY 12, 2012

[R.M. LODHA AND H.L. GOKHALE, JJ.]

Code of Criminal Procedure, 1973: ss.200, 204, 207, 208, 209, 319 - Charge-sheet filed against accused-H in a murder case - Investigating Officer found that no case was made out against the appellant - Issuance of summons by the Magistrate against the appellant on a private complaint u/s.200 made by Respondent No.2 after committal of accused-H to the Sessions Court - Whether addition of appellant to the array of the accused in a case pending before the Sessions Court can be done at a stage prior to collecting any evidence - Held: Once the Sessions Court takes cognizance of the offence pursuant to the committal order, the only other stage when the court is empowered to add any other person to the array of the accused is after reaching evidence collection when powers u/s.319 can be invoked - In the instant case, if the order passed by the Magistrate in issuing summons against the appellant on the private complaint which was confirmed by the High Court is allowed to stand, it would mean addition of the appellant to the array of the accused in a pending case before the Sessions Judge at a stage prior to collecting any evidence by that Court - This course is impermissible - The stage of s.209 having been reached in the case, it was not open to the Magistrate to exercise the power u/s.204(1)(b) and issue summons to the appellant - Order of the Magistrate was totally without jurisdiction.

Ranjit Singh vs. State of Punjab, **1998 (2) Suppl. SCR 8: (1998) 7 SCC 149;** *Kishori Singh and ors. vs. State of*

Bihar and Anr. **(2004) 13 SCC 11;** *Raj Kishore Prasad vs. State of Bihar,* **1996(2) Suppl. SCR 125: (1996) 4 SCC 495;** *India Carat (P) Ltd. vs. State of Karnataka* **1989 (1) SCR 718: (1989) 2 SCC 132 - relied on.**

Hareram Satpathy vs. Tikaram Agarwala & Ors., **1979 (1) SCR 349: 1978 (4) SCC 58;** *Kishan Lal vs. Dharmendra Bafna & Anr.* **2009 (11) SCR 234: 2009 (7) SCC 685 - held in applicable.**

Case Law Reference:

1998 (2) Suppl. SCR 8	**relied on**	**Paras 5, 9**
(2004) 13 SCC 11	**relied on**	**Paras 5, 9**
1996(2) Suppl. SCR 125	**relied on**	**Para 8**
1989 (1) SCR 718	**relied on**	**Para 8**
1979 (1) SCR 349	**held in applicable**	**Paras 6, 10**
2009 (11) SCR 234	**held in applicable**	**Paras 6, 10**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 121 of 2012.

From the Judgment and Order dated 110.03.2011 of the High Court of Judicature at Allahabad in Criminal Revision No. 1241 of 2011.

Manoj Saxena, Khem Chand, Shwatank Sailakwal (for Dr. Kailash Chand) for the Appellant.

Ratnakar Dash, Vikram Patralekh, Shailendra Kr. Mishra, Sarika Singh, Santosh Kumar Tripathi, Anuvrat Sharma and Alka Sinha for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Leave granted.

2. A certain Bharat Lal Sharma was done to death on October 26, 2008. His father (respondent No. 2 herein) informed the Police Station Kosikalan on the next day, i.e., October 27, 2008 at 8 a.m. that he received an information in the morning at about 7 a.m. that his son Bharat Lal Sharma had been murdered and his dead body was lying in the agricultural field of Ghure son of Gaisi, 'Jat' resident of Tumaura. On receipt of this information, he (respondent No. 2 herein) went to the spot and found that the body of his son was lying in blood. His son was killed with some sharp edged weapon the previous night. He requested the police to register First Information Report (FIR) against unknown accused persons and take appropriate action in the matter. On this information, an FIR was registered and investigation commenced. On conclusion of the investigation, the Investigating Officer submitted charge-sheet naming one Hari Singh as an accused having committed the murder of Bharat Lal Sharma. On the basis of the material collected by the Investigating Officer, no case was found out against the present appellant-Jile Singh and the Investigating Officer concluded that the appellant has been falsely named in the course of investigation.

3. On May 2, 2009, the Chief Judicial Magistrate, Mathura, committed the accused-Hari Singh to the Court of Sessions Judge, Mathura for trial. It was then that the complainant-respondent No. 2 herein filed a private complaint under Section 200 of the Code of Criminal Procedure, 1973 (for short, 'the Code') in the court of Judicial Magistrate, Mathura, against the present appellant and one Jayveer Singh for the murder of his son Bharat Lal Sharma.

4. The Chief Judicial Magistrate, Mathura, after recording the statements under Section 202 of the Code, issued

summons to the appellant on January 3, 2011. Aggrieved by that order, the appellant filed Criminal Revision before the Allahabad High Court which came to be dismissed on March 10, 2011. It is from this order that the present Appeal, by special leave, has arisen.

5. Mr. Manoj Saxena, learned counsel for the appellant, submitted that the issuance of summons by the Chief Judicial Magistrate, Mathura, on a private complaint made by the respondent No. 2 after committal of accused-Hari Singh for the murder of Bharat Lal Sharma to the Sessions Court, was without jurisdiction. He would submit that addition of a new person to the array of the accused in a case pending before the sessions court can only be done by that court in exercise of the power under Section 319 of the Code and in no other way. In this regard, he relied upon decisions of this Court in the cases of *Ranjit Singh Vs. State of Punjab*[1] and *Kishori Singh and Ors. Vs. State of Bihar and Anr.*[2]

6. Mr. Ratnakar Dash, learned senior counsel for the respondent No. 1-State of Uttar Pradesh, and Mr. Vikram Patralekh, learned counsel for respondent No. 2-complainant, stoutly defended the impugned order. They submitted that the complaint filed by the complainant before the Magistrate was maintainable under Section 200 of the Code since the Investigating Officer on conclusion of the investigation did not name the appellant as accused although there was material to that effect in the course of investigation. The learned senior counsel and the learned counsel for the respondents submitted that if on receipt of a report, the police takes up the investigation of a case and on completion thereof submits a charge-sheet against few persons and leaves the other persons involved in the crime by stating in the report that no case has been made out against such person, it is open to the aggrieved

1. (1998) 7 SCC 149.
2. (2004) 13 SCC 11.

complainant to file a complaint under Section 200 of the Code and the Magistrate is empowered to issue summons. In this regard, they relied upon a decision of this Court in *Hareram Satpathy Vs. Tikaram Agarwala & Ors.*[3] Mr. Ratnakat Dash, learned senior counsel for the respondent No. 1, also referred to another decision of this Court in *Kishan Lal Vs. Dharmendra Bafna & Anr.*[4] and submitted that if a right has been given to the complainant to be given notice of filing of the police report and to file protest petition, there is no impediment in the law for maintaining a complaint if persons involved in the crime have been left over by the police in the course of the investigation.

7. The present case, in our view, is squarely covered by the law laid down by this Court in the case of *Ranjit Singh* (supra) and the subsequent decision in the case of *Kishori Singh* (supra) reiterating the same legal position. In *Ranjit Singh* (supra), this Court was concerned with the issue whether the sessions court can add a new person to the array of the accused in a case pending before it at a stage prior to collecting any evidence. The three Judge Bench that considered the above issue referred to various provisions of the Code, namely, Sections 204, 207, 208, 209, 225, 226, 227, 228, 229, 230 and 319 and held as under :

> "19. So from the stage of committal till the Sessions Court reaches the stage indicated in Section 230 of the Code, that court can deal with only the accused referred to in Section 209 of the Code. There is no intermediary stage till then for the Sessions Court to add any other person to the array of the accused.
>
> 20. Thus, once the Sessions Court takes cognizance of the offence pursuant to the committal order, the only other

3. 1978 (4) SCC 58.
4. 2009 (7) SCC 685.

> stage when the court is empowered to add any other person to the array of the accused is after reaching evidence collection when powers under Section 319 of the Code can be invoked. We are unable to find any other power for the Sessions Court to permit addition of new person or persons to the array of the accused. Of course it is not necessary for the court to wait until the entire evidence is collected for exercising the said powers."

8. The above legal position has been reiterated by this Court in a subsequent decision in the case of *Kishori Singh* (supra). The two Judge Bench in *Kishori Singh* (supra) considered some of the provisions of the Code and earlier decision of this Court in *Ranjit Singh* (supra) and two other decisions, namely, *Raj Kishore Prasad Vs. State of Bihar*[5] and *India Carat (P) Ltd. Vs. State of Karnataka*[6], and held as under:-

> "9. After going through the provisions of the Code of the Criminal Procedure and the aforesaid two judgments and on examining the order dated 10-6-1997 passed by the Magistrate, we have no hesitation to come to the conclusion that the Magistrate could not have issued process against those persons who may have been named in the FIR as accused persons, but not charge-sheeted in the charge-sheet that was filed by the police under Section 173 CrPC.
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> 10. So far as those persons against whom charge-sheet has not been filed, they can be arrayed as "accused persons" in exercise of powers under Section 319 CrPC when some evidence or materials are brought on record in course of trial or they could also be arrayed as "accused persons" only when a reference is made either by the Magistrate while passing an order of commitment or by the

5. (1996) 4 SCC 495.
6. (1989) 2 SCC 132.

learned Sessions Judge to the High Court and the High Court, on examining the materials, comes to the conclusion that sufficient materials exist against them even though the police might not have filed charge-sheet, as has been explained in the latter three-Judge Bench decision. Neither of the contingencies has arisen in the case in hand."

9. In the present case, if the order passed by the Chief Judicial Magistrate, Mathura, in issuing summons against the appellant on the complaint filed by the respondent No. 2-complainant, which has been confirmed by the High Court, is allowed to stand, it would mean addition of the appellant to the array of the accused in a pending case before the Sessions Judge at a stage prior to collecting any evidence by that court. This course is absolutely impermissible in view of the law laid down by a three Judge Bench of this court in the case of *Ranjit Singh* (supra). The stage of Section 209 of the Code having reached in the case, it was not open to the Chief Judicial Magistrate, Mathura to exercise the power under Section 204(1)(b) of the Code and issue summons to the appellant. The order of the Chief Judicial Magistrate, Mathura is totally without jurisdiction. The High Court was clearly in error in not keeping in view the law laid by this Court in the case of *Ranjit Singh* (supra) followed by a subsequent decision in the case of *Kishori Singh* (supra) and in upholding the illegal order of the Chief Judicial Magistrate, Mathura.

10. The two decisions, namely, *Hareram Satpathy* (supra)and *Kishan Lal* (supra) relied upon by the learned senior counsel and counsel for the respondents have no application at all to the case in hand.

11. We, accordingly, allow this Appeal and set aside the order of the High Court dated March 10, 2011 impugned in this present Appeal and the order of the Chief Judicial Magistrate, Mathura, dated January 3, 2011.

12. Needless to say that in the course of trial, on the basis of the evidence if it appears to the Sessions Judge that any person not being the accused in the trial has committed the offence and the case is made out for exercise of power under Section 319 of the Code for proceeding against such person, it will be open to the Sessions Judge to proceed accordingly and the present order will not come in the way in exercise of his power under Section 319 of the Code.

D.G. Appeal allowed.

M/S FLEX ENGINEERING LIMITED
v.
COMMISSIONER OF CENTRAL EXCISE, U.P.
(Civil Appeal No. 7152 of 2004)

JANUARY 13, 2012.

[D.K. JAIN AND ASOK KUMAR GANGULY, JJ.]

Central Excise Rules, 1944:

Rule 57-A - Modvat credit - Inputs used 'in relation to manufacture' of final product - Manufacturing process -Testing of machines - Flexible laminated plastic film in roll form and poly paper used for testing the automatic form fill and seal machines (F & S Machines) manufactured by the assessee - Held: The process of testing the customised machines is integrally connected with the ultimate production of the final product viz. the F&S machines and, therefore, that process is one in relation to the manufacture, falling within the sweep of r. 57A - The manufacturing process in the instant case gets completed on testing of the F&S machines and, therefore, the flexible plastic films and poly paper used for testing the said machines are inputs used in relation to the manufacture of the final product and would be eligible for Modvat credit under r. 57A - Central Board of Excise and Customs Circular No. 33/33/94/CX.8 dated 4.5.1994 - Notification No. 28/95-C.E.(N.T.) dated 29.6.1995.

The appellant-assessee, engaged in the manufacture of various types of packaging machines, marketed as automatic form fill and seal machines ("F&S machines"), classified under chapter heading 8422.00 of the Schedule to the Central Excise Tariff Act, 1985, filed declarations and availed of the benefit of Modvat credit in respect of the flexible laminated plastic film in roll form and poly paper (falling under chapter headings 3920.38 and

4811.30 of the Schedule to the Tariff Act), which, according to the assessee was used for testing the F&S machines. It was the case of the assessee that the F&S machines manufactured by it were 'made to order' inasmuch as all the dimensions of the packaging/sealing pouches, for which the F&S machine was required, were provided by the customer as per the purchase order which contained an inspection clause to the effect that inspection/trial would be carried out by purchaser's Engineer before dispatch of equipment for the performance of the machine. The adjudicating authority did not accept the stand of the assessee and denied the benefit of Modvat credit as claimed. The appeals of the assessee were dismissed by the Commissioner (Appeals) as also by the Customs, Excise and Gold (Control) Appellate Tribunal. The reference was also answered by the High Court against the assessee opining that testing the performance of a final product was not a process of manufacture and, therefore, materials used for testing the performance of the F&S machines could not be termed as 'inputs' for the purpose of allowing Modvat credit.

Allowing the appeals, the Court

HELD: 1.1. Rule 57A of the Central Excise Rules, 1944 entitles a manufacturer to take credit of the Central Excise duty paid on the inputs used in or in relation to the manufacture of the final product, provided that the input and the finished product are excisable goods and fall under any of the specified chapters in the tariff schedule. Circular No.33/33/94/CX.8, dated 4.5.1994, issued by the Central Board of Excise and Customs, relating to the Modvat scheme stipulates, "Modvat credit is available for all excisable goods used as inputs in or in relation to the manufacture of finished goods. It is, therefore, clarified that the input credit is admissible whether such input is physically present in the finished

excisable goods or not so long such inputs are used in or in relation to the manufacture of finished excisable goods". By Notification No.28/95-C.E. (N.T.), dated 29.6.1995, r.57-A was amended and the phrase "whether directly or indirectly and whether contained in the final product or not" was inserted. There is no dispute that in the instant case, both the F&S machines and the flexible laminated plastic film and poly paper are excisable. [para 13 and 16] [221-D-H; 224-C]

Collector of Central Excise & Ors. Vs. Solaris Chemtech Ltd. & Ors. **2007 (8) SCR 501 = (2007) 7 SCC 347: 2007 (214) E.L.T. 481 (S.C.);** *Collector of Central Excise, Jaipur Vs. Rajasthan State Chemical Works, Deedwana, Rajasthan,* **1991 (1) Suppl. SCR 124 = (1991) 4 SCC 473: 1991 (55) E.L.T. 444 (S.C.) - relied on**

1.2. The process of manufacture is complete only when the product is rendered marketable. Thus, manufacture is intrinsically integrated with marketability. If a product is not saleable, it will not be marketable and consequently the process of manufacture would not be held to be complete, and duty of excise would not be leviable on it. The corollary to this is that till the time the step of manufacture continues, all the goods used in relation to it will be considered as inputs and thus, entitled to Modvat credit under r. 57A of the Rules. In the instant case, each machine is tailor made according to the requirements of individual customers. If the results are not in conformity with the order, then the machine loses its marketability and is of no use to any other customer. Thus, the process of manufacture will not be said to be complete till the time the machines meet the contractual specifications and that will not be possible unless the machines are subjected to individual testing. [para 17 and 20] [225-B-C; 228-B-D]

Union of India & Ors. Vs. Sonic Electrochem (P) Ltd. &

Anr. **2002 (2) Suppl. SCR 475 = (2002) 7 SCC 435;** *Collector of Central Excise, Calcutta-II Vs. M/s Eastend Paper Industries Ltd.* **1989 (3) SCR 1017 = (1989) 4 SCC 244** *Dharampal Satyapal Vs. Commissioner of Central Excise, Delhi-I*, **New Delhi 2005 (3) SCR 746 = (2005) 4 SCC 337 - relied on.**

1.3. Even though the revenue has alleged that the process of manufacture is complete as soon as the machine is assembled, yet it has not discharged the onus of proving the marketability of the machines thus assembled, prior to the stage of testing. In the absence of the revenue having adduced any such evidence or contorted the assessee's claim that the machines cannot be sold unless testing is done with some alternative evidence as to their marketability, the stand of the revenue cannot be accepted. [para 20] [228-D-F]

Hindustan Zinc Ltd. Vs. Commissioner of Central Excise, Jaipur **2005 (2) SCR 391 = (2005) 2 SCC 662 - relied on.**

1.4. This Court holds that the process of testing the customised F&S machines is inextricably connected with the manufacturing process, in as much as, until this process is carried out in terms of the covenant in the purchase order, the manufacturing process is not complete, the machines are not fit for sale and, as such, not marketable at the factory gate. Therefore, the process of testing, in the instant case, is one in relation to the manufacture, falling within the sweep of r. 57A of the Rules. Accordingly, the flexible plastic films used for testing the said machines are inputs used in relation to the manufacture of the final product and would be eligible for Modvat credit under r. 57A of the Rules.[para 21-22] [228-G; 229-A-D]

Commissioner of Income Tax, Kerala, Vs. Tara Agencies **2007 (8) SCR 136 = 2007 (6) SCC 429;** *Maruti Suzuki Ltd.*

Vs. Commissioner of Central Excise, **Delhi-III 2009 (13) SCR 301 = 2009 (9) SCC 193=2009 (240) E.L.T. 641 (S.C.);** *National Leather Cloth Manufacturing Company Vs. Union of India & Anr* **(2010) 12 SCC 218: 2010(256) ELT 321(SC);** *Tata Engineering & Locomotive Co. Ltd. Vs. Commr. Of C. Ex., Pune* **2010 (256) E.L.T. 56 (Bom.) - cited.**

Case Law Reference:

(2010) 12 SCC 218	**cited**	**para 9**
2007 (8) SCR 136	**cited**	**para 9**
2009 (13) SCR 301	**cited**	**para 9**
2010 (256) E.L.T. 321 S.C	**cited**	**para 9**
2007 (8) SCR 501	**relied on**	**para 14**
1991 (1) Suppl. SCR 124	**relied on**	**para 15**
2002 (2) Suppl. SCR 475	**relied on**	**para 17**
1989 (3) SCR 1017	**relied on**	**para 18**
2005 (3) SCR 746	**relied on**	**para 19**
2005 (2) SCR 391	**relied on**	**para 20**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7152 of 2004 etc.

From the Judgment & Order dated 26.08.2002 of the High Court of Judicature at Allahabad in Central Excise Reference No. 11 of 2001.

WITH

C.A. Nos. 429, 430 & 431 of 2012.

Rajesh Kumar, R.K. Srivastava, P.N. Srivastava for the Appellant.

Mukul Gupta, Rashmi Malhotra, Som Prakash, B. Krishna Prasad for the Respondent.

The Judgment of the Court was delivered by

D.K. JAIN, J.: 1. Leave granted in S.L.P. (C) Nos. 875 of 2008, 10759 of 2010 and 6501 of 2011.

2. This batch of appeals, by grant of leave, arises out of judgments dated 26th August, 2002 in C.E.R. No. 11 of 2001, 11th April, 2007 in C.E.A. No. 10 of 2004, 8th September, 2009 in C.E.A. No. 6 of 2003 and 25th October, 2010 in C.E.R. No. 51 of 2002 passed by the High Court of Judicature at Allahabad. By the impugned judgments, rendered in the reference applications filed by the assessee, under Section 35H of the Central Excise Act, 1944 (for short "the Act"), the questions referred by the Customs, Excise and Gold (Control) Appellate Tribunal, as it then existed, (for short "the Tribunal") have been answered in favour of the revenue.

3. In order to comprehend the controversy at hand, a few material facts may be noticed. At the outset, it may be noted that these appeals relate to the period between August 1992 to June 1996.

The appellant –assessee, a body corporate, claiming to be pioneers in the concept of flexible packaging, is engaged in the manufacture of various types of packaging machines, marketed as Automatic form fill and seal machines (for short "F&S machines"), classified under chapter heading 8422.00 of the Schedule to the Central Excise Tariff Act, 1985 (for short "the Tariff Act"). The literature placed on record shows that the assessee has prototype models of F&S machines with technical details like web width, Roll diameter, Core diameter, typical material range, the type of material to be packed, etc. According to the assessee, the machines are 'made to order', inasmuch as all the dimensions of the packaging/sealing

pouches, for which the F&S machine is required, are provided by the customer. The purchase order contains the following inspection clause:

> "Inspection/Trial will be carried out at your works in the presence of (sic) our Engineer before dispatch of equipment for the performance of the machine."

Flexible Laminated Plastic Film in roll form & Poly Paper which are duty paid, falling under chapter headings 3920.38 and 4811.30 of the Schedule to the Tariff Act, are used for testing, tuning and adjusting various parts of the F&S machine in terms of the afore-extracted condition in the purchase order. As the machine ordered is customer specific, if after inspection by the customer it is found deficient in respect of its operations for being used for a particular specified packaging, it cannot be delivered to the customer, till it is re-adjusted and tuned to make it match with the required size of the pouches as per the customer's requirement. On completion of the above process and when the customer is satisfied, an entry is made in the RG 1 register declaring the machine as manufactured, ready for clearance.

4. The assessee filed declarations and availed of the benefit of Modvat credit in respect of the Flexible Laminated Plastic Film in roll form & Poly Paper used for testing the F&S machine. On 4th March, 1993, a notice was issued to the assessee to show cause as to why the benefit of Modvat credit on the above goods be not denied, on the ground that they have used the said material for the purpose of testing the final product i.e. the F&S machine which cannot be treated as inputs as stipulated in Rule 57A of the Central Excise Rules, 1944 (for short "the Rules"). On a similar ground, a number of show cause notices were issued to the assessee covering the period from August 1992 to June 1996. The assessees' reply to the show cause notices did not find favour with the adjudicating authority, who accordingly, denied the benefit of Modvat credit

on the said items. Appeals preferred by the assessee before the Commissioner (Appeals) and the Tribunal were also dismissed.

5. Aggrieved thereby, the assessee filed applications seeking reference to the High Court on the questions proposed. However, having failed to persuade the Tribunal that its orders gave rise to questions of law, the assessee moved the Allahabad High Court, praying for a direction to the Tribunal for reference.

6. The High Court partly allowed the application and directed the Tribunal to draw a statement of the case and refer the following questions of law for its opinion:

> "Q1) Whether, in the circumstances of the present case, facts of which are not in dispute, duties paid on material, namely, plastic films/poly paper used for testing machines for forming commercial/technical opinion as to their marketability/ excisability would be eligible to be taken as credit (sic) under rule 57-A read with relevant notification?
>
> Q2) Whether such use of material in testing in view of the purposes mentioned above, could be said to be used (sic) in the manufacture of or use in relation to the manufacture of the final products viz., Machines as assembled?"

7. As aforesaid, the High Court has answered both the questions in the negative, opining that testing the performance of a final product is not a process of manufacture and therefore, materials used for testing the performance of the F&S machine cannot be termed as 'inputs' for the purpose of allowing Modvat credit. According to the High Court, anything required to make the goods marketable must form a part of the manufacture and any raw material or any materials used for the same would be a component part of the end product. It has observed that materials used after manufacture of the final product, viz. the F&S machine, is complete, is only to detect the deficiency in

the final product and therefore, could not be the goods used in or in relation to the manufacture of the final product within the meaning of Rule 57A of the Rules. Hence the present appeals by the assessee.

8. Assailing the opinion of the High Court, Mr. Rajesh Kumar, learned counsel appearing on behalf of the assessee submitted that the expression "in or in relation to" used in Rule 57A of the Rules is very wide and is used to expand the scope, meaning and content of the expression 'inputs' so as to include all inputs so long as these are used "in or in relation to the manufacture" of finished excisable goods. It was argued that since the machines are tailor made, as per the specifications provided by a customer to achieve a distinct and different result, it is of no use to any other customer. Therefore, unless each individual machine is tested by using the flexible plastic films in the presence of the customer or his representative, as per the terms of the contract, to satisfy him that it is capable of being used for a particular packing as specified by him, the process of manufacture of the final product cannot be said to be complete. It was contended that the testing of the machine being an integral process of the manufacture and marketability of the final product, particularly in terms of the specific condition in the contract, the claim for Modvat credit was admissible on flexible plastic films consumed in the testing of the F&S machines. It was stressed that to avail of the Modvat credit in respect of an input, it is not necessary that such input must be physically present in the finished product.

9. In support of the proposition that the material used in testing, for the purpose of verification of certain characteristics of the final product, is an input in or in relation to the manufacture, learned counsel placed reliance on the decisions of this Court in *Commissioner of Income Tax, Kerala, Vs. Tara Agencies*[1], *Maruti Suzuki Ltd. Vs. Commissioner of Central*

1. (2007) 6 SCC 429..

Excise, Delhi-III[2], *National Leather Cloth Manufacturing Company Vs. Union of India & Anr.*[3] and a decision of the Bombay High Court in *Tata Engineering & Locomotive Co. Ltd. Vs. Commr. Of C. Ex., Pune*[4].

10. *Per contra,* Mr. Mukul Gupta, learned senior counsel appearing for the revenue, supporting the decision of the High Court, contended that Modvat credit is available only on the inputs which are actually used in the manufacture of the final product. According to the learned counsel, testing of a machine can take place only after the manufacture of the machine is complete and therefore, any goods used in a process subsequent to the completion of the process of manufacture cannot be termed as inputs within the meaning of Rule 57A of the Rules.

11. Before analysing the rival submissions, it would be appropriate to refer to the relevant statutory provisions.

12. The Modvat scheme, introduced with effect from 1st March 1986, was aimed at allowing credit to the manufacturers for the excise duty paid by them in respect of the inputs used in the manufacture of the finished product. Rules 57A and 57C of the Rules, which make a manufacturer eligible to avail of the credit for the duty paid on the inputs read as follows:

> **"RULE 57A : Applicability.- (1)** The provisions of this section shall apply to such finished excisable goods (hereinafter referred to as the "final products") as the Central Government may, by notification in the Official Gazette, specify in this behalf, for the purpose of allowing credit of any duty of excise or the additional duty under Section 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be specified in the said notification (hereinafter

2. (2009) 9 SCC 193 : 2009 (240) E.L.T. 641 (S.C.)
3. (2010) 12 SCC 218 : 2010 (256) E.L.T. 321 (S.C.)
4. 2010 (256) E.L.T. 56 (Bom.)

referred to as the "specified duty") paid on the goods used in or in relation to the manufacture of the said final products whether directly or indirectly and whether contained in the final product or not (hereinafter referred to as the "inputs") and for utilising the credit so allowed towards payment of duty of excise leviable on the final products, whether under the Act or under any other Act, as may be specified in the said notification, subject to the provisions of this section and the conditions and restrictions that may be specified in the notification:

Provided that the Central Government may specify the goods or classes of goods in respect of which the credit of specified duty may be restricted.

Explanation.—For the purposes of this rule, "inputs" includes—

(a) inputs which are manufactured and used within the factory of production, in or in relation to, the manufacture of final products,

(b) paints and packaging materials,

(c) inputs used as fuel,

(d) inputs used for generation of electricity, used within the factory of production for manufacture of final products or for any other purpose, and

(e) accessories of the final product cleared alongwith such final product, the value of which is included in the assessable value of the final product,

but does not include—

(i) machines, machinery, plant, equipment, apparatus, tools, appliances or capital goods as defined in rule 57Q used for producing or processing of any goods

or for bringing about any change in any substance in or in relation to the manufacture of the final products;

(ii) packaging materials in respect of which any exemption to the extent of the duty of excise payable on the value of the packaging materials is being availed of for packaging any final products;

(iii) packaging materials or containers, the cost of which is not included in the assessable value of the final products under section 4 of the Act; and

(iv) crates and glass bottles used for aerated waters.

(2) Notwithstanding anything contained in sub-rule (1), the Central Government may, by notification in the official Gazette, declare the inputs on which declared duties of excise or additional duty (hereinafter referred to as 'declared duty') paid shall be deemed to have been paid at such rate or equivalent to such amount as may be specified in the said notification and allow the credit of such declared duty deemed to have been paid in such manner and subject to such condition as may be specified in the said notification even if the declared inputs are not used directly by the manufacturer of final products declared in the said notification, but are contained in the said final products.

Explanation. – For the purposes of this sub-rule, it is clarified that even if the declared inputs are used directly by a manufacturer of final products, the credit of the declared duty shall, notwithstanding the actual amount of duty paid on such declared inputs, be deemed to be equivalent to the amount specified in the said notification and the credit of the declared duty shall be allowed to such manufacturer.

Rule 57C. Credit of duty not to be allowed if final products are exempt.—No credit of the specified duty paid on the inputs used in the manufacture of a final product (other than those cleared either to a unit in a Free Trade Zone or to a hundred per cent Export-Oriented Unit) or to a unit in an Electronic Hardware Technology Park or to a unit in Software Technology Parks or supplied to the United Nations or an international organisation for their official use or supplied to projects funded by them, on which exemption of duty is available under notification of the Government of India in the Ministry of Finance (Department of Revenue) No.108/95-Central Excises, dated the 28th August, 1995 shall be allowed if the final product is exempt from the whole of the duty of excise leviable thereon or is chargeable to nil rate of duty."

13. It is manifest that Rule 57A of the Rules entitled a manufacturer to take credit of the Central Excise duty paid on the inputs used in or in relation to the manufacture of the final product provided that the input and the finished product are excisable goods and fall under any of the specified chapters in the tariff schedule. It is pertinent to note that vide Notification No.28/95-C.E. (N.T.), dated 29th June 1995, the said Rule was amended and the phrase "whether directly or indirectly and whether contained in the final product or not" was inserted. There is no dispute that in the instant case, both the F&S machines and the flexible laminated plastic film and poly paper are excisable. Therefore, the short question for consideration is whether the said material on which Modavt credit is claimed by the assessee, not physically used in the manufacture of the said machine but used for testing the F&S machines would be covered within the sweep of the expression "in or in relation to the manufacture of the final products", as appearing in Rule 57A of the Rules. In short, the bone of contention is as to what meaning is to be assigned to the expression "in relation to the manufacture of final products."

14. In our opinion, apart from the fact that the amended Rule itself contemplates that physical presence of the input, in respect of which Modvat credit is claimed, in the final product is not a pre-requisite for such a claim, even otherwise this issue is no longer *res-integra.* In *Collector of Central Excise & Ors. Vs. Solaris Chemtech Ltd. & Ors.*[5], this Court while examining the scope and purport of the expression "in or in relation to the manufacture of the final products" observed that these words have been used to widen and expand the scope, meaning and content of the expression "inputs" so as to attract goods which do not enter into finished goods. Speaking for the Bench, S.H. Kapadia, J. (as his Lordship then was) held as follows:

> "11**.** Lastly, we may point out that in order to appreciate the arguments advanced on behalf of the Department one needs to interpret the expression "in or in relation to the manufacture of final products". The expression "in the manufacture of goods" indicates the use of the input in the manufacture of the final product. The said expression normally covers the entire process of converting raw materials into finished goods such as caustic soda, cement, etc. However, the matter does not end with the said expression. The expression also covers inputs "used in relation to the manufacture of final products". It is interesting to note that the said expression, namely, "in relation to" also finds place in the extended definition of the word "manufacture" in Section 2(*f*) of the Central Excises and Salt Act, 1944 (for short "the said Act"). It is for this reason that this Court has repeatedly held that the expression "in relation to" must be given a wide connotation.
>
> 12. The Explanation to Rule 57-A shows an inclusive definition of the word "inputs". Therefore, that is a dichotomy between inputs used in the manufacture of the

5. (2007) 7 SCC 347 : 2007 (21) E..L.T. 481 (S.C.)

final product and inputs used in relation to the manufacture of final products. The Department gave a narrow meaning to the word "used" in Rule 57-A. The Department would have been right in saying that the input must be raw material consumed in the manufacture of final product, however, in the present case, as stated above, the expression "used" in Rule 57-A uses the words "in relation to the manufacture of final products".

13**.** The words "in relation to" which find place in Section 2(*f*) of the said Act have been interpreted by this Court to cover processes generating intermediate products and it is in this context that it has been repeatedly held by this Court that if manufacture of final product cannot take place without the process in question then that process is an integral part of the activity of manufacture of the final product. Therefore, the words "in relation to the manufacture" have been used to widen and expand the scope, meaning and content of the expression "inputs" so as to attract goods which do not enter into finished goods.

14. In *J.K. Cotton Spg. & Wvg. Mills Co. Ltd. v. STO*[6] this Court has held that Rule 57-A refers to inputs which are not only goods used in the manufacture of final products but also goods used in relation to the manufacture of final products. Where raw material is used in the manufacture of final product it is an input used in the manufacture of final product. *However, the doubt may arise only in regard to use of some articles not in the mainstream of manufacturing process but something which is used for rendering final product marketable or something used otherwise in assisting the process of manufacture. This doubt is set at rest by use of the words "used in relation to manufacture"*.

(Emphasis supplied by us)

6. AIR 1965 1310.

15. In *Collector of Central Excise, Jaipur Vs. Rajasthan State Chemical Works, Deedwana, Rajasthan*[7]*,* to which a reference was made in *Solaris Chemtech Limited* (supra), this Court had held that any operation which results in the emergence of the manufactured goods would come within the ambit of the term manufacture. This is because of the words used in Rule 57A, namely, goods used in or in relation to the manufacture of final products.

16. At this juncture, it would also be apposite to refer to Circular No.33/33/94/CX.8, dated 4th May 1994, issued by the Central Board of Excise and Customs, relating to the Modvat scheme. The relevant part of the Circular reads as under:

"*Subject: Instruction regarding Modvat Scheme.*

1.....

2. With a view to consolidate the instructions and streamline of procedures, the following instructions are issued in supersession of all the instructions issued on or before 31st December, 1993, in relation to Modvat -

(i) Modvat credit is available for all excisable goods used as inputs *in or in relation to the manufacture* of finished goods. It is, therefore, clarified that the input credit is admissible *whether such input is physically present in the finished excisable goods or not so long such inputs are used in or in relation to the manufacture* of finished excisable goods. In this connection definition of the term manufacture as propounded by the Supreme Court in the *Empire Industry's case*–1985 (20) E.L.T. 179 and *C.C.E.* v. *Rajasthan State Chemical* case – 1991 (55) E.L.T. 444, 448 (S.C.) are quite relevant.

(Emphasis supplied)"

7. (1991) 4 SCC 473 : 1991 (55) E.L.T. 444 (S.C.)

17. It is trite to state that "manufacture" takes place when the raw materials undergo a series of changes and transformation that result in the formation of a commercially distinct commodity having a different name, character and use. It is equally well settled that physical presence of an input in the final finished excisable goods is not a pre-requisite for claiming Modvat credit under Rule 57A of the Rules. It may very well be indirectly related to manufacture and still be necessary for the completion of the manufacture of the final product. It needs little emphasis that the process of manufacture is complete only when the product is rendered marketable. Thus, manufacture is intrinsically integrated with marketability. In this regard it would be profitable to refer to the following observations of this Court in *Union of India & Ors. Vs. Sonic Electrochem (P) Ltd. & Anr.*[8]:

> **"**8**.** We do not consider it necessary to discuss the cases on the question of marketability, as this Court has dealt with all relevant cases in *A.P. SEB case*[9]. In that case, the question was whether electric poles manufactured with cement and steel for the appellant Board were marketable. After considering various cases on the question of marketability of goods, Jeevan Reddy, J., speaking for the Court, summed up the position thus: (SCC p. 434, para 10)
>
> > "*10*. It would be evident from the facts and ratio of the above decisions that the goods in each case were found to be not marketable. Whether it is refined oil (non-deodorised) concerned in *Union of India v. Delhi Cloth and General Mills Co. Ltd.*[10] or kiln gas in *South Bihar Sugar Mills Ltd. v. Union of India*[11] or aluminium cans with rough uneven

8. (20020 7 SCC 435.
9. (1994) 2 SCC 428.
10. AIR 1963 SC 791.
11. AIR 1968 SC 922.

> surface in *Union Carbide India Ltd. v. Union of India*[12] or PVC films in *Bhor Industries Ltd. v. CCE*[13] or hydrolysate in *CCE v. Ambalal Sarabhai Enterprises (P) Ltd.*[14] the finding in each case on the basis of the material before the Court was that the articles in question were not *marketable* and were not known to the market as such. *The 'marketability' is thus essentially a question of fact to be decided on the facts of each case. There can be no generalisation*. The fact that the goods are not in fact marketed is of no relevance."

9. It may be noticed that in the cases referred to in the passage, quoted above, the reasons for holding the articles "not marketable" are different, however, they are not exhaustive. It is difficult to lay down a precise test to determine marketability of articles. Marketability of goods has certain attributes. *The essence of marketability is neither in the form nor in the shape or condition in which the manufactured articles are to be found, it is the commercial identity of the articles known to the market for being bought and sold. The fact that the product in question is generally not being bought and sold or has no demand in the market would be irrelevant.* The plastic body of EMR does not satisfy the aforementioned criteria. There are some competing manufacturers of EMR. Each is having a different plastic body to suit its design and requirement. If one goes to the market to purchase the plastic body of EMR of the respondents either for replacement or otherwise one cannot get it in the market because at present it is not a commercially known product. For these reasons, the plastic body, which is a part of EMR of the respondents, is not "goods" so as to be liable

12. (1986) 2 SCC 547.
13. (1989) 1 SCC 602.
14. (1989) 4 SCC 112.

to duty as parts of EMR under para 5(*f*) of the said exemption notification."

(Emphasis supplied by us)

18. In *Collector of Central Excise, Calcutta-II Vs. M/s Eastend Paper Industries Ltd.*[15], the assessee was manufacturing different kinds of paper. A question arose whether the wrapping paper manufactured and used for wrapping the finished product is a part of manufacture. It was held that wrapping of finished product by wrapping paper is process incidental and ancillary to completion of the manufactured product under Section 2 (f) of Act. Thus, the Court held that, anything required to make goods marketable, must form a part of manufacture and any raw material or any material used for same would be a component part of the final product.

19. In *Dharampal Satyapal Vs. Commissioner of Central Excise, Delhi-I, New Delhi,*[16] the term marketable has been held to mean saleable, as under:

"18……Marketability is an attribute of manufacture. It is an essential criteria for charging duty. Identity of the product and marketability are the twin aspects to decide chargeability. Dutiability of the product depends on whether the product is known to the market. The test of marketability is that the product which is made liable to duty must be marketable in the condition in which it emerges. Marketable means saleable. The test of classification is, how are the goods known in the market. These tests have been laid down by this Court in a number of judgments including *Moti Laminates (P). Ltd. v. CCE*[17], *Union of India v. Delhi Cloth & General Mills Co. Ltd.*[18] and *Cadila*

15. (1989) 4 SCC 244.

16. (2005) 4 SCC 337.

17. (1995) 3 SCC 23.

18. (1997) 5 SCC 767.

Laboratories (P) Ltd. v. CCE[19]."

20. Thus, if a product is not saleable, it will not be marketable and consequently the process of manufacture would not be held to be complete and duty of excise would not be leviable on it. The corollary to the above is that till the time the step of manufacture continues, all the goods used in relation to it will be considered as inputs and thus, entitled to Modvat credit under Rule 57A of the Rules. In the present case, as aforesaid, each machine is tailor made according to the requirements of individual customers. If the results are not in conformity with the order, then the machine loses its marketability and is of no use to any other customer. Thus, the process of manufacture will not be said to be complete till the time the machines meet the contractual specifications and that will not be possible unless the machines are subjected to individual testing. Even though the revenue has alleged that the process of manufacture is complete as soon as the machine is assembled, yet it has not discharged the onus of proving the marketability of the machines thus assembled, prior to the stage of testing. Moreover, as has been held in the case of *Hindustan Zinc Ltd. Vs. Commissioner of Central Excise, Jaipur,*[20] the burden of proving whether a particular product is marketable or not is on the department and in the absence of such proof it cannot be presumed to be marketable. In the absence of the revenue having adduced any such evidence or contorted the assessee's claim that the machines cannot be sold unless testing is done with some alternative evidence as to their marketability, the stand of the revenue cannot be accepted.

21. Thus, in our opinion the process of testing the customised F&S machines is inextricably connected with the manufacturing process, in as much as, until this process is carried out in terms of the afore-extracted covenant in the

19. (2003) 4 SCC 12.

20. (2005) 2 SCC 662.

purchase order, the manufacturing process is not complete; the machines are not fit for sale and hence not marketable at the factory gate. We are, therefore, of the opinion that the manufacturing process in the present case gets completed on testing of the said machines and hence, the afore-stated goods *viz.* the flexible plastic films used for testing the F&S machines are inputs used in relation to the manufacture of the final product and would be eligible for Modvat credit under Rule 57A of the Rules.

22. In view of the aforegoing discussion, the opinion rendered by the High Court on the questions referred by the Tribunal cannot be sustained. We hold that the process of testing the customised machines is integrally connected with the ultimate production of the final product *viz*. the F&S machines and therefore, that process is one in relation to the manufacture, falling within the sweep of Rule 57A of the Rules. Consequently, the appeals are allowed and the impugned orders are set aside, leaving the parties to bear their own costs.

R.P. Appeals allowed.

FOOD CORPORATION OF INDIA & ORS.

v.

BHARTIYA KHADYA NIGAM KARMCHARI SANGH & ANR.

(Civil Appeal No. 7268 of 2002)

JANUARY 13, 2012

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

CONSTITUTION OF INDIA, 1950:

Article 14 - Classification between two sets of employees - Grant of incentives only to the in-service employees of the FCI, who acquired professional qualifications after entering in service and denial of the same to those who had acquired the same professional qualifications before entering the service - Reasonableness of classification - Held: The classification sought to be made by the FCI between the two sets of employees bore a just and rational nexus to the object sought to be achieved by introducing the said incentive scheme - Judged from this point of view grant of the incentive in relation to the in-service employees, in no way amounted to discrimination between the in-service employees and the employees recruited with higher qualification, offending either Articles 14 or 16 of the Constitution, particularly when the incentive was in the form of a special increment as 'personal pay' to be merged in pay at the time of promotion to the next higher grade and thus, having no bearing on the inter-se seniority and/or to the future promotion to the next higher grade - Service law.

Article 226 - Scope of interference - Held: Courts should interfere with the administrative decisions pertaining to pay fixation and pay parity only when they find such a decision to be unreasonable, unjust and prejudicial to a section of employees and taken in ignorance of material and relevant factors - Judicial review.

On 29th July, 1985, the FCI issued Circular No.40 of 1985 introducing a scheme which provided for incentives to its employees on acquiring additional qualifications during their service in the FCI. The Circular provided for grant of two increments to employees in their respective pay scales on acquiring such professional degrees and diplomas as were mentioned in the Circular. Subsequently, another Circular No. 72 of 1986, dated 14th November, 1986, was issued, extending the benefit of one special increment to in-service employees who acquire one year diploma course in any professional subject as mentioned in the Circular. These circulars were complimented by Circular No. 58 of 1987, dated 24th August, 1987, which clarified that the increments shall only be in the form of a personal pay to an official till his promotion to the next higher grade, which shall be subsequently absorbed in the basic pay at the time of pay fixation for the promoted post. The Circular of 1985 was challenged on the ground that it resulted in discrimination between in-service employees acquiring additional qualification and the persons recruited by the FCI already possessing the prescribed additional qualification. The High Court while allowing the intervention application of the respondent (Karamchari Sangh) allowed the petition and directed that the writ petitioner be granted two additional increments under the said Circular.

The Karamchari Sangh filed a writ petition before the High Court. The High Court held that the said Circular was discriminatory and violative of Article 14 of the Constitution and directed the FCI not to give effect to the Circular and to withdraw any incentives, if already given to the employees in furtherance of the said Circular. The FCI and the Karamchari Sangh filed appeals challenging the order of the High Court.

The question which arose for consideration in these appeals was whether grant of incentives only to the in-service employees of the FCI, who acquired professional qualifications after entering in service and denial of the same to those who had acquired the same professional qualifications before entering the service is invalid in law, being violative of Articles 14 and 16 of the Constitution.

Allowing the appeal of FCI and dismissing the appeal of the Karamchari Sangh, the Court

HELD: 1. It is trite law that Article 14 of the Constitution, which enshrines the principle of equality, is of wide import. It guarantees equality before the law and equal protection of the laws within the territory of India. It implies right to equal treatment in similar circumstances, except in cases where the two persons form a separate and distinct class and such classification is a reasonable one based on intelligible differentia having nexus with the object sought to be achieved. [Para 11] [238-E-F]

State of West Bengal v. Anwar Ali Sarkar **(1952) SCR 284:** *John Vallamattom & Anr. v. Union of India* **(2003) 6 SCC 611: 2003 (1) Suppl. SCR 638 - relied on.**

2. The fundamental objective of the impugned circular is to provide an incentive to the in-service employees in order to motivate and encourage them to acquire professional qualifications in various courses, spelt out in the Circular, for their career progression and at the same time enable the FCI to build a reserve of qualified professionals from within the organisation to back up key positions. Evidently, the incentive would not only improve their overall performance and efficiency in the organisation, but also, in the final analysis would strengthen the management with the advent of an atmosphere of professionalism in the FCI. The

classification sought to be made by the FCI between the two sets of employees bore a just and rational nexus to the object sought to be achieved by introducing the said incentive scheme. Judged from this point of view grant of the incentive in relation to the in-service employees, in no way amounted to discrimination between the in-service employees and the employees recruited with higher qualification, offending either Articles 14 or 16 of the Constitution, particularly when the incentive was in the form of a special increment as 'personal pay' to be merged in pay at the time of promotion to the next higher grade and thus, having no bearing on the inter-se seniority and/or to the future promotion to the next higher grade. [Paras 13, 15] [242-C-D; 243-B-E]

H.P. Gupta and Anr. v. Union of India and Ors. **(2002) 10 SCC 658 - relied on.**

Food Corporation of India & Ors. v. Ashis Kumar Ganguly & Ors. **(2009) 7 SCC 734: 2009 (8) SCR 806;** *B. Manmad Reddy & Ors. v. Chandra Prakash Reddy & Ors.* **(2010) 3 SCC 314: 2010 (2) SCR 860 - Distinguished.**

3. Article 14 of the Constitution permits reasonable classification based on qualities or characteristics of persons recruited and grouped together, as against those who are left out. Courts should interfere with the administrative decisions pertaining to pay fixation and pay parity only when they find such a decision to be unreasonable, unjust and prejudicial to a section of employees and taken in ignorance of material and relevant factors. The decision of the High Court, holding the said Circular to be discriminatory and in violation of Articles 14 and 16 of the Constitution cannot be sustained. [Paras 16, 19] [243-G-H; 244-A-B; 245-C]

State of M.P. and Anr. v. Shakri Khan **(1996) 8 SCC 648: 1996 (1) Suppl. SCR 608;** *United Bank of India v. Meenakshi*

Sundaram and Ors. **(1998) 2 SCC 609: 1998 (1) SCR 233 - referred to.**

Case Law Reference:

1996 (1) Suppl. SCR 608	**referred to**	**Para 8**
1998 (1) SCR 233	**referred to**	**Para 8**
(2002) 10 SCC 658	**relied on**	**Para 8**
2009 (8) SCR 806	**distinguished**	**Para 9**
2010 (2) SCR 860	**distinguished**	**Para 9**
(1952) SCR 284	**relied on**	**Para 11**
2003 (1) Suppl. SCR 638	**relied on**	**Para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7268 of 2002.

From the Judgment & Order dated 23.05.2002 of the High Court of Jammu & Kashmir at Jammu in S.W.P. No. 1470 of 1994.

WITH

C.A. No. 6878 of 2003.

Ajit Pudussery, Dinesh Khurana, Archana Mohanty, Ashok Mathur, Anshul Narayan, Kanika Singh for the appearing parties.

The Judgment of the Court was delivered by

D.K. JAIN, J.: 1. Challenge in these appeals is to the judgment dated 23rd May, 2002, rendered by a Division Bench of the High Court of Jammu and Kashmir at Jammu in S.W.P No. 1470 of 1994. By the impugned judgment, while declaring Circular No.40 of 1985, dated 29th July, 1985, which accorded monetary incentives to in-service employees of the Food Corporation of India (for short "the FCI") for acquiring higher

qualifications, as discriminatory, the High Court has directed that if any benefit under the said Circular has been given to any employee, it shall be withdrawn.

2. Since both the appeals, one by the FCI and the other by the Bhartiya Khadya Nigam Karamchari Sangh (for short "the Karamchari Sangh"), arise out of the same judgment, the same are being disposed of by this common judgment. We may however, note that the FCI is aggrieved by the impugned judgment as a whole, whereas the Karamchari Sangh impugns the direction relating to the denial of the incentives to other employees, possessing same qualifications.

3. The material facts, giving rise to the appeal are as follows:-

The FCI was set up with the objective of safeguarding the interest of the farmers, distribution of food grains throughout the country and to maintain a satisfactory level of food grain stocks to ensure national food security. The Food Corporation of India Act, 1964, became effective w.e.f. 17th December 1964. Section 45 of the said Act empowers the FCI to make regulations for regulating the appointment, conditions of service and scales of pay of its officers and employees. Resultantly, the Food Corporation of India (Staff) Regulations, 1971, were made and came into effect from the year 1971.

4. With a view to ensure a desired degree of efficiency and mobility in the administration and management of its affairs, the FCI, vide Circular No.40 of 1985, dated 29th July, 1985, introduced a scheme providing for incentives to its employees on acquiring additional qualifications during their service in the FCI. The Circular provided for grant of two increments to employees in their respective pay scales on acquiring such professional degrees and diplomas as were mentioned in the Circular. Subsequently, another Circular No. 72 of 1986, dated 14th November, 1986, was issued, extending the benefit of one

special increment to in-service employees who acquire one year diploma course in any professional subject as mentioned in the Circular.

5. The afore-mentioned Circulars were complimented by Circular No. 58 of 1987, dated 24th August, 1987, which clarified that the increments shall only be in the form of a personal pay to an official till his promotion to the next higher grade, which shall be subsequently absorbed in the basic pay at the time of pay fixation for the promoted post.

6. The Circular of 1985 was challenged by one Shri. V.K. Tandon, vide S.W.P. No. 1146 of 1986, on the ground that it resulted in discrimination between in-service employees acquiring additional qualification and the persons recruited by the FCI already possessing the prescribed additional qualification. The High Court of Jammu and Kashmir, vide order, dated, 13th October, 1992, while allowing the intervention application of the Karamchari Sangh, allowed the petition and directed that the writ petitioner be granted two additional increments under the said Circular. Letters Patent Appeal against the said judgment came to be dismissed on the ground of delay. Nonetheless, the Zonal Office of the FCI, vide letter dated 19th May, 1994, notified that the aforesaid judgment was a judgment *in personam*.

7. Probably, the said clarification prompted the Karamchari Sangh to file the writ petition (W.P. No.1470 of 1994) in which the impugned judgment has been delivered. As aforestated, the High Court has held that, the said Circular is discriminatory and violative of Article 14 of the Constitution of India, 1950 (for short "the Constitution") and has directed the FCI not to give effect to the Circular and to withdraw any incentives, if already given to the employees in furtherance of the said Circular. Hence, the appeal by the FCI. The nub of the grievance of the Karamchari Sangh in their appeal (C.A. No.6878/2003) is that having held the said Circular to be

discriminatory, the High Court ought to have directed grant of similar incentives to other employees as well.

8. Mr. Ajit Pudussery, learned counsel appearing on behalf of the FCI, vehemently urged that the said Circular was constitutionally valid and in consonance with the established principles of law, inasmuch as the employees already working in the FCI, with lower professional qualifications as compared to those who already had higher qualification at the time of initial recruitment are a class by themselves and therefore, there was no question of any discrimination between the two differently placed set of employees. It was submitted that the objective sought to be achieved by providing incentive to the already recruited employees with lower qualifications was to motivate them to acquire higher qualifications in various fields while in service, which would not only benefit the employee concerned but also the FCI in the long run. It was thus, stressed that the classification adopted by the FCI had a rational nexus with the objective sought to be achieved and therefore, was not discriminatory, offending Article 14 of the Constitution. In support of the proposition that the beneficiaries of the said incentive being a class by themselves; there being no parity between grant of incentives to in-service employees, who acquire the prescribed qualifications and denial of the same to the employees recruited with higher qualification; the Circular does not result in discrimination, the learned counsel placed reliance on the decisions of this Court in *State of M.P. and Anr. Vs. Shakri Khan*[1]*; United Bank of India Vs. Meenakshi Sundaram and Ors.*[2]*,* and *H.P. Gupta and Anr. Vs. Union of India and Ors*[3]*.*

9. *Per Contra,* Mr. Ashok Mathur, learned Counsel appearing on behalf of the respondents, argued that the said

1. (1996) 8 SCC 648.
2. (1998) 2 SCC 609.
3. (2002) 10 SCC 658.

Circular was clearly discriminatory, inasmuch as the incentive under the said Circular was denied to one set of employees and granted to another set of employees, governed by the same service conditions and possessing such prescribed additional qualifications. Commending us to the decisions of this Court in *Food Corporation of India & Ors. Vs. Ashis Kumar Ganguly & Ors.*[4] and *B. Manmad Reddy & Ors. Vs. Chandra Prakash Reddy & Ors.,*[5] learned counsel urged that, irrespective of the educational qualifications, all employees in a particular grade got integrated into one class and therefore, there could be no discrimination amongst them in the matter of grant of incentives.

10. The short question that falls for consideration is, whether grant of incentives only to the in-service employees of the FCI, who acquire professional qualifications after entering in service and denial of the same to those who had acquired the same professional qualifications before entering the service is invalid in law, being violative of Articles 14 and 16 of the Constitution?

11. It is trite law that Article 14 of the Constitution, which enshrines the principle of equality, is of wide import. It guarantees equality before the law and equal protection of the laws within the territory of India. It implies right to equal treatment in similar circumstances, except in cases where the two persons form a separate and distinct class and such classification is a reasonable one based on intelligible differentia having nexus with the object sought to be achieved. (*See: State of West Bengal Vs. Anwar Ali Sarkar*[6] and *John Vallamattom & Anr. Vs. Union of India*[7]).

12. Before examining the issue at hand on the touchstone

4. (2009) 7 SCC 734.
5. (2010) 3 SCC 314.
6. (1952) SCR 284.
7. (2003) 6 SCC 611.

of the aforesaid principle envisaged in Article 14 of the Constitution, it would be apposite to refer to the relevant portions of the Circular dated 29th July, 1985. These read as follows:

"The Food Corporation of India, since its inception, has been pursuing the policy of Management Development by providing suitable training facilities both within the Corporation as well as by nominating its employees to short-term professional courses, work-shops, seminars, conferences etc. organized by leading management institutions in India and abroad.

2. These efforts can get an uplift and possibly be supplemented to a great extent by the involvement of its employees in acquiring professional management qualifications on their own. In order, therefore, to fill the basic gaps to acquire knowledge, the matter has been under consideration for introducing suitable incentive scheme for motivating the employees of the Corporation to encourage them to acquire professional qualifications for rapid career advancement and enabling the Corporation to build a reserve of qualified professionals from within to back up key positions and to improve the overall performance and efficiency of the organization. This will further create an atmosphere of "professionalism" in the working of the Corporation. With this end in view it has been decided with the approval of the Board of Directors to introduce the following incentive scheme with effect from 1st April, 1984.

3. The following courses of study have been approved for grant of the two increments as indicated in subsequent pages.

(A) …… …… …… ……

(B) High professional qualifications viz. MBA, ACA, AMIE, LLB, BL, ACS etc. All the above courses (Diplomas/Degrees) should be at least of two years duration.

4. The following are the details of the scheme for grant of incentive:-

ELIGIBILITY:

All regular employees of the Corporation would be eligible for benefit under the Scheme subject to the following terms and conditions:-

(i) The scheme would apply to all regular employees of the Corporation except deputationists/those employed on contract basis/ casual or on tenure basis.

(ii) Employees covered under (i) above should have acquired or may acquire higher professional qualifications from recognised institutions/Universities during the course of their service in the FCI with prior permission from the competent authority of the Corporation. The acquisition of said qualification should be useful to the Corporation in its operations.

(iii) …… …… …… ……

(iv) …… …… …… ……

(v) …… …… …… ……

(vi) …… …… …… ……

(vii) …… …… …… ……

(viii) …… …… …… ……

(ix) In cases where the employees, who join the higher post under direct recruitment and where for such higher post the prescribed minimum qualification is the same as acquired

by the employee while in the lower post, the incentive already granted to him/her in the lower post would not be allowed to continue on his/her appointment to the higher post.

INCENTIVE ADMISSIBLE:

Employees fulfilling the eligibility conditions referred to above would only be entitled to the benefits under the scheme. The incentives offered under this Scheme would be in the form of two special increments as 'personal pay', to be merged in pay at the time of promotion to the next higher grade. This incentive would be admissible only on written orders by the competent authority on merit of each case. The incentive in the form of two increments would be granted starting from first day of the following month when the employee concerned has been declared to have passed the listed Courses or the date of enforcement of this scheme whichever is later.

ENTITLEMENT :

In order to overcome the administrative difficulties and financial implications in implementation of the Scheme with retrospective effect covering all the cases of eligible employees who might have acquired such higher management or professional qualifications prescribed in this Scheme once or more than once in the past and might be holding higher post on promotion or direct recruitment within the Corporation, the employees would be entitled to the incentive under this scheme with effect from 1.4.1984 only. Eligible employees would be entitled to draw incentive increments at the rates applicable to their present pay scales. Arrears of incentive increments shall be payable.

In the case of past cases, eligible employees should apply

within six months from the date of the Scheme is circulated. In case of employees who may acquire any of the above qualifications hereafter, they may apply as and when they acquire the higher qualifications in the prescribed Proforma enclosed.

...."

13. It is manifest from a bare reading of the above-mentioned portions of Circular that the fundamental objective of the Circular is to provide an incentive to the in-service employees in order to motivate and encourage them to acquire professional qualifications in various courses, spelt out in the Circular, for their career progression and at the same time enable the FCI to build a reserve of qualified professionals from within the organisation to back up key positions. Evidently, the incentive will not only improve their overall performance and efficiency in the organisation, but also, in the final analysis would strengthen the management with the advent of an atmosphere of professionalism in the FCI.

14. Our attention was also drawn to Circular No. 27 of 2000, dated 11th September, 2000, empowering the competent authorities to grant higher start/advance increments to newly recruited employees at par with the pay drawn in their previous employment before joining the FCI. It is therefore, plain that the provision to grant extra benefit to a new recruit possessing higher qualifications was already in existence. It is also pertinent to note that the said Circular and the benefit which is sought to be given under any of the Circulars, referred to above, is not assailed by the respondents. Their only grievance is that there is no justification in depriving the persons, who already possess the higher qualifications from the benefit of extra incentives, which are being granted to the in-house employees.

15. We are of the opinion that bearing in mind the aforesaid fact situation and the objective sought to be achieved

by issuance of the said Circular, there is substantial merit in the stand of the FCI. The classification adopted by the FCI is between an employee obtaining a higher qualification after joining service and an employee who already possessed such qualification before joining the service. As aforesaid, the main purpose of this classification is to grant an incentive to the employees already in service in the FCI to motivate them to acquire higher qualifications for their own benefit as well as of their employer *viz.* the FCI. We are convinced that the classification sought to be made by the FCI between the two sets of employees bears a just and rational nexus to the object sought to be achieved by introducing the said incentive scheme. Judged from this point of view, in our opinion, grant of the incentive in relation to the in-service employees, in no way amounts to discrimination between the in-service employees and the employees recruited with higher qualification, offending either Articles 14 or 16 of the Constitution, particularly when the incentive is in the form of a special increment as 'personal pay' to be merged in pay at the time of promotion to the next higher grade and thus, having no bearing on the *inter-se* seniority and/or to the future promotion to the next higher grade.

16. The decisions of this Court in ***B****. Manmad Reddy & Ors. Vs. Chandra Prakash Reddy & Ors.* (supra) and *Food Corporation of India & Ors. Vs. Ashis Kumar Ganguly & Ors.* (supra), on which reliance was placed by learned counsel for respondents are clearly distinguishable on facts inasmuch as these decisions deal with cases relating to employees being classified into separate categories for the purpose of promotion on the basis of the source from which they were drawn and increments being given only to the Central Government employees on being absorbed into the corporation respectively, which is not the case here. However, it is important to note that in both these cases, it was observed that the doctrine of equal pay for equal work is not an abstract doctrine. Article 14 of the Constitution permits reasonable classification based on

qualities or characteristics of persons recruited and grouped together, as against those who are left out. Courts should interfere with the administrative decisions pertaining to pay fixation and pay parity only when they find such a decision to be unreasonable, unjust and prejudicial to a section of employees and taken in ignorance of material and relevant factors.

17. At this juncture, it would be profitable to refer to the decision of this Court in *H.P. Gupta and Anr.* (supra), which is on all fours to the fact situation in the present appeal. In the said case, grant of two advance increments to Telecom Officers who acquired Engineering degree while in service and not to those who possessed such degree at the time of joining the service was held to be constitutionally valid. Dealing with a similar controversy, the Court observed as follows:

> "The object of giving two advance increments to those officials who did not possess degree in Engineering before joining the service, is only to encourage them to get such a degree so that they could improve themselves while in service. When that object is satisfied, the contentions that there should be equality in the matter of payment of salary or other emoluments or that there should be parity in the matter of giving increments, cannot be accepted. It is true that in such a situation, certain anomalies may arise in specific cases when the official who has acquired degree in Engineering subsequent to joining of service may get higher salary though junior to those who possessed the qualification of degree in Engineering even at the time of joining the service. There cannot be perfect equality in any matter on an absolute scientific basis and there may be certain inequities here and there. If the classification is correct and serves a particular purpose, the same is not to be judicially interfered with."

We deferentially concur with the observations in the afore-extracted passage.

18. For the view we have taken above, we deem it unnecessary to deal with the contentions urged on behalf of the parties in C.A. No. 6878 of 2003, praying for extension of the said incentive to the employees recruited with higher qualifications.

19. In view of the foregoing discussion, the decision of the High Court, holding the said Circular to be discriminatory and in violation of Articles 14 and 16 of the Constitution cannot be sustained. Consequently, C.A. No. 7268 of 2002, filed by the FCI is allowed and C.A. No.6878 of 2003 preferred by the Karamchari Sangh is dismissed. However, in the facts and circumstances of the case, we leave the parties to bear their own costs throughout.

D.G. Appeals disposed of.

OM PRAKASH ASATI

v.

STATE OF U.P. & ORS.

(Special Leave Petition (C) Nos. 13896-13897 of 2008)

JANUARY 13, 2012

[ASOK KUMAR GANGULY AND JAGDISH SINGH KHEHAR, JJ.]

Service law: Retirement - Pre-mature retirement from service - Jal Nigam adopted criterion for screening the claim of employees for continuation of service - Order of premature retirement against several employees including petitioner - The criterion adopted by Jal Nigam set aside by the High Court and the said decision attained finality - Whether setting aside of the criterion adopted by Jal Nigam would ipso facto result in the negation of the impugned order by which the petitioner was prematurely retired from service - Held: The order passed by the Jal Nigam, prematurely retiring the petitioner from its employment, cannot be set aside merely because the criterion adopted by the Jal Nigam has been set aside - The veracity of the impugned order will have to be examined independently of the criterion so as to determine, whether or not the impugned order is sustainable on the basis of the record taken into consideration by the Screening Committee - The petitioner was punished 3 times in the preceding 4 years - Besides the gradual deterioration in his career-graph noticeable from the last 7 years of his service, 4 annual reports assessed the work and conduct of the petitioner as "average" - The service record of the petitioner was objectively evaluated - Thus the passing of the impugned order cannot be described as arbitrary or unfair in any manner.

The petitioner was appointed as Assistant Engineer, in the Local Self Engineering Department of the State of Uttar Pradesh on 3.3.1974. In 1975, the Uttar Pradesh

Water Supply and Sewerage Act was enacted. The said enactment resulted in the creation of the Uttar Pradesh Jal Nigam. In 1976, the services of the petitioner came to be allocated to the Jal Nigam, where the petitioner was absorbed against the post of Assistant Engineer, on regular basis. While in the employment of the Jal Nigam, the petitioner was promoted to the post of Executive Engineer. On his attaining the age of 50 years in January 2001, his claim for retention in service was placed before a Screening Committee. A departmental enquiry was pending against the petitioner. The Screening Committee found the petitioner fit to continue in service.

By orders dated 1.9.2005, several employees of the Jal Nigam, including the petitioner, were prematurely retired from service. The petitioner filed a writ petition on the ground that the criterions adopted by Jal Nigam for screening the claim of the employees of the Jal Nigam were illegal and in complete derogation of Fundamental Rule 56(c). The petitioner relied upon the two decisions of the High Court whereby the criterions adopted by the Jal Nigam in retiring its employees under Fundamental Rule 56(c) were held illegal. The said decisions of the High Court had attained finality. The High Court dismissed the writ petition and upheld the order of premature retirement. The instant special leave petitions were filed challenging the order of the High Court.

Dismissing the special leave petitions, the Court

HELD: 1. In the two judgments rendered by the High Court which were relied upon by the petitioner, it was held, that the criterion adopted by the Screening Committee for prematurely retiring the employees of the Jal Nigam was illegal and not in consonance with law. The validity of the criterion adopted by the Jal Nigam for prematurely retiring its employees is a pure question of

law. The same having attained finality against the respondents, is liable to be respectfully adhered to. Once a challenge raised at the hands of the respondents to the judgments relied upon by the petitioner remained futile before this Court, the same should have been accepted without any further protestation. The contention for the respondents that the criterion adopted by the Jal Nigam was enforceable against the petitioner is rejected. [Paras 5, 6, 8] [252-F; 254-G-H; 255-A]

2. Whether the setting aside of the criterion adopted by the Screening Committee would ipso facto result in the negation of the impugned order dated 1.9.2005 (by which the petitioner was prematurely retired from service) The impugned order dated 1.9.2 005 passed by the Jal Nigam, prematurely retiring the petitioner from its employment, cannot be set aside merely because the criterion adopted by the Jal Nigam has been set aside. The veracity of the impugned order will have to be examined independently of the criterion so as to determine, whether or not the impugned order is sustainable on the basis of the record taken into consideration by the Screening Committee. The entries in the Confidential Reports of the petitioner for the years 1997-1998, 1998-1999, 1999-2000 and 2002-2003 were recorded as "satisfactory". Entries for the year 1996-1997, 2000-2001, 2001-2002 and 2003-2004 were recorded as "good". For the remaining two entries, the one for the year 1994-1995 was recorded as "very good" and for a part of the year of 1995-1996 the work of the petitioner was assessed as "excellent". It is therefore apparent from the Annual Confidential Report of the petitioner, that over the last decade, preceding the impugned order dated 1.9.2005, there has been a regular and consistent deterioration from "excellent" and "very good" to "satisfactory". In fact in as many as 4 of the preceding 7

years, the work and conduct of the petitioner was evaluated as "satisfactory". The orders of punishment taken into consideration were dated 18.4.2002, 23.11.2004 and 4.1.2005. The petitioner was punished 3 times in the preceding 4 years. The claim of the petitioner was considered by the Screening Committee on the basis of the annual entries in his service record and the punishments suffered by him during the recent past. [paras 9, 12] [255-B-H; 256-A-C; E-H; 257-A-C; 258-C]

3. Besides the gradual deterioration in his career-graph noticeable from the last 7 years of his service (before the impugned order was passed), wherein 4 annual reports assessed the work and conduct of the petitioner as "average". It is also apparent that punishment orders were passed against the petitioner on 3 occasions within the last 4 years. These punishments were ordered because of negligence and irregularity in granting tenders; delay in work, excess payment, financial irregularity and mis-utilization of funds, lack of administrative control; and death of 6 labourers because of lack of supervision by the petitioner which resulted in huge financial loss by way of compensation which had to be paid to the families of the deceased labourers. Based on the said, it would not be incorrect to conclude, that there was a gradual deterioration in the overall performance of the petitioner. In the said view of the matter, it is not possible to find fault with the impugned order of premature retirement dated 1.9.2005. The service record of the petitioner was objectively evaluated. Thus viewed, the passing of the impugned order cannot be described as arbitrary or unfair in any manner. The deliberations adopted by the Jal Nigam while passing the impugned order dated 1.9.2005 are, therefore, not liable to be interfered with. The impugned orders dated 27.3.2006 and 19.7.2006 passed by the High Court,

upholding the order dated 1.9.2005, were fully justified and call for no interference. [para 12, 13] [259-D-H; 260-A-B]

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 13896-13897 of 2008.

From the Judgment & Order dated 3.5.2006 of the High Court of Allahabad in Civil Misc. Writ Petition No. 64396 of 2005 and Order dated 29.2.2008 in Review Petition No. 144184 of 2006.

B.S. Patil, Nikhil Majithia, Vishwajit Singh for the Petitioner.

Pramod Swarup, Ameet Singh, Gunnam Venkateswara Rao, Pradeep Misra, Suraj Singh for the Respondents.

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. The petitioner herein, having qualified the B.E. examination, came to be appointed as Assistant Engineer, in the Local Self Engineering Department of the State of Uttar Pradesh, on 3.3.1974. The Uttar Pradesh Water Supply and Sewerage Act was enacted in 1975. The aforesaid enactment resulted in the creation of the Uttar Pradesh Jal Nigam (hereinafter referred to as, the Jal Nigam). In 1976 the services of the petitioner came to be allocated to the Jal Nigam, where the petitioner was absorbed against the post of Assistant Engineer, on regular basis. While in the employment of the Jal Nigam, the petitioner came to be promoted to the post of Executive Engineer, on 1.6.1996.

2. It is the claim of the petitioner, that on the eve of his attaining the age of 50 years in January 2001, his claim for retention in service was placed before a Screening Committee. The Screening Committee found the petitioner fit to continue in service. It is therefore, that the petitioner remained in the

employment of the Jal Nigam beyond the age of 50 years. The instant stance adopted by the petitioner is seriously contested at the hands of the respondents. It is the assertion of the respondents, that the Screening Committee did not evaluate the claim of the petitioner for extension in service beyond the age of the 50 years, on account of the fact that a departmental inquiry was pending against him. The position adopted by the respondents in our considered view is wholly unjustified. Even after the culmination of the departmental proceedings, the petitioner was permitted to continue in service. It is therefore apparent, that the petitioner satisfied the standards adopted by the Jal Nigam, for continuation in service beyond the age of 50 years, and as such, his continuation thereafter must be deemed to have been with the implied approval of his employer, the Jal Nigam.

3. By orders dated 1.9.2005, several employees of the Jal Nigam, including the petitioner, were prematurely retired from service. The aforesaid order (pertaining to the petitioner) is available on the record of this case as Annexure P1. A perusal thereof reveals, that the retirement of the petitioner had been ordered, in exercise of powers emerging from the amended provisions of Fundamental Rule 56(c) of the Financial Handbook, Volume II (Parts II to IV). The instant provision is being extracted hereunder :

> "**56(c)** Notwithstanding anything contained in clause (a) or clause (b), the appointing authority may, at any time by notice to any Government servant (whether permanent or temporary), without assigning any reason, require him to retire after he attains the age of fifty years or such Government servant may by notice to the appointing authority voluntarily retire at any time after attaining the age of forty five years or after he has completed qualifying service of twenty years".

4. It is the case of the petitioner, that the Screening

Committee which evaluated the case of the petitioner for continuation in service, had adopted a criterion for screening the claim of the employees of the Jal Nigam. Under the said criterion, marks were awarded to the employees falling in the zone of consideration. The afore stated criterion provided for deduction of one mark for every adverse entry, as well as, for every punishment awarded during the course of employment. Marks were awarded keeping in mind the employees annual assessment. It is also the contention of the learned counsel for the petitioner, that the criterion framed by the Screening Committee also postulated, that an employee who had been awarded a punishment of recovery, as also, an employee who had deposited any amount towards recovery, as a result of some fault/mistake committed by him in the discharge of his duties, would be a valid ground for the employee to be prematurely retired. It is also the contention of the learned counsel for the petitioner, that based on the criterion adopted by the Jal Nigam, an employee belonging to the general category would be entitled to continue in service only if he was awarded 9 or more marks. For an employee belonging to the reserved categories, the Jal Nigam had prescribed a minimum of 6 marks for retention in service.

5. The first and foremost contention advanced at the hands of the learned counsel for the petitioner was, that the criterion adopted by the Jal Nigam was illegal and unacceptable in law, as the same was in complete derogation of Fundamental Rule 56(c). It was therefore prayed, that the impugned order be set aside on account of the fact, that while passing the same the respondents had taken the decision on the petitioners suitability by applying a criterion which was wholly illegal and unsustainable in law. In order to substantiate his contention, learned counsel for the petitioner invited our attention to a decision rendered by a Division Bench of the High Court of judicature at Allahabad (Lucknow Bench) in Mahesh Chandra Agrawal vs. State of U.P. and Ors. (Writ Petition No.1888 (S/

B) of 2005, decided on 27.3.2006), as well as, on another judgment rendered by the same Division Bench in Naresh Kumar Aggarwal vs. State of U.P. and Ors. (Writ Petition No.1955 (S/B) of 2005, decided on 19.7.2006). Relying on the aforesaid two judgments, it was the contention of the learned counsel for the petitioner, that the criterion relied upon to pass the impugned order against the petitioner (in the instant case) had been considered by the Division Bench which decided the aforesaid two cases, and the same had been set aside as being unsustainable in law. It is also brought to our notice by the learned counsel for the petitioner, that the orders dated 27.3.2006 and 19.7.2006 passed by the High Court of judicature at Allahabad (Lucknow Bench) were assailed before this Court, but the petitions for special leave to appeal, were dismissed. It is therefore the contention of the learned counsel for the petitioner, that the determination rendered by the High Court of judicature at Allahabad (Lucknow Bench) on the issue of validity of the criterion adopted by the Jal Nigam in prematurely retiring its employees under Fundamental Rule 56(c) had attained finality. Based on the aforesaid assertions, it is the submission of the learned counsel for the petitioner, that the impugned order of premature retirement, passed in the instant case against the petitioner on 1.6.1996, was also liable to be set aside.

6. Insofar as the first contention of the learned counsel for the petitioner is concerned, it would be relevant to notice, that the petitioner assailed the impugned order dated 1.9.2005 before the High Court of judicature at Allahabad by filing Civil Miscellaneous Writ Petition No.64396 of 2005. The aforesaid writ petition came to be dismissed by a Division Bench of the High Court on 3.5.2006. Dissatisfied with the impugned order dated 3.5.2006, the petitioner preferred Civil Miscellaneous Review Application No.144184 of 2006. The said Review Application was also dismissed on 29.2.2008. The orders dated 3.5.2006 and 29.9.2008 rendered by the High Court of

judicature at Allahabad besides the order of premature retirement dated 1.9.2005, have been assailed by the petitioner through this petition.

7. In order to repudiate the first contention advanced at the hands of the learned counsel for the petitioner, learned counsel for the respondents vehemently contended, that the petitioner is not entitled to raise the instant issue before this Court on account of the fact, that the criterion adopted by the Screening Committee which had led to the passing of the impugned order of premature retirement dated 1.9.2005, had not been assailed by the petitioner before the High Court. It is also contended, that the evaluation of the record of the petitioner independently of the criterion adopted by the Screening Committee would also establish, that the Jal Nigam was fully justified in passing the impugned order of premature retirement dated 1.9.2005.

8. We have given our thoughtful consideration to the first contention at the hands of the learned counsel for the petitioner. In our considered view in the judgments rendered by the Division Bench of the High Court of judicature at Allahabad (Lucknow Bench) in Writ Petition No.1888 (S/B) of 2005 and Writ Petition No.1955 (S/B) of 2005 it was held, that the criterion adopted by the Screening Committee for prematurely retiring the employees of the Jal Nigam was illegal and not in consonance with law. A plea of the nature canvassed at the hands of the learned counsel for the respondents (as has been noticed in the foregoing paragraph), is no longer available to the respondents to defeat the claim of the petitioner. The validity of the criterion adopted by the Jal Nigam for prematurely retiring its employees is a pure question of law. The same having attained finality against the respondents, is liable to be respectfully adhered to. We therefore, hereby, deprecate the action of the respondents in canvassing the instant proposition. Once a challenge raised at the hands of the respondents to the judgments relied upon by the learned counsel for the petitioner remained futile before this Court, the same should have been

accepted without any further protestation. We, therefore, hereby reject the contention advanced at the hands of the learned counsel for the respondents that the criterion adopted by the Jal Nigam was enforceable against the petitioner herein.

9. The question which still arises for consideration is, whether the setting aside of the criterion adopted by the Screening Committee would ipso facto result in the negation of the impugned order dated 1.9.2005 (by which the petitioner was prematurely retired from service)? According to the learned counsel for the respondents, even if the criterion adopted by the Screening Committee (for the sake of arguments), is accepted as invalid in law, the impugned order of premature retirement dated 1.9.2005 will have to be independently examined in the light of the material taken into consideration by the Screening Committee. According to the learned counsel for the respondents the impugned order dated 1.9.2005, if so evaluated, would stand the scrutiny of law.

10. During the course of consideration of the present controversy, we had the occasion of going through the judgments rendered by the High Court of judicature at Allahabad (Lucknow Bench) in Writ Petition No.1888 (S/B) of 2005, and in Writ Petition No.1955 (S/B) of 2005. In both the aforesaid decisions, after the High Court accepted the contention of the respective petitioner therein, and set aside the criterion adopted by the Selection Committee, the Court shorn of the parameters laid down in the said criterion, independently evaluated the veracity of the impugned orders of premature retirement. This exercise was sought to be carried out on the basis of the record taken into consideration by the Screening Committee in arriving at the conclusion that the petitioner deserved to be retired prematurely. The High Court therefore examined at its own, whether there were sufficient reasons for passing the impugned orders of premature retirement against the concerned petitioners. We are of the view, that the course adopted by the

High Court in both the aforesaid cases, was just an appropriate. We, therefore, hereby uphold the instant contention at the hands of the learned counsel for the respondents, that the impugned order dated 1.9.2005 passed by the Jal Nigam, prematurely retiring the petitioner from its employment, cannot be set aside merely because the criterion adopted by the Jal Nigam has been set aside. The veracity of the impugned order will have to be examined independently of the criterion so as to determine, whether or not the impugned order is sustainable on the basis of the record taken into consideration by the Screening Committee.

11. It is the aforesaid determination at our hands, that prompted the learned counsel for the petitioner to raise the second contention, namely, that the material taken into consideration for prematurely retiring the petitioner did not justify the passing of the impugned order dated 1.9.2005. Insofar as the instant contention is concerned, learned counsel for the rival parties invited out attention to Annexure R/4 (appended to the counter affidavit filed on behalf of the Jal Nigam), i.e. a compilation of the service profile of the petitioner. A perusal thereof reveals, that the entries recorded in the Confidential Reports of the petitioner for the preceding 10 years were outlined therein. The entries taken into consideration were for the years 1994-1995 to 2003-2004. Shorn of further details it would be relevant to mention, that out of the aforesaid entries the work and conduct of the petitioner for the years 1997-1998, 1998-1999, 1999-2000 and 2002-2003 were recorded as “satisfactory”. Entries for the year 1996-1997, 2000-2001, 2001-2002 and 2003-2004 were recorded as “good”. For the remaining two entries, the one for the year 1994-1995 was recorded as “very good” and for a part of the year of 1995-1996 the work of the petitioner was assessed as “excellent”. It is therefore apparent from the Annual Confidential Report of the petitioner, that over the last decade, preceding the impugned order dated 1.9.2005, there has been a regular and consistent

deterioration from "excellent" and "very good" to "satisfactory". In fact in as many as 4 of the preceding 7 years, the work and conduct of the petitioner was evaluated as "satisfactory". The compilation Annexure R/4 also outlines the various orders of punishment inflected on the petitioner. The orders of punishment taken into consideration were dated 18.4.2002, 23.11.2004 and 4.1.2005. The petitioner was punished 3 times in the preceding 4 years. Details in respect of the orders of punishment were mentioned in the counter affidavit filed on behalf of the respondents. Its summary was also made available for our consideration. The said summary, pertaining to the orders of punishment, is being extracted hereunder:

> "That the case of the petitioner was also screened and the petitioner has earned only 5.59 marks out of 30 marks which shows that his performance during last 10 years was not satisfactory. Besides this, vide Office Order dated 18.4.2002 in respect of irregularities inviting in tenders it has been found that the petitioner has not compared the rate offered by the contractor with Schedule G and H which is a gross negligence, hence he should be given a warning to be more cautious in future (Annexure R/1).
>
> That again vide office order dated 23.11.2004 it has been found that respondent while posted as Executive Engineer at Lalitpur did not reside at Lalitpur and used to come from Jhansi which is against the Rules. Further it has been found that there has been delay in work, excess payment, financial irregularity and mis-utilization of funds because the petitioner could not had administrative control while discharging his responsibilities which is proved, hence a warning to this effect has been issued to the petitioner and it is directed that the order be kept in his personal file and character roll (Annexure R/2).
>
> That again vide Officer Order dated 04.01.2005 after completion of an enquiry against the respondent and

> relevant documents it has been found that all the charges against him is proved regarding the incident at Kanpur while he was working as Project Manager in Ganga Pollution Control Unit in which 6 labourers have died and the Corporation had to pay compensation in respect of their death. Hence he has been awarded censor entry and his two increments were withheld. It was further directed that the said order be kept in his character roll and personal file (Annexure R/3)".

From the above it is apparent, that the claim of the petitioner was considered by the Screening Committee on the basis of the annual entries in his service record and the punishments suffered by him during the recent past.

12. We have given our thoughtful consideration to the material taken into consideration by the Screening Committee before passing the impugned order dated 1.9.2005. Besides the gradual deterioration in his career-graph noticeable from the last 7 years of his service (before the impugned order was passed), wherein 4 annual reports assessed the work and conduct of the petitioner as "average". It is also apparent that punishment orders were passed against the petitioner on 3 occasions within the last 4 years. These punishments were ordered because of negligence and irregularity in granting tenders; delay in work, excess payment, financial irregularity and mis-utilization of funds, lack of administrative control; and death of 6 labourers because of lack of supervision by the petitioner which resulted in huge financial loss by way of compensation which had to be paid to the families of the deceased labourers. Based on the aforesaid, it would not be incorrect to conclude, that there was a gradual deterioration in the overall performance of the petitioner. In the aforesaid view of the matter, it is not possible for us to find fault with the impugned order of premature retirement dated 1.9.2005. We are therefore satisfied, that the service record of the petitioner

was objectively evaluated. Thus viewed, the passing of the impugned order cannot be described as arbitrary or unfair in any manner. The deliberations adopted by the Jal Nigam while passing the impugned order dated 1.9.2005 are, therefore, not liable to be interfered with.

13. For the reasons recorded hereinabove we are of the view, that the impugned orders dated 27.3.2006 and 19.7.2006 passed by the High Court, upholding the order dated 1.9.2005, were fully justified and call for no interference.

14. Dismissed.

D.G. SLPs dismissed.

ARCHAEOLOGICAL SURVEY OF INDIA
v.
NARENDER ANAND AND OTHERS
(Civil Appeal No. 2430 of 2006)

JANUARY 16, 2012

[G.S. SINGHVI AND ASOK KUMAR GANGULY, JJ.]

Ancient Monuments and Archaeological Sites and Remains Act, 1958:

ss. 20-A, 20-B, 20-C and 20-Q (as inserted by Amendment Act, 2010) r/w Notification dated 16.6.1992 - Protected monuments - Janter Manter - Carrying out construction works in prohibited area - Held:The term "renovation" appearing in s. 20C will take its colour from the word "repair" appearing in that section - In the garb of renovation, the owner of a building cannot demolish the existing structure and raise a new one and the competent authority cannot grant permission for such reconstruction - The use of the expression "such other work or project" in clause (b) of s. 20A(3) has to be interpreted keeping in view the mandate of Article 49 of the Constitution and the objects of the Act, i.e. preservation of ancient and historical monuments, archaeological sites and remains of national importance - Thus, 'such other work or project' must be in larger public interest in contrast to private interest and any construction by a private person de hors public interest cannot be permitted - In future, Central Government or the Director General shall not pass any order except in accordance with the observations made in the judgment - Constitution of India, 1950 - Article 49 - Ancient Monuments and Archaeological Sites and Remains (Amendment and Validation) Act, 2010 - Public interest litigation.

Ancient Monuments and Archaeological Sites and Remains Rules, 1959:

r.32 - Ancient monument - Protected limits - Prohibition contained in notification dated 16.6.1992 - HELD: The distance of 100 meters has to be counted from the outer boundary wall of Jantar Mantar, which has the protected area of 5.39 acres, and not from the physical structures of the observatory - Ancient Monuments Preservation Act, 1904 - s.3.

Jantar Mantar, New Delhi was declared as a protected monument as per Notification dated 4.10.1956, issued by the Central Government in terms of s.3(1) of the Ancient Monuments Preservation Act, 1904, which was published in the Gazette of India dated 13.10.1956. By a subsequent Notification dated 3.5.1957, the Government of Rajasthan was shown as owner of Jantar Mantar. In exercise of the power under r. 32 of the Ancient Monuments and Archaeological Sites and Remains Rules, 1959, the Central Government issued Notification dated 16.6.1992, duly published in the official Gazette, declaring an area of 100 meters from the protected limits and further beyond it upto 200 meters near or adjoining protected monuments to be prohibited and regulated areas. When respondent nos. 1 and 2 demolished the existing structure on plot No.14, Janpath Lane (the plot in question) and started digging foundation for the new building, the Conservation Assistant of Archaeological Survey of India lodged a complaint on 5.5.2001. The Corporation issued notice dated 23.5.2001 to respondent nos. 1 and 2 and directed them to stop the construction and obtain the requisite permission from the Archaeological Survey of India. Respondent nos. 1 and 2 challenged the letter of the Corporation in Suit No. 645 of 2002. The Single Judge of the High Court passed an

ex parte injunction restraining the Corporation from giving effect to the letter dated 23.5.2001 subject to the condition that respondent nos. 1 and 2 would furnish an undertaking that they would raise construction up to the height of 55 feet only. During the pendency of the appeal filed against the order of the Single Judge, the Heritage and Culture Forum, Delhi filed Writ Petition No.2635 of 2002 by way of public interest litigation and prayed for a mandamus to stop the construction of multistoried building on the plot in question. The Division Bench of the High Court vacated the order of injunction passed by the Single Judge but directed the Central Government to review the Notification dated 16.6.1992.

Disposing of the appeals, the Court

HELD: 1.1. The Ancient Monuments and Archaeological Sites and Remains Act, 1958 was amended by the Ancient Monuments and Archaeological Sites and Remains (Amendment and Validation) Act, 2010 and ss. 20A and 20B were inserted with effect from 16.6.1992 and ss. 20C to 20Q were inserted with effect from 29.3.2010. In terms of s. 20A(2), it has been made clear that no person other than an Archaeological Officer shall carry out any construction in any prohibited area. This is subject to s.20C, which can be treated as an exception to s. 20A(2). That section lays down that any person who owns any building or structure, which existed in a prohibited area before 16.6.1992 or had been subsequently constructed with the approval of the Director General, may carry out any repair or renovation of such building or structure by making an application to the competent authority. The term "renovation" appearing in s. 20C will take its colour from the word "repair" appearing in that section. This would mean that in the garb of renovation, the owner of a building cannot

demolish the existing structure and raise a new one and the competent authority cannot grant permission for such reconstruction. The use of the expression "such other work or project" in clause (b) of s. 20A(3) has to be interpreted keeping in view the mandate of Article 49 of the Constitution and the objects sought to be achieved by enacting 1958 Act, i.e. preservation of ancient and historical monuments, archaeological sites and remains of national importance. This would necessarily imply that 'such other work or project' must be in larger public interest in contrast to private interest. Thus, in exercise of power u/s 20A(3), the Central Government or the Director General cannot pass an order by employing the stock of words and phrases used in that section and permit any construction by a private person de hors public interest. It also needs to be emphasized that public interest must be the core factor to be considered by the Central Government or the Director General before allowing any construction and in no case the construction should be allowed if the same adversely affects the ancient and historical monuments or archaeological sites. [para 28-29] [285-F-H; 286-A; 290-A-H; 291-A-H; 292-A-B]

1.2. Notification dated 16.6.1992 was issued by the Central Government for implementing the policy enshrined in Article 49 of the Constitution and the 1958 Act. Section 19 of the 1958 Act contains a restriction against construction of any building within the protected area or carrying out of any mining, quarring, excavating, blasting or any other operation of similar nature in such area. Rules 31 and 32 of the Ancient Monuments and Archaeological Sites and Remains Rules, 1959, empower the Central Government to declare an area near or adjoining a protected monument to be a prohibited area or a regulated area for the purposes of mining operation

or construction. The Central Government must have issued notification dated 16.6.1992 after consulting experts in the field and keeping in view the object of the 1958 Act. Therefore, in the name of development and accommodating the need for multistoried structures, the High Court could not have issued a mandamus to the Central Government to review/reconsider the Notification dated 16.6.1992 and that too by ignoring that after the independence, a large number of protected monuments have been facing the threat of extinction and if effective steps are not taken to check the same, these monuments may become part of history. One of such monument is Jantar Mantar, New Delhi. Some of its instruments have become unworkable/ non functional. This is largely due to construction of multistoried structures around Jantar Mantar. Therefore, the High Court was not justified in directing the Central Government to review or reconsider Notification dated 16.6.1992. [para 30] [292-C-H; 293-A-C]

1.3. Further, with the insertion of ss. 20A and 20B, the direction given by the High Court for review of notification dated 16.6.1992 has become infructuous and the Government is no longer required to act upon the same. [para 30] [293-C-D]

1.4. The High Court has rightly held that even though the notification dated 3.5.1957 did not become effective because the same was not published in the Official Gazette, the earlier notification issued on 4.10.1956 remained effective and the same was saved by s.39(2) of the 1958 Act. [para 31] [293-E]

1.5. The High Court's interpretation of the prohibition contained in notification dated 16.6.1992 is correct and the distance of 100 meters has to be counted from the outer boundary wall of Jantar Mantar which has protected area of 5.39 acres and not the physical

structures of the observatory. The High Court has rightly rejected the plea of respondent nos.1 and 2 that the provisions of the DDA Act would prevail over those contained in the 1958 Act. [para 31] [293-F-H]

1.6. The direction given by the Division Bench of the High Court for review of notification dated 16.6.1992 is set aside. However, it is made clear that in future the Central Government or the Director General shall not take action or pass any order u/s 20A (3) and 20C except in accordance with the observations made in this judgment. [para 33] [294-C-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2430 of 2006.

From the Judgment & Order dated 23.7.2004 of the High Court of Delhi at New Delhi in F.A.O.(OS) No. 414 of 2002 and W.P. (C) No. 2635 of 2002.

WITH

C.A. No. 2431 of 2006.

Mohan Parasaran, H.P. Raval, ASG, A. Mariarputham, J.S. Attri, Ashok Bhan, Shweta Verma, Asha G. Nair, Pradeep Kumar Bakshi, Rajat N. Bohra Anand, Anjani Aiyagiri, Pawan Bindra, Kavita Wadia, Vishnu B. Saharya (for Saharya & Co) Ravindra Kumar for the appearing parties.

The Judgment of the Court was delivered by

G. S. SINGHVI, J. 1. These appeals are directed against the judgment of the Division Bench of the Delhi High Court whereby the appeal filed by Archaeological Survey of India (appellant in C.A. No. 2430 of 2006 and respondent No.1 in C.A. No. 2431 of 2006) was allowed and the order of injunction passed by the learned Single Judge in IA No. 2912 of 2002 in

Suit No. 645 of 2002 allowing Shri Narender Anand and M/s. Raval Apartments Pvt. Ltd. (respondent Nos. 1 and 2 in C.A. No.2430 of 2006 and appellants in C.A. No. 2431 of 2006) to raise construction up to the height of 55 feet on plot No.14, Janpath Lane, New Delhi was set aside and Writ Petition No.2635 of 2002 filed by Heritage and Cultural Forum was disposed of with a direction to the Central Government to review notification dated 16.6.1992 issued under Rule 32 of the Ancient Monuments and Archaeological Sites and Remains Rules, 1959 (for short, 'the Rules').

2. While Archaeological Survey of India has questioned the direction given by the Division Bench of the High Court for review of notification dated 16.6.1992, respondent Nos. 1 and 2 have challenged that portion of the impugned judgment by which the Division Bench vacated the order of injunction passed by the learned Single Judge.

3. Archaeological and historical pursuits in India started with the efforts of Sir William Jones, who put together a group of antiquarians to form the Asiatic Society on 15th January 1784 in Calcutta. He was supported by many persons who carried out survey of monuments in various parts of India. The identification of Chandragupta Maurya with Sandrokottos of Greek historians by Jones helped in fixing a chronological horizon of Indian history. This was followed by the identification of Pataliputra (Palibothra of classical writings) at the confluence of the Ganga and Sone. The decipherment of Gupta and Kutila script by Charles Wilkinson was a landmark in this regard. Thereafter, many individuals made contribution in surveying different monuments in India. In 1861, Alexander Cunningham was appointed as the first Archaeological Surveyor. He surveyed areas stretching from Gaya in the east to the Indus in the northwest, and from Kalsi in the north to the Narmada in the south, between 1861 and 1865. For this, he largely followed the footsteps of the Chinese pilgrim Hieun Tsang. However, with the abolition of the Archaeological Survey in 1866, this work

came to a grinding halt. In the meanwhile, an Act was passed in 1863 empowering the Government to prevent injury to, and preserve the buildings remarkable for their antiquity and historical or architectural value. In 1878, Treasure Trove Act was enacted which enabled the Government to confiscate treasures and antiques found during chance digging. After 26 years, the Ancient Monuments Preservation Act, 1904 (for short, 'the 1904 Act') was enacted for the preservation of ancient monuments and objects of archaeological, historical or artistic interest. Section 2(1) of that Act, which contains the definition of "ancient monuments" and Section 3 under which the Central Government was empowered to declare an ancient monument to be a protected monument were as under:

> *"2. Definitions*.— In this Act, unless there is anything repugnant in the subject or context.—
>
> (1) *"ancient monument"* means any structure, erection or monument, or any tumulus or place of interment, or any cave, rock-sculpture, inscription or monolith, which is of historical, archaeological or artistic interest, or any remains thereof, and includes—
>
> (a) the site of an ancient monument;
>
> (b) such portion of land adjoining the site of an ancient monument as may be required for fencing or covering in or otherwise preserving such monument; and
>
> (c) the means of access to and convenient inspection of an ancient monument:
>
> ****
>
> *3. Protected monuments*.—(1) The Central Government may, by notification in the Official Gazette, declare an ancient monument to be a protected monument within the meaning of this Act.

> (2) A copy of every notification published under sub-section (1) shall be fixed up in a conspicuous place on or near the monument, together with an intimation that any objections to the issue of the notification received by Central Government within one month from the date when it is so fixed up will be taken into consideration.
>
> (3) On the expiry of the said period of one month, the Central Government, after considering the objections, if any, shall confirm or withdraw the notification.
>
> (4) A notification published under this section shall, unless and until it is withdrawn, be conclusive evidence of the fact that the monument to which it relates is an ancient monument within the meaning of this Act."

4. The framers of the Constitution were very much conscious of the need of protecting the monuments and places/objects of artistic and historic importance. This is why Article 49 was incorporated in the Directive Principles of State Policy (Part IV of the Constitution) whereby an obligation has been imposed on the State to protect every monument or place or object of artistic or historic interest declared by or under law made by Parliament. For the sake of reference Article 49 is reproduced below:

> *"49. Protection of monuments and places and objects of national importance.* – It shall be the obligation of the State to protect every monument or place or object of artistic or historic interest, declared by or under law made by Parliament to be of national importance, from spoilation, disfigurement, destruction, removal, disposal or export, as the case may be."

5. In 1951, Parliament enacted the Ancient and Historical Monuments and Archaeological Sites and Remains (Declaration of National Importance) Act, 1951, whereby

certain monuments etc. were declared to be of national importance. After 7 years, Parliament enacted the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (for short, 'the 1958 Act') to provide for the preservation of ancient and historical monuments and archaeological sites and remains of national importance, for the regulation of archaeological excavations and for the protection of sculptures, carvings and other like objects. Similar legislations have been enacted by various State legislatures with reference to entry 12 List II of the Seventh Schedule of the Constitution. The definition of "ancient monument" contained in Section 2(a) and Sections 3, 4, 38(1), (2)(a) and (b) and 39 of the 1958 Act, which are relevant for deciding the issues raised in these appeals are reproduced below:

> *"2. Definitions.* – In this Act, unless the context otherwise requires,—
>
> (a) "ancient monument" means any structure, erection or monument, or any tumulus or place of interment, or any cave, rock sculpture, inscription or monolith, which is of historical, archaeological or artistic interest and which has been in existence for not less than 100 years, and includes—
>
> (i) the remains of an ancient monument,
>
> (ii) the site of an ancient monument,
>
> (iii) such portion of land adjoining the site of an ancient monument as may be required for fencing or covering in or otherwise preserving such monument, and
>
> (iv) the means of access to, and convenient inspection of an ancient monument;
>
> ****

> *3. Certain ancient monuments, etc., deemed to be of national importance.* – All ancient and historical monuments and all archaeological sites and remains which have been declared by the Ancient and Historical Monuments and Archaeological Sites and Remains (Declaration of National Importance) Act, 1951 (71 of 1951), or by section 126 of the States Reorganisation Act, 1956 (37 of 1956), to be of national importance shall be deemed to be ancient and historical monuments or archaeological sites and remains declared to be of national importance for the purposes of this Act.
>
> *4. Power of Central Government to declare ancient monument, etc., to be of national importance.* - (1) Where the Central Government is of opinion that any ancient monument or archaeological site and remains not included in section 3 is of national importance, it may, by notification in the Official Gazette, give two months' notice of its intention to declare such ancient monument or archaeological site and remains to be of national importance; and a copy of every such notification shall be affixed in a conspicuous place near the monument or site and remains, as the case may be.
>
> (2) Any person interested in any such ancient monument or archaeological site and remains may, within two months after the issue of the notification, objects to the declaration of the monument, or the archaeological site and remains, to be of national importance.
>
> (3) On the expiry of the said period of two months, the Central Government may, after considering the objections, if any, received by it, declare by notification in the Official Gazette, the ancient monument or the archaeological site and remains, as the case my be, to be of national importance.

(4) A notification published under sub-section (3) shall, unless and until it is withdrawn, be conclusive evidence of the fact that the ancient monument or archaeological site and remains to which it relates is of national importance for the purposes of this Act.

38. Power to make rules.–(1) The Central Government may, by notification in the Official Gazette and subject to the condition of previous publication, make rule for carrying out the purposes of this Act.

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

(a) the prohibition or regulation by licensing or otherwise of mining, quarrying, excavating, blasting or any operation of a like nature near a protected monument or the construction of buildings on land adjoining such monument and the removal of unauthorised buildings;

(b) the grant of licences and permissions to make excavations for archaeological purposes in protected areas, the authorities by whom, and the restrictions and conditions subject to which, such licences may be granted, the taking of securities from licensees and the fees that may be charged for such licences.

39. Repeals and saving. – (1) The Ancient and Historical Monuments and Archaeological Sites and Remains (Declaration of National Importance) Act, 1951 (71 of 1951), and section 126 of the States Reorganisation Act, 1956 (37 of 1956), are hereby repealed.

(2) The Ancient Monuments Preservation Act, 1904 (7 of 1904), shall cease to have effect in relation to ancient and historical monuments and archaeological sites and remains declared by or under this Act to be of national

importance, except as respects things done or omitted to be done before the commencement of this Act."

6. In exercise of the power vested in it under Section 38 of the 1958 Act, the Central Government enacted the Rules, the relevant provisions whereof are extracted below:

"31. Notice or intention to declare a prohibited or regulated area.- (1) Before declaring an area near or adjoining a protected monument to be a prohibited area or a regulated area for purposes of mining operation or construction or both, the Central Government shall, by notification in the Official Gazette, give one month's notice of its intention to do so, and a copy of such notification shall be affixed in a conspicuous place near the area.

(2) Every such notification shall specify the limits of the area which is to be so declared and shall also call for objection, if any, from interested persons.

32. Declaration of prohibited or regulated area. – After the expiry of one month from the date of the notification under rule 31 and after considering the objections, if any, received within the said period, the Central Government may declare, by notification in the Official Gazette, the area specified in the notification under rule 31, or any part of such area, to be a prohibited area, or, as the case may be, a regulated area for purposes of mining operation or construction or both.

33. Effect of declaration of prohibited or regulated area.- No person other than an archaeological officer shall undertake any mining operation or any construction, -

(a) in a prohibited, area, or

(b) in a regulated area except under and in accordance with the terms and conditions of a licence granted by the Director- General."

7. Jantar Mantar, New Delhi is one of the five unique observatories built between 1699 and 1743 by Majaraja Jai Singh (II) of Jaipur, who was a great Mathematician and Astronomer. The other observatories are at Jaipur, Ujjain, Varanasi and Mathura. Jantar Mantar, New Delhi, like other observatories has several instruments that can graph the path of the astronomical universe. There is a colossal Samrat Yantra at the periphery of Jantar Mantar. To the South of Samrat Yantra, there is an amazing instrument called Jai Prakash, which has two concave hemispherical structures used for determining the position of the Sun and celestial bodies. The other important yantras are Misra Yantra, Daksinovartti Bhitti Yantra, Karka Rasivalaya, Niyat Cakra, Rama Yantra, Brhat Samrat and Sasthamsa Yantra. Unfortunately, some of these yantras have been rendered unworkable or have become non-functional. One of the main reasons for this is the construction of multistoried structures which have come up in the vicinity of Jantar Mantar in the last 25 to 30 years.

8. In exercise of the powers conferred by Section 3(1) of the 1904 Act, the Central Government issued notification dated 4.10.1956, which was published in the Gazette of India dated 13.10.1956, declaring Jantar Mantar, New Delhi to be a protected monument. That notification reads as under:

"MINISTRY OF EDUCATION

ARCHAEOLOGY
New Delhi, the 4th October 1956

S.R.O. 2306. - In exercise of the powers conferred by sub-section (1) of Section 3 of the Ancient Monuments Preservation Act, 1904 (7 of 1904), the Central Government hereby declares the ancient monument described in the Schedule annexed hereto to be a protected monument within the meaning of the said Act.

SCHEDULE

Sl. No.	District	Locality	Name of Monument	Area	Boundary: East, South, North, West	Whether religious use	Ownership	Remarks
	Delhi	New Delhi	Jantar Mantar	Protected area 5.39	South: South India Club, 9, Jantar Mantar Road East: Low Land with a modern temple & well West: Jantar Mantar Road North-East: Partap Singh Building North-West: Parliament Street	No	Maharaja of Jaipur	

[No.F-3-76/50-C-1]
D. CHAKRAVARTI
Under Secretary"

9. With a view to correct an obvious mistake committed by showing Maharaja of Jaipur as the owner of Jantar Mantar in the Schedule of the aforesaid notification, the Central Government issued notification dated 3.5.1957 under Section 3(1) of the 1904 Act, which reads as under:

"TO BE PUBLISHED IN THE GAZETTE OF INDIA

PART II SECTION III.

No. F.3-76/50-0.1
Government of India,
Ministry of Education.
New Delhi, dated the 3rd May, 1957.

NOTIFICATION

(ARCHAEOLOGY)

In exercise of powers conferred by sub-section (1) of section 3 of the Ancient Monuments Preservation Act, 1904 (7 of 1904) and in supersession of notification of the Government of India Ministry of Education No.F.3-76/50/0.1 dated the 4th October, 1956, the Central Government hereby declares the ancient monument described in the Schedule annexed hereto to be a protected monument within the meaning of the said Act.

(Sd/-
(Rameshwar Dass)
Under Secretary

The Publisher,
Gazette of India,
New Delhi."

The Schedule annexed with that notification is reproduced below:

"Ct.	Locality	Name of Monument	Area	Boundary: East, South, North, West	Ownership
1	2	3	4	5	6
Delhi	New Delhi	Jantar Mantar	Protected area 5.39	South: South India Club,	Government of Rajasthan

				9, Jantar Mantar Road East: Low Land with a modern temple & well West: Jantar Mantar Road North-East: Partap Singh Building North-West: Parliament Street"	

10. Although, notification dated 3.5.1957 was not published in the Official Gazette, as was done in the case of notification dated 4.10.1956, the only difference in the two notifications was that in the Schedule appended to the first notification, the ownership of Jantar Mantar was shown to be that of "Maharaja of Jaipur" and in the second notification, the owner of Jantar Mantar was shown as the Government of Rajasthan. What needs to be emphasized is that after merger of the erstwhile State of Jaipur and formation of the State of Rajasthan, Maharaja of Jaipur did not retain his earlier status and he no longer remained the owner of Jantar Mantar because it was not his private property.

11. In exercise of the power vested in it under Rule 31 of the Rules, the Central Government issued notification dated 15.5.1991, which was published in Gazette of India dated 25.5.1991, and gave notice of its intention to declare an area of 100 meters from the protected limits and further beyond it upto 200 meters near or adjoining protected monuments to be prohibited and regulated areas respectively for the purposes of mining operations and constructions. After considering the

objections/suggestions received from the public, the Central Government issued notification dated 16.6.1992, which was duly published in the Official Gazette. The final notification reads thus:

"DEPARTMENT OF CULTURE
(Archaeological Survey of India)
New Delhi, the 16th June, 1992.

(ARCHAEOLOGY)

S.O. 1764-Whereas by the notification of the Government of India in the Department of Culture, Archaeological Survey of India No. S.O. 1447 dated the 15th May, 1991 published in Gazette of India, Part-II Section 3 sub-section (ii) dated 25th May, 1991, the Central Government gave one month's notice of its intention to declare area upto 100 metres from the protected limits, and further beyond it upto 200 meters near or adjoining protected monuments to be prohibited and regulated areas respectively for purposes of both mining operation and construction.

And whereas the said Gazette was made available to the public on the 5th June, 1991.

And whereas objections to the making of such declaration received from the person interested in the said areas have been considered by the Central Government.

Now, therefore, in exercise of the powers conferred by Rule 32 of the Ancient Monument and Archaeological sites and Remains Rules, 1959, the Central Government hereby declares the said areas to be prohibited and regulated areas. This shall be in addition to and not in any way prejudice the similar declarations already made in respect of monuments at Fatehpur Sikri; Mahabalipuram; Golcunda Fort, Hyderabad (Andhra Pradesh); Thousands Pillared Temple, Hanamkonda, Distt. Warangal (Andhra Pradesh); Shershah' Tomb, Sasaram (Bihar); Rock Edict

of Ashoka, Kopbal, Distt. Raichur (Karnatka); Gomateshwara Statue at Sravanbelgola, District Hassan (Karnataka); Elephanta Caves, Gharapur, District Kolba (Maharashtra).

(No.F.8/2/90-M-M.C.

M.C. Joshi, Director General"

12. Respondent Nos. 1 and 2, who own plot No. 14, Janpath Lane submitted an application to the New Delhi Municipal Corporation (for short, 'the Corporation') sometime in August 1986 for sanction of the building plan for the construction of multistoried commercial building. The same was rejected vide letter dated 15.9.1986 on the ground that the area was under comprehensive development and the details of redevelopment controls/drawings, if any, finalized by the Delhi Development Authority (for short, 'the DDA') were not available with the Corporation. After about 7 years, respondent Nos.1 and 2 again submitted application dated 24.6.1993 for sanction of the building plan. The DDA vide its letter dated 1.10.1993 suggested to the Corporation that plot No.14, Janpath Lane form part of redevelopment scheme and the building plan should be approved as per the Development Control Norms. The building plan was finally sanctioned by the Corporation sometime in September 2000 and was released on 5.3.2001. Thereafter, respondent Nos. 1 and 2 demolished the existing structure and started digging foundation for the new building. On 5.5.2001, the Conservation Assistant of Archaeological Survey of India lodged a complaint about the excavation and construction being undertaken by respondent Nos. 1 and 2 in violation of the prohibition contained in notification dated 16.6.1992. The Superintending Archaeologist, Archaeological Survey of India, vide his letter dated 10.5.2001 informed the Corporation that the sanction given by it was contrary to notification dated 16.6.1992. Thereupon, the Corporation issued notice dated 23.5.2001 to respondent Nos. 1 and 2 and directed them to

stop the construction and obtain the requisite permission from the Archaeological Survey of India.

13. Respondent Nos. 1 and 2 challenged the letter of the Corporation in Suit No. 645 of 2002 and prayed that the restriction imposed on the construction of building be declared as nullity. They also filed I.A. No. 2912 of 2002 under Order 39 Rules 1 and 2 CPC for temporary injunction. On 22.3.2002, the learned Single Judge directed registration of the suit and passed an ex parte injunction order whereby the Corporation was restrained from giving effect to letter dated 23.5.2001 subject to the condition that respondent Nos. 1 and 2 shall furnish an undertaking that they will raise construction up to the height of 55 feet only. On notice, Archaeological Survey of India filed I.A.No.4479 of 2002 for modification of order dated 22.3.2002. The same was disposed of by the learned Single Judge with a direction to respondent Nos. 1 and 2 not to raise construction beyond the DPC level.

14. The injunction application was finally allowed by the learned Single Judge vide order dated 30.10.2002 and order dated 22.3.2002 was made absolute. The learned Single Judge noted that despite several opportunities, counsel representing Archaeological Survey of India failed to produce a copy of the Official Gazette in which notification dated 3.5.1957 was published and held that in the absence of such publication, the notification cannot be treated as effective. The learned Single Judge further held that subsequent notification dated 8.1.1958 in which reference was made to earlier notification dated 3.5.1957 was also ineffective and in the absence of a legally binding notification having been issued under Section 3(1) of the 1904 Act, the prohibition contained in notification dated 16.6.1992 cannot be made applicable to the plot of respondent Nos.1 and 2.

15. I.A.No.10985/2002 filed by Archaeological Survey of India for review of the injunction order was disposed of by

learned single Judge on 27.11.2002 by taking cognizance of the concession made by the counsel appearing on its behalf that notification dated 3.5.1957 had not been published in the Official Gazette.

16. Archaeological Survey of India challenged the order of injunction in FAO (OS) No.414 of 2002 mainly on the ground that while deciding the application for injunction, the learned Single Judge had misinterpreted the notifications issued under Section 3(1) of the 1904 Act and Section 39 of the 1958 Act.

17. During the pendency of the appeal filed against the order of the learned Single Judge, Heritage and Culture Forum, Delhi filed Writ Petition No.2635 of 2002 by way of public interest litigation and prayed for issue of a mandamus for stopping the construction of multistoried building on the plot owned by respondent Nos. 1 and 2 by asserting that the same was contrary to the provisions of the 1958 Act and the Rules framed thereunder and the prohibition imposed on the construction of buildings within 100 meters of the protected monument.

18. In their counter affidavit, respondent Nos. 1 and 2 not only questioned the *locus standi* of the Heritage and Culture Forum to challenge the permission granted to them for the construction of building, but also pleaded that the prohibition contained in notification dated 16.6.1992 was not applicable to their plot. On behalf of Archaeological Survey of India, the Superintending Archaeologist filed counter affidavit and pleaded that the building plan sanctioned by the Corporation which enabled respondent Nos. 1 and 2 to construct the building was violative of the prohibition contained in notification dated 16.6.1992.

19. At the hearing of the appeal, learned counsel for respondent Nos. 1 and 2 reiterated the plea taken before the learned Single Judge that Jantar Mantar, New Delhi cannot be

treated as a protected monument because notification dated 3.5.1957 had not been published in the Official Gazette and, as such, the prohibition contained in notification dated 16.6.1992 was not applicable to his clients. He then argued that there was no justification to enforce the prohibition qua plot No. 14, Janpath Lane because a number of other buildings including Phase-II of the Corporation's building had already been constructed around Jantar Mantar in violation of the restriction of 100 meters.

20. The Division Bench of the High Court took cognizance of the fact that the Corporation had constructed Phase-II building in violation of the prohibition contained in notification dated 16.6.1992 and directed Archaeological Survey of India to explain why such construction of that building was not stopped. Thereupon, the Superintending Archaeologist filed affidavit dated 26.5.2003. In paragraph III(1) and (2) of his affidavit, the deponent spelt out the details of the objections raised by Archaeological Survey of India against the construction of Phase II building of the Corporation and claimed that the officers of the Corporation continued with the construction despite objections. In paragraph IV of his affidavit, the deponent made the following statement:

> "IV) That it is evident from the above-stated chronology of events that in so far as ASI is concerned, it pursued the matter with NDMC and Government of NCT of- Delhi vigorously with the hope that NDMC would stop the construction. However, despite best efforts of ASI, nothing was being done to ensure that the construction activity at the site takes place in accordance with the provisions of Law. It is only on 26th August, 2003 that an application in the prescribed form has been submitted by NDMC, seeking the permission of Archaeological Survey of India to sanction the construction in the regulated area. It is respectfully submitted that Archaeological Survey of India does not have any machinery, either to demolish the

> construction or to stop the construction and therefore it could do only as much in the present case, since it involved a local authority, and for the purposes of execution of its orders ASI has to depend upon the assurance of Local Government only. It is significant to note that in the present case the construction was carried cut by none other than the municipal authority, and, as such, there was nothing that Archaeological Survey of India could do except to persuade the concerned authority to dissuade from persisting with the same. Towards the said directions, best efforts were made by the ASI, but to no avail."

21. In compliance of order dated 26.4.2002 passed by the Division Bench of the High Court, the Corporation submitted a status report containing the details of the applications made by respondent Nos. 1 and 2 and sanction of the building plan. The status report also made a mention of letter dated 25.9.2001 written by the DDA to the Corporation that the objections/ suggestions made by Archaeological Survey of India regarding setbacks and heights were considered while finalizing the Redevelopment Scheme in 1989, which was approved by the DDA on 24.5.1994 and by the Ministry of Urban Development in October 1994.

22. In compliance of another order passed by the Division Bench on 6.8.2003, the Corporation explained its position regarding Phase II building by stating that approval for NDMC, New Delhi City Centre was granted vide Resolution dated 12.2.1969 and the building was to be constructed in two phases. That plan for Phase II was approved by the Delhi Urban Arts Commission on 13.3.1992 and the building was constructed without violating the 100 meters restriction.

23. Respondent Nos.1 and 2 also filed an affidavit and claimed that the proposed building is 218 feet away from the outer boundary of Jantar Mantar and 101.46 meters from the protected monument. According to respondent Nos.1 and 2, in

terms of the sanction plan they are entitled to construct building up to the height of 75 feet but the learned Single Judge has allowed construction only up to 55 feet.

24. The Division Bench of the High Court first considered the implication of the concession made before the learned Single Judge by the counsel appearing for Archaeological Survey of India that notification dated 3.5.1957 had not been published in the Official Gazette as per the requirement of Section 3(2) of the 1904 Act and observed that the so called concession was inconsequential because copy of the Official Gazette had, in fact, not been produced before the Court. The Division Bench then considered the question whether Jantar Mantar is a protected monument, referred to notifications dated 4.10.1956 and 3.5.1957 and observed that the second notification had been issued only with a view to correct the mistake which had been committed in mentioning the name of Maharaja of Jaipur in the column of 'ownership' of the first notification. The Division Bench opined that Jantar Mantar had already been declared as a protected monument by notification dated 4.10.1956, which was specifically saved by Section 39 (2) of the 1958 Act. The Division Bench then referred to notification dated 16.6.1992 and held that in view of the prohibition contained therein, respondent Nos. 1 and 2 were not entitled to raise construction on plot No.14, Janpath Lane because the same was within 100 meters of the protected monument. The observations made by the Division Bench in this respect are extracted below:

> "The Notification dated 4.10.1956 clearly refers to the protected area as comprising 5.39 acres. It is not in dispute that the entire area within the boundary wall comprises of these from 5.39 acres. Thus, reading the 1956 Notification itself makes it clear that what is protected is not just the buildings/structures comprised within, which collectively go by the name Jantar Mantar, but the entire area of 5.39 acres. Now, reading the Notification dated 16.6.1992, it

> is apparent that what has been prohibited is mining and construction activity within 100 meters "from the protected limits" of the protected monuments. Therefore, the measurement that has to be obtained is not from the structures but from the boundary wall or in other words from "the limits of the protected area". If that is so, then there is no dispute that the proposed building at plot No.14, Janpath Lane falls within 100 meters thereof."

25. The Division Bench rejected the argument of respondent Nos.1 and 2 that in view of the provisions contained in the Delhi Development Authority Act, 1957 (for short, 'the DDA Act'), which is a special law enacted for planned development of Delhi, the prohibition contained in notification dated 16.6.1992 issued under Rule 32 of the Rules framed under Section 38 of the 1958 Act will not be applicable to their case. In the opinion of the Division Bench, there is no conflict between the provisions of the DDA Act and the 1958 Act because the two statutes operate in different fields and even if there was some conflict, the 1958 Act being a special law enacted for the preservation and protection of ancient monuments would prevail over the DDA Act.

26. The Division Bench then noted that several buildings including the Phase II building of the Corporation had come up in violation of the prohibition contained in notification dated 16.6.1992 but did not delve deep into the issue because an undertaking was given on behalf of the Corporation that the basement of the building constructed in violation of the prohibition shall not be used. Finally, the Division Bench vacated the order of injunction passed by the learned Single Judge but proceeded to direct the Central Government to review notification dated 16.6.1992 by observing that a provision could be made for relaxation of the prohibition on case to case basis because the degree and type of protection depends upon variables such as the nature of protected

monument, its location, the weather conditions, the topography, the soil etc. and there has to be application of mind on these and other issues linked with preservation of monuments and Archaeological Survey of India cannot take shelter of the notification prohibiting construction within 100 meters from the boundary of the protected monument in each and every case for refusing permission or license for construction.

27. Before proceeding further, we deem it proper to mention that in compliance of the direction given by this Court on 29.9.2010, an additional affidavit was filed on behalf of the Corporation detailing the events leading to the construction of its Phase II building. In the end, it has been stated that Director General, Archaeological Survey of India has accorded ex-post facto approval to the construction of that building. In support of this assertion, copies of letter dated 11.2.2005 issued by the Director General, Archaeological Survey of India to the Chairperson of the Corporation conveying ex-post facto approval and license dated 21.2.2005 issued by the Superintending Archaeologist, Delhi Circle, have been placed on record. Respondent Nos.1 and 2 also filed additional affidavit stating therein that while they are not being allowed to construct building, the Corporation has constructed multistoried building within 70 meters of the protected monument and this is in clear violation of the prohibition contained in notification dated 16.6.1992.

28. At this stage, it is apposite to mention that during the pendency of these appeals the 1958 Act was amended by the Ancient Monuments and Archaeological Sites and Remains (Amendment and Validation) Act, 2010 and Sections 20A and 20B were inserted with effect from 16.6.1992 and Sections 20C to 20Q were inserted with effect from 29.3.2010. Since the validity of the Amendment Act has not been questioned before us, we do not propose to examine the same. However, we would like to notice the provisions of Sections 20A, 20B,

20C and 20F(1) and (2), the interpretation of which will have far reaching impact on the future of protected monuments of national and international importance including Jantar Mantar, New Delhi. These sections read as under:

> *"20A. Declaration of prohibited area and carrying out public work or other works in prohibited area.*-Every area, beginning at the limit of the protected area or the protected monument, as the case may be, and extending to a distance of one hundred metres in all directions shall be the prohibited area in respect of such protected area or protected monument:
>
> Provided that the Central Government may, on the recommendation of the Authority, by notification in the Official Gazette, specify an area more than one hundred metres to be the prohibited area having regard to the classification of any protected monument or protected area, as the case may be, under section 4A.
>
> (2) Save as otherwise provided in section 20C, no person, other than an archaeological officer, shall carry out any construction in any prohibited area.
>
> (3) In a case where the Central Government or the Director-General, as the case may be, is satisfied that—
>
> (a) it is necessary or expedient for carrying out such public work or any project essential to the public; or
>
> (b) such other work or project, in its opinion, shall not have any substantial adverse impact on the preservation, safety, security of, or, access to, the monument or its immediate surrounding, it or he may, notwithstanding anything contained in sub-section (2), in exceptional cases and having regard to the public interest, by order and for reasons to be recorded in writing, permit, such public work or project essential to the public or other constructions, to

be carried out in a prohibited area:

Provided that any area near any protected monument or its adjoining area declared, during the period beginning on or after the 16th day of June, 1992 but ending before the date on which the Ancient Monuments and Archaeological Sites and Remains (Amendment and Validation) Bill, 2010, receives the assent of the President, as a prohibited area in respect of such protected monument, shall be deemed to be the prohibited area declared in respect of that protected monument in accordance with the provisions of this Act and any permission or licence granted by the Central Government or the Director-General, as the case may be, for the construction within the prohibited area on the basis of the recommendation of the Expert Advisory Committee, shall be deemed to have been validly granted in accordance with the provisions of this Act, as if this section had been in force at all material times:

Provided further that nothing contained in the first proviso shall apply to any permission granted, subsequent to the completion of construction or re-construction of any building or structure in any prohibited area in pursuance of the notification of the Government of India in the Department of Culture (Archaeological Survey of India) number S.O. 1764, dated the 16th June, 1992 issued under rule 34 of the Ancient Monuments and Archaeological Sites and Remains Rules, 1959, or, without having obtained the recommendations of the Committee constituted in pursuance of the order of the Government of India number 24/22/2006-M, dated the 20th July, 2006 (subsequently referred to as the Expert Advisory Committee in orders dated the 27th August, 2008 and the 5th May, 2009).

(4) No permission, referred to in sub-section (3), including carrying out any public work or project essential to the public or other constructions, shall be granted in any

prohibited area on and after the date on which the Ancient Monuments and Archaeological Sites and Remains (Amendment and Validation) Bill, 2010 receives the assent of the President.

20B. Declaration of regulated area in respect of every protected monument.-(1) Every area, beginning at the limit of prohibited area in respect of every ancient monument and archaeological sites and remains, declared as of national importance under sections 3 and 4 and extending to a distance of two hundred metres in all directions shall be the regulated area in respect of every ancient monument and archaeological sites and remains:

Provided that the Central Government may, by notification in the Official Gazette, specify an area more than two hundred metres to be the regulated area having regard to the classification of any protected monument or protected area, as the case may be, under section 4A:

Provided further that any area near any protected monument or its adjoining area declared, during the period beginning on or after the 16th day of June, 1992 but ending before the date on which the Ancient Monuments and Archaeological Sites and Remains (Amendment and Validation) Bill, 2010, receives the assent of the President, as a regulated area in respect of such protected monument, shall be deemed to be the regulated area declared in respect of that protected monument in accordance with the provisions of this Act and any permission or licence granted for construction in such regulated area shall, be deemed to have been validly granted in accordance

with the provisions of this Act, as if this section had been in force at all material times.

20C. Application for repair or renovation in prohibited area, or construction or re-construction or repair or renovation in regulated area. - (1) Any person, who owns any building or structure, which existed in a prohibited area before the 16th day of June, 1992, or, which had been subsequently constructed with the approval of the Director-General and desires to carry out any repair or renovation of such building or structure, may make an application to the competent authority for carrying out such repair or renovation, as the case may be.

(2) Any person, who owns or possesses any building or structure or land in any regulated area, and desires to carry out any construction or re-construction or repair or renovation of such building or structure on such land, as the case may be, may make an application to the competent authority for carrying out construction or re-construction or repair or renovation, as the case may be.

20F. Constitution of National Monuments Authority. –(1) The Central Government shall, by notification in the Official Gazette, constitute an Authority to be called as the National Monuments Authority.

(2) The Authority shall consist of,—

(a) a Chairperson, on whole-time basis, to be appointed by the President, having proven experience and expertise in the fields of archaeology, country and town planning, architecture, heritage and conservation-architecture or law;

(b) such number of members not exceeding five whole-time members and five part-time members to be appointed, on the recommendation of the Selection Committee referred to in section 20G, by the Central Government, having proven experience and expertise in the fields of archaeology, country and town planning, architecture, heritage, conservation-architecture or law.

(c) the Director-General as member, ex officio."

29. What has been done by enacting Sections 20A and 20B is to give legislative mandate to the concept of prohibited and regulated areas respectively for the purposes of mining operation and construction. Before the 2010 amendment, the Central Government could issue notification under Rule 31 read with Rule 32 and declare an area near or adjoining a protected monument to be a prohibited area or a regulated area for the purposes of mining operation or construction or both. With the insertion of Section 20A it has been made clear that every area, beginning at the limit of the protected area or the protected monument, as the case may be, and extending to a distance of one hundred meters in all directions shall be the prohibited area in respect of such protected area or protected monument. Not only this, by virtue of proviso to Section 20A(1) the Central Government has been clothed with the power to extend the prohibition beyond 100 meters by issuing a notification in the Official Gazette keeping in view the classification of any protected monument or protected area, as the case may be, under Section 4A. Of course, this power can be exercised only on the recommendations of the Authority as defined in Section 2(da) and constituted under Section 20F. Somewhat similar provision has been made in Section 20B for the regulated area in respect of every ancient monument and archaeological site and remains. Proviso to that section empowers the Central Government to issue notification in the Official Gazette and specify an area more than two hundred meters to be the regulated area having regard to the classification of any protected monument or protected area, as the case may be, under Section 4A. In terms of Section 20A(2), it has been made clear that no person other than an Archaeological Officer shall carry out any construction in any prohibited area. This is subject to Section 20C, which can be treated as an exception to Section 20A(2). That section lays down that any person who owns any building or structure, which

existed in a prohibited area before 16.6.1992 or had been subsequently constructed with the approval of the Director General may carry out any repair or renovation of such building or structure by making an application to the competent authority. The term "renovation" appearing in Section 20C will take its colour from the word "repair" appearing in that section. This would mean that in the garb of renovation, the owner of a building cannot demolish the existing structure and raise a new one and the competent authority cannot grant permission for such reconstruction. Section 20A(3) lays down that the Central Government or the Director General can, in exceptional cases and having regard to the public interest, pass a reasoned order and permit a public work or any project essential to the public or other construction in a prohibited area provided that such construction does not have substantial adverse impact on the preservation, safety, security of, or access to the protected monuments or its immediate surrounding. The use of the expression "such other work or project" in clause (b) of Section 20A(3), if interpreted in isolation, may give an impression that the Central Government or the Director General is empowered to allow any other work or project by any person in the prohibited area but, in our view, the said expression has to be interpreted keeping in view the mandate of Article 49 of the Constitution and the objects sought to be achieved by enacting 1958 Act, i.e. preservation of ancient and historical monuments, archaeological sites and remains of national importance. This would necessarily imply that 'such other work or project' must be in larger public interest in contrast to private interest. In other words, in exercise of power under Section 20A(3), the Central Government or the Director General cannot pass an order by employing the stock of words and phrases used in that section and permit any construction by a private person de hors public interest. Any other interpretation of this provision would destroy the very object of the 1958 Act and the prohibition contained in notification dated 16.6.1992 and sub-section (1) of Section 20A would become redundant and we do not think that this

would be the correct interpretation of the amended provision. It also needs to be emphasized that public interest must be the core factor to be considered by the Central Government or the Director General before allowing any construction and in no case the construction should be allowed if the same adversely affects the ancient and historical monuments or archaeological sites.

30. We may now revert to the impugned judgment in these appeals. In our view, Archaeological Survey of India is fully justified in making a grievance that the Division Bench of the High Court was not justified in directing the Central Government to review the prohibition contained in notification dated 16.6.1992. The High Court's anxiety to maintain a balance between the dire necessity of protecting historical monuments of national and international importance and development of infrastructures is understandable, but it is not possible to approve the fiat issued to the Central Government to review the prohibition contained in notification dated 16.6.1992. That notification was issued by the Central Government for implementing the policy enshrined in Article 49 of the Constitution and the 1958 Act i.e. to preserve and protect ancient and historical monuments and archaeological sites and remains of national importance. Section 19 of the 1958 Act contains a restriction against construction of any building within the protected area or carrying out of any mining, quarring, excavating, blasting or any other operation of similar nature in such area. Rules 31 and 32 of the Rules empower the Central Government to declare an area near or adjoining a protected monument to be a prohibited area or a regulated area for the purposes of mining operation or construction. The Central Government must have issued notification dated 16.6.1992 after consulting experts in the field and keeping in view the object of the 1958 Act. Therefore, in the name of development and accommodating the need for multistoried structures, the High Court could not have issued a mandamus to the Central

Government to review/reconsider notification dated 16.6.1992 and that too by ignoring that after independence large number of protected monuments have been facing the threat of extinction and if effective steps are not taken to check the same, these monuments may become part of history. One of such monument is Jantar Mantar, New Delhi. Some of its instruments have become unworkable/non functional. This is largely due to construction of multistoried structures around Jantar Mantar. Therefore, we have no hesitation to hold that the High Court was not justified in directing the Central Government to review or reconsider notification dated 16.6.1992 and, to that extent, the impugned judgment is liable to be set aside. We may add that with the insertion of Sections 20A and 20B, the direction given by the High Court for review of notification dated 16.6.1992 has become infructuous and the Government is no longer required to act upon the same.

31. The appeal of respondent Nos.1 and 2 is wholly meritless. The High Court, in our view, has rightly held that even though notification dated 3.5.1957 did not become effective because the same was not published in the Official Gazette, the earlier notification issued on 4.10.1956 remained effective and the same was saved by Section 39(2) of the 1958 Act. We may add that even though notification dated 3.5.1957 was issued in supersession of notification dated 4.10.1956, the same remained alive because of non compliance of Section 3(2) of the 1904 Act. The High Court's interpretation of the prohibition contained in notification dated 16.6.1992 is correct and the distance of 100 meters has to be counted from the outer boundary wall of Jantar Mantar which has protected area of 5.39 acres and not the physical structures of the observatory. The High Court has given detailed reasons for rejecting the plea of respondent Nos.1 and 2 that the provisions of the DDA Act would prevail over those contained in the 1958 Act and we entirely agree with it.

32. We may have dealt with the additional affidavits of the parties in greater detail and examined whether Archaeological Survey of India was justified in not taking action against construction of large number of buildings in violation of the prohibition contained in notification dated 16.6.1992, but do not consider it proper to do so because the owners of these buildings are not parties to these appeals.

33. In the result, Civil Appeal No.2430 of 2006 is allowed and the direction given by the Division Bench of the High Court for review of notification dated 16.6.1992 is set aside. However, it is made clear that in future the Central Government or the Director General shall not take action or pass any order under Section 20A(3) and 20C except in accordance with the observations made in this judgment. Civil Appeal No.2431 of 2006 is dismissed. The parties are left to bear their own costs.

R.P. Appeals disposed of.