SMT. K. LAKSHMI
v.
STATE OF KERALA & ORS.
(Civil Appeal No. 2511 of 2012)

FEBRUARY 27, 2012

[T.S. THAKUR AND GYAN SUDHA MISRA, JJ.]

Service law – Appointment/Selection – Filling up of non-notified vacancies – Propriety of – On facts, issuance of notification for filling up four vacancies – Application invited and written exam held – Only seven candidates qualified for consideration – Award of additional marks by moderation and more candidates found place in merit list – Introduction of age bar provision after commencement of selection process and as a result exclusion of certain candidates – Challenge to – Direction by the High Court that selection process to be conducted as per the Rules as on the date of issuance of Notification – Preparation of revised merit list resulting in exclusion of candidates who were appointed earlier – Thereafter, the High Court recommending invocation of r. 39 by the Government and utilization of four vacancies that arose subsequently to accommodate the excluded candidates – Meanwhile writ petition filed challenging award of grace marks by moderation – Writ petition allowed and all steps taken pursuant to grant of moderation were held not sustainable – Revised merit list made of only seven students who were found eligible initially – Writ petition by the appellant, dismissed holding that he was not one of the seven successful candidates who qualified for consideration – On appeal, held: Power vested in the Government u/r. 39 could not have been invoked for filling up the vacancies which had not been advertised and which had occurred after the issue of the initial advertisement – It could not be done for protecting the service of someone who had found a place in the merit

list on account of additional marks given to him and who was bound to lose that place by reasons of the judgment of the Court – Proposed addition of the vacancies was contingent upon the Government agreeing to exercise its power u/r. 39 – Since the Government did not and could not possibly exercise the said power as a result of the quashing of the marks awarded by way of moderation the proposed addition of the vacancies to the number already notified became clearly infructuous – High Court was in the light of the subsequent development justified in recalling the recommendations made by it – Furthermore, it cannot be said that even if the number of vacancies is taken to be limited to six, the appellant was entitled to be appointed against one of the unfilled vacancies meant for reserved category candidates – No foundation was laid in the writ petition filed by the appellant nor point was raised before the High Court – Appellant participated in the fresh selection process initiated by the High Court like many others who were eligible to apply – Thus, it is neither proper nor feasible at this stage for this Court to interfere with the ongoing selection process – Kerala State Higher Judicial Service Rules – r. 39.

Notification was issued by the High Court for appointment to the six vacancies in the cadre of District and Sessions Judges by direct recruitment from the Bar. Since only seven candidates qualified the written examination, 20 marks were awarded by way of moderation to all the candidates who appeared for the examination and as such more candidates became eligible. Two candidates 'MR' and 'MM' secured employment during the interregnum and were excluded from the selection process. Their exclusion was successfully challenged. Thereafter, interviews were held and a final selection list was published. Certain candidates were excluded from the list on basis of the age bar provision introduced after the selection process

had commenced. The excluded candidates challenged their exclusion. The Division Bench of the High Court directed that the selection process be conducted in accordance with the Rules as were there on the date of the issuance of the Notification inviting applications. Pursuant thereto, a revised merit list was issued. The Recruitment Committee considered the merit list and found that the two open category candidates and one reserved category candidate who stood appointed earlier were excluded. Thereafter, on recommendation of the Committee, the High Court recommended to the Government to invoke its power under Rule 39 of the Kerala State Higher Judicial Service Rules and utilise four vacancies which occurred subsequent to the issue of the recruitment Notification in addition to the six already notified. The recommendation sent to the State Government contained names of nine candidates while one was kept unfilled in view of the pendency of Special Leave Petition. The SLP was dismissed and the said slot was recommended to be filled up by appointing 'MR' against 10th vacancy. 'CJ' and 'MM' filed writ petition challenging the award of grace marks by way of moderation to other three candidates included in the said list and the same was allowed. It was held that all steps taken pursuant to the grant of moderation were not sustainable and only seven students who were initially found eligible should have been subjected to the interview. The merit list was revised again and the appellant could not be appointed. The appellant challenged the selection process. The Single Bench of the High Court dismissed the writ petition holding that the appellant was not one of the candidates who figured in the list of seven successful candidates qualified initially. The appellant filed a writ appeal and the Division Bench of the High Court dismissed the same. Therefore, the appellant filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1. The initial notification confined itself to filling up of six vacancies only, confusion relating to the said number arose on account of the High Court recommending invocation of Rule 39 of the Kerala State Higher Judicial Service Rules by the Government to avoid a situation where the candidates who had already been appointed pursuant to the selection process had to go out of service on account of the Court directing preparation of a revised merit list on the basis of the unamended Rules. It is common ground that the vacancies that had arisen after the issue of the Notification were sought to be filled up only with the solitary purpose of somehow saving the three candidates from ouster who were bound to lose their jobs on account of the re-casting of the merit list. All that the High Court intended to recommend to the Government was that four vacancies that were available in the cadre, though the same had arisen after the issue of the Recruitment Notification, could be utilised by the Government if it invoked its power under Rule 39. The candidates facing ouster could then be continued as an exception to the general rule. The said recommendations could not have been accepted once the award of additional marks by way of moderation was struck down by the High Court in J's case. The inevitable consequence flowing from that judgment was that anyone who had found place in the merit list only because of the benefit of moderation would have to lose that place and go out of the list. Once that happened the question of retaining the services of the three candidates by invocation of powers vested in the Government under Rule 39 did not arise. The High Court was in the light of the subsequent development justified in recalling the recommendations made by it which in turn had the effect of limiting the number of vacancies to those originally

notified. The proposed utilisation of four vacancies did not *ipso facto* add to the number of already notified. The addition was contingent upon the Government agreeing to exercise its power under Rules 39. Since the Government did not and could not possibly exercise the said power as a result of the quashing of the marks awarded by way of moderation the proposed addition of the vacancies to the number already notified became clearly infructuous. The High Court could and had rightly recalled the recommendations in the light of the said subsequent development. [Para 13] [594-E-H; 595-A-F]

1.2. The power vested in the Government under Rule 39 could not have been invoked for filling up the vacancies which had not been advertised and which had occurred after the issue of the initial advertisement much less could that be done for purposes of protecting the service of someone who had found a place in the merit list on account of additional marks given to him and who was bound to lose that place by reasons of the judgment of the Court. [Para 18] [597-E-F]

1.3. The number of vacancies notified for recruitment remained limited to six and did not get increased to ten as the condition precedent for such increase had failed not only because no decision was taken by the Government to invoke its power under Rule 39 but also because even if a decision had been taken the same would have had no effect in the face of the judgment in J's case. Besides the power vested in the Government was not exercisable so as to utilise subsequent vacancies for the purpose of saving someone who had no legitimate right to continue even after being removed from the merit list. [Para 19] [597-G-H; 598-A-B]

1.4. There is no legal or equitable right in favour of the appellant to claim one of the four vacancies that were proposed to be added in terms of the recommendation

made by the High Court, even assuming that the appellant could urge before this Court a point which had never been urged before the High Court. [Para 20] [598-C]

Rakhi Ray v. High Court of Delhi **(2010) 2 SCC 637: 2010 (2) SCR 239;** *Hoshiar Singh v. State of Haryana* **1993 Supp (4) SCC 377;** *State of Haryana v. Subhash Chander Marwaha* **(1974) 3 SCC 220: 1974 (1) SCR 165;** *Shankarsan Dash v. Union of India* **(1991) 3 SCC 47: 1991 (2) SCR 567;** *UPSC v. Gaurav Dwivedi* **(1999) 5 SCC 180: 1999 (3) SCR 64;** *All India SC & ST Employees' Association v. A. Arthur Jeen* **(2001) 6 SCC 380: 2001 (2) SCR 1183;** *Food Corporation of India v. Bhanu Lodh* **(2005) 3 SCC 618: 2005 (2) SCR 350 – referred to.**

1.5. It cannot be said that even if the number of vacancies is taken to be limited to six, he was entitled to be appointed against one of the unfilled vacancies meant for reserved category candidates. Firstly, because there is no foundation laid in the writ petition filed by the appellant nor was any such point ever raised before the High Court. The result is that the unfilled vacancies meant for reserved category candidates and those that have become available in the merit category after the issue of the initial recruitment notification have already been notified. The appellant participated in the fresh selection process initiated by the High Court like many others who were eligible to apply against the vacancies in the open merit and the reserved category. It is, therefore, neither proper nor feasible at this stage for this Court to interfere with the ongoing selection process. The appellant it goes without saying would get a fair chance like every other eligible candidate to compete for an appointment. [Para 21] [598-D-H]

Umesh Chandra Shukla v. Union of India and Ors. **(1985) 3 SCC 721: 1985 (2) Suppl. SCR 367 – referred to.**

Case Law Reference:

1985 (2) Suppl. SCR 367	**Referred to**	**Para 5**
2010 (2) SCR 239	**Referred to**	**Para 15**
1993 Supp (4) SCC 377	**Referred to**	**Para 16**
1974 (1) SCR 165	**Referred to**	**Para 17**
1991 (2) SCR 567	**Referred to**	**Para 17**
1999 (3) SCR 64	**Referred to**	**Para 17**
2001 (2) SCR 1183	**Referred to**	**Para 17**
2005 (2) SCR 350	**Referred to**	**Para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2511 of 2012.

From the Judgment & Order dated 08.03.2011 of the High Court of Kerala at Ernakulam in Writ Petition No. 1856 of 2010.

P.P. Rao, PU Dinesh, Jaimon Andrews, Robin V.S., Sindu TP, Naresh Kumar, T.G. Narayanan Nair, KN Madhu Soodhanan, Utsav Sidhu, Apeksha Sharan, Abhimanyu Tiwari, P.A. Noor Muhamed, Giffara S., John Mathew, M.T. George, K. Rajeev for the appearing parties.

The Judgment of the Court was delivered by

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

2. Recruitment to public services often gets embroiled in legal complications and resultant litigation consequently delaying the process of filling up of the vacancies, a feature hardly conducive to public interest. What is disturbing is that recruitment process for appointment to the District Judiciary in the States is also not immune to this phenomenon no matter recruitments are made in consultation with the High Court on the administrative side and at times monitored by them. The

present appeal that arises out of an order passed by the High Court of Kerala is one such case where the recruitment process for the post of District and Sessions Judges in the Kerala State Higher Judicial Service was the subject-matter of multiple rounds of litigation. The genesis of the present lis lies in a notification issued by the High Court of Kerala for appointment to the six vacancies in the cadre of District and Sessions Judges by direct recruitment from the Bar. Notification dated 16th April, 2007 inviting applications against those vacancies was followed by a written examination conducted in October 2007 in which as against 960 candidates who applied, only 443 candidates actually took the written examination conducted between 27th to 29th October, 2007. Surprisingly enough only seven candidates qualified in the written examination by securing the minimum qualifying marks specified in paragraph 4 of the recruitment Notification. Out of the seven, one belonged to Scheduled Castes category, three to OBCs and the remaining candidates were from the open merit category.

3. Looking to the number of candidates who had qualified for interview, the Recruitment Committee comprising five senior-most Judges of the High Court was of the view that sufficient number of candidates may not be available to fill up the notified vacancies. The Committee, therefore, resolved to award 20 marks by way of moderation in all the three papers of the written examination to all the candidates who appeared for the examination so that a larger number of candidates qualified in the written examination and became eligible for consideration. Merit list after giving such benefit was prepared and approved by the Recruitment Committee. The result was that against the seven candidates who had previously qualified, 45 candidates became eligible for the viva-voce examination. Two of these candidates namely, Muhammed Raees M and Minu Mathews were, however, excluded from the selection process on the ground that they had secured employment during the interregnum. The exclusion was successfully

challenged by the said candidates who were then permitted to participate in the viva-voce examination as well.

4. Interviews for the eligible candidates were held in December 2008 and based on the merit so determined, the High Court published a final selection list containing the names of 29 candidates. The select list was prepared by excluding candidates who were less than 35 years of age or more than 45 years as on 1st January, 2007. The age bar, it is noteworthy, was introduced by the amending Kerala Sate Higher Judicial Services Rules which amendment came in June 2008 i.e. after the selection process has commenced. Those who were excluded from consideration on the basis of the amended rules challenged their exclusion in Writ Petition(C) No.2021 of 2009 and connected petitions which were allowed by a Division Bench of the High Court of Kerala with a direction that the selection process be conducted in accordance with the rules as the same were on the date of the issue of the notification inviting applications from the eligible candidates. A revised merit list was accordingly issued comprising 45 names.

5. The Recruitment Committee considered the revised merit list and found that two open category candidates and one reserved category candidate who stood appointed shall have to be elbowed out of service in view of the revised select list. The Committee appears to have suggested a solution that would avoid such a situation. The High Court on the basis of the recommendations made by the Committee recommended to the Government to invoke its power under Rule 39 of the K.S. & S.S.R. to protect the said three candidates whose services were otherwise very satisfactory. The recommendation suggested utilisation of four vacancies that had occurred subsequent to the issue of the recruitment Notification in addition to the six already notified. The recommendation sent to the State Government accordingly contained names of nine candidates while one was kept unfilled in view of the pendency of Special Leave Petition (C) No.4203 of 2009. With the

dismissal of the Special Leave Petition, the said slot was recommended to be filled up by appointing Muhammed Raees M. against 10th vacancy. Writ Petition (C) Nos.16206 of 2010 and 16207 of 2010 were then filed by C. Jayachandran and Minu Mathews whereby the award of grace marks by way of moderation to other three candidates included in the said list was challenged. The said petitions were finally allowed by the High Court of Kerala by its order dated 13th September, 2010 holding that the award of grace marks by way of moderation was not legally permissible and was contrary to the decision of this Court in *Umesh Chandra Shukla v. Union of India and Ors.* (1985) 3 SCC 721. The High Court observed:

> "……
> The present two writ petitioners were among the seven successful candidates in the written examination who secured the cut off marks in each of the papers as stipulated by the notification. In view of the decision of the selection committee to award moderation though the writ petitioners still continued to be the successful candidates in the written examination, many more candidates artificially became eligible for being called for the viva-voce resulting in a heavier competition for the petitioners at the second stage of selection process, i.e. viva-voce. In the above extracted passage of the judgment (1985) 3 SCC 721, the Supreme Court held that the candidates who secured the minimum qualifying marks in the written examination acquire the right to be included in the list of the candidates to be called for viva-voce examination and such a right cannot be defeated by enlarging the said list including certain other candidates who are otherwise ineligible."

6. The High Court accordingly declared the grant of moderation marks and all steps taken pursuant to the said decision bad in law. The High Court observed:

> "In the result, we are of the opinion that the decision of the

Selection Committee to grant moderation is unsustainable in law. Therefore, all further steps pursuant to the said decision would be unsustainable. The resultant situation is that only the seven candidates who were initially found eligible on the basis of their having secured the cut off marks in the examination should have been subjected to the viva-voce examination and an appropriate decision regarding their suitability to fill up the originally advertised 6 posts should have been taken by the 1st respondent in accordance with law."

7. In compliance with the above direction, the merit list was revised again and the appellant placed at serial no.6 in the open merit category. Since there were only three vacancies in the said category which had been allotted to three candidates with higher merit than the appellant, the appellant could not be appointed. Out of three vacancies meant for reserved category candidates one was filled up while the remaining two vacancies meant for OBC candidates remained unfilled for want of candidates in the said category.

8. It was in the above backdrop that Writ Petition No. 20683 of 2009 filed by the appellant to challenge the selection process came up for hearing before a Single Bench of the High Court of Kerala and was dismissed by a short order stating that since the appellant was not one of the candidates who figured in the list of seven successful candidates qualified for consideration there was no question of issuing any direction for appointment. The learned Single Judge observed:

"……The selection now stands narrowed down to only seven persons. The petitioners in these writ petitions are not among them. That being so, there is no point in considering these writ petitions on merits. Accordingly, they are closed leaving open the other contentions in these writ petitions, which have not been considered by the Division Bench in *Jayachandran's* case (supra) to be

raised and agitated appropriately, if occasion arises in future."

9. Aggrieved by the above order the appellant filed a writ appeal before the Division Bench of the High Court which too failed and was dismissed by the High Court. The High Court was of the view that the contention urged in support of the challenge to the selection process did not have any foundation in the pleadings of the parties and even assuming that the challenge on the grounds urged before it was maintainable the fact that the writ petition had itself been filed nearly two years from the date of the issue of the notification was sufficient for the High Court to decline interference. The present appeal questions the correctness of the above order before us.

10. Appearing for the appellant Mr. P.U. Dinesh, learned counsel strenuously argued that the High Court had failed to consider the effect of the order passed by it in Writ Petition No.16206 of 2010 in Jayachandran's case. It was contended that the High Court had by the said decision clearly directed that ten vacancies had to be filled up from out of seven candidates found eligible in terms of the select list. Heavy reliance was, in support of that contention, placed by the learned counsel upon the following passage appearing in the said judgment:

"However, in view of the subsequent decision of the 1st respondent to fill up 10 posts, the 1st respondent may now proceed with the selection from out of the 7 abovementioned candidates in accordance with law by recasting the select list. In view of the fact that some of the 10 posts sought to be filled up are required to be filled up by candidates belonging to reserved categories, if on such an exercise any of the vacancies of the abovementioned 10 posts sought to be filled up cannot be filled up for lack of a suitable candidate, the respondents should now resort to the procedure contemplated under Rule 15(a) of the K.S. & S.S.R. It goes without saying that it should be open to

the respondents to prescribe such cut off marks as the minimum qualifying marks in such limited recruitment as they deem fit and proper in the circumstances. Both the writ petitions are allowed as above."

11. In as much as the High Court had remained oblivious of the above direction it had according to the learned counsel fallen in a palpable error that deserved to be corrected. Alternatively, it was contended that even if the number of vacancies to be filled up were restricted to only six the appellant was entitled to an appointment against one out of the two unfilled vacancies meant for the reserved category candidates having regard to the provisions of the Rules which according to the learned counsel entitled him to such an appointment by diversion of the unfilled vacancies to the open merit category.

12. Mr. P.P. Rao, learned counsel for the respondents, on the other hand, argued that the High Court was perfectly justified in dismissing the writ petition filed by the appellant as none of the grounds which were set out in the writ petition were found to have any merit. He drew our attention to the writ petition filed by the appellant and the grounds on which the selection process was challenged to contend that the challenge urged in support of the present appeal was never pressed into service or urged before the High Court. It was not, therefore, argued Mr. Rao, open to the appellant to make out a new case in his favour before this Court on which the High Court had no occasion to express any opinion. It was further contended that reliance upon the order passed by the High Court in Jayachandran's case was misplaced for the direction issued by the High Court was limited to filling up of the vacancies "in accordance with law". This implied that no appointment against the available vacancies could be made if the same were not legally permissible. It was argued that subsequent to the judgment of the High Court in Jayachandran's case, the High Court had passed a Full Court resolution by which the recommendations made earlier to the Government for filling up

of the four vacancies that had occurred after issue of the recruitment notification by resort to Rule 39 of the K.S. & S.S.R. Rules was withdrawn. Copy of the said resolution in the consequent letter issued by the High Court was also placed on record by the learned counsel, in support of the submission that after the quashing of the moderation in Jayachandran's case there was no room left for filling up of the four additional vacancies by taking resort to Rule 39 of the Rules mentioned above. That was so, for the obvious reason, that the candidates for whose benefit the said recommendation had been made had gone out of service as a consequence of the judgment of the High Court in Jayachandran's case. There was, therefore, neither any need nor any occasion for the Government to invoke this power under Rule 39 of the Rules as recommended by the High Court. The net result then was that the number of vacancies required to be filled up continued to be only six, three out of which were to go to open merit candidates while the remaining would go to the candidates in the reserved category.

13. The short question that falls for determination in the above backdrop is whether the number of vacancies to be filled up was six as claimed by the High Court or ten as claimed by the appellant. While it is not disputed that the initial notification confined itself to filling up of six vacancies only, confusion relating to the said number arose on account of the High Court recommending invocation of Rule 39 by the Government to avoid a situation where the candidates who had already been appointed pursuant to the selection process had to go out of service on account of the Court directing preparation of a revised merit list on the basis of the unamended Rules. It is common ground that the vacancies that had arisen after the issue of the Notification were sought to be filled up only with the solitary purpose of somehow saving the three candidates from ouster who were bound to lose their jobs on account of the re-casting of the merit list. All that the High Court intended to recommend to the Government was that four vacancies that were available in the cadre, though the same had arisen after

the issue of the Recruitment Notification, could be utilised by the Government if it invoked its power under Rule 39. The candidates facing ouster could then be continued as an exception to the general rule. It is also beyond dispute that the said recommendations could not have been accepted once the award of additional marks by way of moderation was struck down by the High Court in Jayachandran's case. The inevitable consequence flowing from that judgment was that anyone who had found place in the merit list only because of the benefit of moderation would have to lose that place and go out of the list. Once that happened the question of retaining the services of the three candidates by invocation of powers vested in the Government under Rule 39 did not arise. The High Court was in the light of the subsequent development justified in recalling the recommendations made by it which in turn had the effect of limiting the number of vacancies to those originally notified. Mr. Rao was, therefore, right in contending that the proposed utilisation of four vacancies did not *ipso facto* add to the number of already notified. The addition was contingent upon the Government agreeing to exercise its power under Rules 39. Since the Government did not and could not possibly exercise the said power as a result of the quashing of the marks awarded by way of moderation the proposed addition of the vacancies to the number already notified became clearly infructuous. The High Court could and had rightly recalled the recommendations in the light of the said subsequent development.

14. There is another aspect to which we may advert at this stage and that relates to the question whether the Government could at all exercise the powers vested in it under Rule 39 in a manner that would have had the effect of depriving candidates otherwise eligible for appointment against the said vacancies from competing for the same. Rule 39 reads as under:

> "Notwithstanding anything contained in these rules or in the Special Rules or in any other Rules or Government Orders the Government shall have power to deal with the case of any person or persons serving in a civil capacity under the Government of Kerala or any candidate for appointment to a service in such manner a may appear to the Government to be just and equitable:
>
> Provided that where such rules or orders are applicable to the case of any person or persons, the case shall not be dealt with in any manner less favourable to him or them than that provided by those rules or orders.
>
> This amendment shall be deemed to have come into force with effect from 17.12.1958."

15. The legal position regarding the power of the Government to fill up vacancies that are not notified is settled by several decisions of this Court. Mr. Rao relied upon some of those decisions to which we shall briefly refer. In *Rakhi Ray v. High Court of Delhi* (2010) 2 SCC 637, this Court declared that the vacancies could not be filled up over and above the number of vacancies advertised as recruitment of the candidates in excess of the notified vacancies would amount to denial of equal opportunity to eligible candidates violative of Article 14 and 16(1) of the Constitution of India. This Court observed:

> "It is settled law that vacancies cannot be filled up over and above the number of vacancies advertised as recruitment of the candidates in excess of the notified vacancies is a denial being violative of Articles 14 and 16(1) of the Constitution of India."

16. In *Hoshiar Singh v. State of Haryana* 1993 Supp (4) SCC 377, also this Court held that appointment to an additional post would deprive candidates who were not eligible for appointment to the post on the last date of submission of the applications mentioned in the advertisement and who became eligible for appointment thereafter or the opportunity of being considered for such appointment. This Court observed:

> "The appointment on the additional posts on the basis of

such selection and recommendation would deprive candidates who were not eligible for appointment to the posts on the last date for submission of applications mentioned in the advertisement and who became eligible for appointment thereafter, of the opportunity of being considered for appointment on the additional posts."

17. In *State of Haryana v. Subhash Chander Marwaha* (1974) 3 SCC 220, this Court held that the Government had no constraint to make appointments either because there are vacancies or because a list of candidates has been prepared and is in existence. So, also this Court in *Shankarsan Dash v. Union of India (1991) 3 SCC 47, UPSC v. Gaurav Dwivedi* (1999) 5 SCC 180, *All India SC & ST Employees' Association v. A. Arthur Jeen* (2001) 6 SCC 380 and *Food Corporation of India v. Bhanu Lodh* (2005) 3 SCC 618, held that mere inclusion of a name in the select list for appointment does not create a right to appointment even against existing vacancies and the State has no legal duty to fill up all or any of the vacancies.

18. In the light of the above pronouncements the power vested in the Government under Rule 39 (supra) could not have been invoked for filling up the vacancies which had not been advertised and which had occurred after the issue of the initial advertisement much less could that be done for purposes of protecting the service of someone who had found a place in the merit list on account of additional marks given to him and who was bound to lose that place by reasons of the judgment of the Court.

19. The upshot of the above discussion is that the number of vacancies notified for recruitment remained limited to six and did not get increased to ten as the condition precedent for such increase had failed not only because no decision was taken by the Government to invoke its power under Rule 39 but also because even if a decision had been taken the same would have had no effect in the face of the judgement in

Jayachandran's case. Besides the power vested in the Government was not exercisable so as to utilise subsequent vacancies for the purpose of saving someone who had no legitimate right to continue even after being removed from the merit list.

20. In the light of the above discussion paragraph 33 of the judgment in Jayachandran's case does not come to the rescue of the appellant's to support his claim for appointment. We fail to see any legal or equitable right in favour of the appellant to claim one of the four vacancies that were proposed to be added in terms of the recommendation made by the High Court, even assuming that the appellant could urge before us a point which had never been urged before the High Court.

21. That brings us to the second limb of the submission of Mr. Dinesh that even if the number of vacancies is taken to be limited to six, he was entitled to be appointed against one of the unfilled vacancies meant for reserved category candidates. That submission, in our opinion, needs notice only to be rejected. Firstly, because there is no foundation laid in the writ petition filed by the appellant nor was any such point ever raised before the High Court. The result is that the unfilled vacancies meant for reserved category candidates and those that have become available in the merit category after the issue of the initial recruitment notification have already been notified. The appellant, it is not in dispute, has participated in the fresh selection process initiated by the High Court like many others who were eligible to apply against the vacancies in the open merit and the reserved category. It is, therefore, neither proper nor feasible at this stage for this Court to interfere with the ongoing selection process. The appellant it goes without saying would get a fair chance like every other eligible candidate to compete for an appointment. In the result this appeal fails and is hereby dismissed but in the circumstances without any orders as to costs.

N.J. Appeal dismissed.

BRAJENDRASINGH
v.
STATE OF MADHYA PRADESH
(Criminal Appeal Nos. 113-114 of 2010)

FEBRUARY 28, 2012

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

Penal Code, 1860 – s. 302 – Conviction and sentence under – Allegations that accused suspecting his wife having illicit relations with his neighbour killed his three young children who were asleep and sprinkled kerosene oil on his wife and put her on fire – Convicted u/s. 302 and sentenced to death by courts below – On appeal held: Circumstantial evidences read with the statements of the prosecution witnesses and the statement of the accused himself prove one fact without doubt, that the accused had certainly murdered his wife – Regarding the death of the children, as alleged by the accused that his wife caused death of three children, when the deceased inflicted severe injuries on the throat of the sleeping child, the child would have got up, there would have been commotion and disturbance in the room which would have provided enough opportunity to the accused to protect his other two children – He could have overpowered his wife and could even have prevented the murder of all the three children – This abnormal and unnatural conduct of the appellant renders his defence unbelievable and untrustworthy – Thus, the appellant is guilty of offence u/s. 302 for murdering his wife and three minor children – As regards the quantum of sentence, circumstances examined cumulatively would to some extent, suggest the existence of a mental imbalance in the accused at the moment of committing the crime – Case does not fall in the category of 'rarest of rare' cases where imposition of death sentence is imperative as also it is not a case where imposing any other sentence would

not serve the ends of justice or would be entirely inadequate – Drawing the balance sheet of aggravating and mitigating circumstances and examining them in the light of the facts and circumstances of the instant case, it is not a case where extreme penalty of death be imposed upon the accused – Thus, the death sentence awarded to the accused is commuted to one of life imprisonment – Sentence/Sentencing.

FIR – FIR recorded by Sub-inspector based on statement of accused, made in Police Station – Evidentiary value – Held: FIR cannot be treated in law and in fact, as a confessional statement made by the accused – It would certainly attain its admissibility in evidence as an FIR recorded by the competent officer in accordance with law.

Evidence – Conviction based on circumstantial evidence – General Principles – Stated.

Code of Criminal Procedure, 1973:

s. 313 – Statement of accused under – Held: Can be used as evidence against the accused, insofar as it supports the case of the prosecution – Statement u/s. 313 simplicitor normally cannot be made the basis for conviction of the accused – However, where the statement of the accused u/s. 313 is in line with the case of the prosecution, then certainly the heavy onus of proof on the prosecution is to some extent reduced.

s. 354 (3) – Award of death sentence – Recording of special reasons – Need for – Principles governing exercise of such discretion – Stated.

According to the prosecution, appellant suspected his wife 'A' of having illicit relations with 'LT' (neighbor), and killed his three young children, who were asleep, sprinkled kerosene oil on his wife and put her on fire.

The appellant had forbidden his wife from talking to

'LT' (neighbour). On the fateful day, he allegedly stopped her from talking to 'LT' but she retorted that she would die and poured kerosene oil on her person and then put herself on fire. The appellant then tried to extinguish the fire, but being under the impression that she was dying, he also caused injuries to his wife by a knife and killed her. The appellant also suffered burn injuries in his attempt to extinguish the fire. Thereafter, he killed his children by inflicting injuries by knife to the throat. He also tried to commit suicide by injuring his neck but did not succeed. Thereafter, he went towards the Bye Pass Road and was about to commit suicide under the truck but in the meantime the police came and stopped him and brought him to the police station. In the midnight, the appellant lodged a report in respect of the commission of the crime. Investigations were carried out. The appellant was committed to the Court of Sessions since the offence was under Sections 302 and 309 IPC. The appellant stood trial and made a statement under Section 313 Cr.P.C. that it was the deceased 'A' who had inflicted injuries upon their three minor children and poured kerosene on herself and thereafter, set herself on fire. The trial court acquitted the appellant for the offence under Section 309 IPC. However, convicted him for the offence under Section 302 IPC and imposed death sentence. The High Court upheld the same. Therefore, the appellant filed the instant appeals.

Partly allowing the appeals, the Court

HELD: 1. Having appreciated the evidence on record, there is no hesitation in holding that the appellant is guilty of an offence under Section 302 IPC for murdering his wife and three minor children. Once the balance-sheet of aggravating and mitigating circumstances is drawn and examined in the light of the facts and circumstances of the instant case, there is no hesitation in coming to the

conclusion that this is not a case where this Court ought to impose the extreme penalty of death upon the accused. Therefore, the death sentence awarded to the accused is commuted to one of life imprisonment (21 years). [Paras 22 and 28] [621-G; 629-F-H]

2.1. The statement of an accused under Section 313 Cr.P.C. can be used as evidence against the accused, insofar as it supports the case of the prosecution. Equally true is that the statement under Section 313 Cr.P.C. simplicitor normally cannot be made the basis for conviction of the accused. But where the statement of the accused under Section 313 Cr.P.C. is in line with the case of the prosecution then certainly the heavy onus of proof on the prosecution is, to some extent reduced. [Para 10] [614-H; 615-A-B]

2.2. The FIR was recorded by Sub-Inspector Mohan PW16 based on the statement of the appellant itself, made in the Police Station. This cannot be treated, in law and in fact, as a confessional statement made by the accused and it would certainly attain its admissibility in evidence as an FIR recorded by the competent officer in accordance with law. [Para 12] [616-D]

2.3. In the instant case, there is no eye-witness despite the fact that it occurred in an LIG flat and obviously some people must be living around that flat. However, to complete the chain of events and to prove the version given by the appellant in the FIR, it examined a number of witnesses. PW2 is the brother-in-law of the appellant and brother of the deceased 'A'. He clearly stated that the appellant had been married to 'A' 12-13 years before the date on which his statement was recorded and the couple had three children. He was staying with his sister and on the date of the incident he had been in the house of the accused during the day and left in the evening. At about 2.30 a.m. in the night, he

received a phone call from the Police Station informing him that his sister, nephews and niece had been murdered. He went to the Police Station where he found the accused was also present. PW3 was examined to prove that the appellant was the tenant at a monthly rent and had been given two rooms. According to her, 'LT' had also been residing in one room in the same building on rent. PW5, is the sister of the deceased 'A' whose statement was similar to that of PW2. This witness was declared hostile and was subjected to cross-examination by the prosecution. PW7, the husband of PW5 and brother of the appellant, also made a similar statement. PW10, 'LT' was also examined and he stated that he was residing in the same building in one room. PW12 is the doctor who had performed post mortem examination upon the body of 'A' and noticed various injuries on her body. Post mortem upon the other dead bodies was also performed by PW12 and the cause of death was common. PW16 is the Sub-Inspector in the Police Station, He recorded the statement at the Police Station and had conducted the investigation. He had prepared the site plan and seized the knife. It is with the help of these witnesses that the prosecution attempted to prove its case but the foundation of the case was laid on the basis of the information given by the appellant-accused himself. The statements of these witnesses have to be examined in light of the FIR, Exhibit P27, as well as the statement of the accused made under Section 313 Cr.P.C. But for Exhibit P27, it would have been difficult for the prosecution to demonstrate as to who was responsible for committing the murder of the three young children. To this extent, it is a case purely of circumstantial evidence. [Paras 13, 14, 15] [616-E-H; 617-A-H; 618-A-D]

2.4. There is no doubt that it is not a case of direct evidence but the conviction of the accused is founded on circumstantial evidence. It is a settled principle of law

that the prosecution has to satisfy certain conditions before a conviction based on circumstantial evidence can be sustained. The circumstances from which the conclusion of guilt is to be drawn should be fully established and should also be consistent with only one hypothesis, i.e. the guilt of the accused. The circumstances should be conclusive and proved by the prosecution. There must be a chain of events so complete so as not to leave any substantial doubt in the mind of the Court. Irresistibly, the evidence should lead to the conclusion inconsistent with the innocence of the accused and the only possibility that the accused has committed the crime. To put it simply, the circumstances forming the chain of events should be proved and they should cumulatively point towards the guilt of the accused alone. In such circumstances, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. Furthermore, the rule which needs to be observed by the Court while dealing with the cases of circumstantial evidence is that the best evidence must be adduced which the nature of the case admits. The circumstances have to be examined cumulatively. The Court has to examine the complete chain of events and then see whether all the material facts sought to be established by the prosecution to bring home the guilt of the accused, have been proved beyond reasonable doubt. It has to be kept in mind that all these principles are based upon one basic cannon of the criminal jurisprudence that the accused is innocent till proven guilty and that the accused is entitled to a just and fair trial. [Para 16] [618-E-H; 619-A-C]

2.5. The circumstances in the instant case, which have been proved, are that the couple used to quarrel on the issue of deceased 'A' speaking to 'LT' even after the

appellant having restrained her from doing so; that the three children were sleeping at the time of occurrence; that the injury on their necks just below the jaw was caused by a knife which was recovered and exhibited; and that it was mentioned in the Doctor's report that there were number of burn injuries on the body of 'A' and the injuries on the throats of all the deceased. The cause of death was common to all, that is excessive hemorrhage. These circumstantial evidences read with the statements of the prosecution witnesses and the statement of the appellant himself prove one fact without doubt, i.e., the accused had certainly murdered his wife. His stand was that since he believed that his wife may not survive the burn injuries, therefore, he killed her by inflicting the injury with knife on her throat similar to the one inflicted upon the throats of the three young children. [Paras 18 and 19] [619-F-H; 620-A-D]

2.6. As regards death of the children, one very abnormal conduct on the part of the appellant comes to light from the evidence on record that a father, seeing his wife killing his children, would certainly have prevented the death of at least two out of the three children. He could have overpowered his wife and could even have prevented the murder of all the three children. This abnormal conduct of the appellant renders his defence unbelievable and untrustworthy. Upon appreciation of the evidence on record, there is an inclination to accept the story of the prosecution though it is primarily based on circumstantial evidence and there is no witness to give optical happening of events. Once these circumstances have been proved and the irresistible conclusion points to the guilt of the accused, the accused has to be held guilty of the offences. Normally, the injuries like the ones inflicted in the instant case would not lead to instantaneous death. The excessive bleeding leading to death would be possible over a short

period. The injured would struggle before he succumbs to such injury. As alleged by the accused, if the wife caused death of all the three children, he could have certainly prevented death of at least two of them. When the deceased inflicted such severe injuries on the throat of the sleeping child, the child would have got up, there would have been commotion and disturbance in the room which would have provided enough opportunity to the appellant to protect his other two children. According to the prosecution, at that stage, none had suffered any injury. This unnatural conduct of the accused in not making an effort to protect the children and exhibiting helplessness creates a serious doubt and renders the entire case put forward by the defence as unreliable and of no credence. This abnormal conduct of exhibiting helplessness on the part of the appellant creates a serious doubt and entire case put forward by the defence loses its credibility. [Para 20] [620-E-H; 621-A-C]

2.7. The cumulative effect of the prosecution evidence is that the accused persisted with commission of the crime despite availability of an opportunity to check himself from indulging in such heinous crime. May be there was some provocation initially but nothing can justify his conduct. Whatever be the extent of his anger, revenge and temper, he still could have been kind to his own children and spared their life. He is expected to have overcome his doubts about the conduct of his wife, for the larger benefit of his own children. Though the appellant had stated that he lost his mind and did not know what he was doing, this excuse is not worthy of credence. Admittedly, he was not ailing from any mental disorder or frustration. He was a person who was earning his livelihood by working hard. [Para 21] [621-D-F]

3.1. As regards the question of quantum of sentence, it is always appropriate for this Court to remind itself of the need for recording of special reasons, as

contemplated under Section 354(3) Cr.P.C., where the Court proposes to award the extreme penalty of death to an accused. [Para 23] [621-H; 622-A]

3.2. First and the foremost, the Court has not only to examine whether the instant case falls under the category of 'rarest of rare' cases but also whether any other sentence, except death penalty, would be inadequate in the facts and circumstances of the instant case. [Para 24] [627-H; 628-A]

3.3. The appellant is held guilty of an offence under Section 302 IPC for committing the murder of his three children and the wife. All this happened in the spur of moment, but, of course, the incident must have continued for a while, during which period the deceased 'A' received burn injuries as well as the fatal injury on the throat. All the three children received injuries with a knife similar to that of the deceased 'A'. But one circumstance which cannot be ignored is that the prosecution witnesses clearly stated that there was a rift between the couple on account of her talking to 'LT', the neighbor, PW10. Even if some credence is given to the statement made by the accused under Section 313 Cr.P.C. wherein he stated that he had seen the deceased and PW10 in a compromising position in the house of PW10, it also supports the allegation of the prosecution that there was rift between the husband and wife on account of PW10. It is also clearly exhibited in the FIR that the accused had forbidden his wife from talking to PW10, which despite such warning she persisted with and, therefore, he committed the murder of her wife along with the children. It would be useful to refer to the conduct of the accused prior to, at the time of and subsequent to the commission of the crime. Prior to the commission of the crime, none of the prosecution witnesses, including the immediate blood relations of the deceased, made any complaint

about his behaviour or character. On the contrary, it is admitted that he used to prohibit 'A' from speaking to PW10 about which she really did not bother. His conduct, either way, at the time of commission of the crime is unnatural and to some extent even unexpected. However, subsequent to the commission of the crime, he was in such a mental state that he wanted to commit the suicide and even inflicted injuries to his own throat and also went to the bye-pass road with the intention of committing suicide, where he was stopped by PW4, Head Constable and taken to the Police Station wherein he lodged the FIR. In other words, he felt great remorse and was sorry for his acts. He informed the police correctly about what he had done. [Para 25] [628-B-H; 629-A]

3.4. Another mitigating circumstance is that as a result of the commission of the crime, the appellant himself is the greatest sufferer. He has lost his children, whom he had brought up for years and also his wife. Besides that, it was not a planned crime and also lacked motive. It was a crime which had been committed out of suspicion and frustration. The circumstances examined cumulatively would, to some extent, suggest the existence of a mental imbalance in the accused at the moment of committing the crime. It cannot be conceived much less accepted by any stretch of imagination that the accused was justified in committing the crime as he claims to have believed at that moment. [Para 26] [629-B-C]

3.5. It is not a case which falls in the category of 'rarest of rare' cases where imposition of death sentence is imperative. It is also not a case where imposing any other sentence would not serve the ends of justice or would be entirely inadequate. [Para 27] [629-D-E]

Dhananajoy Chatterjee vs. State of W.B. **JT 1994 (1) SC 33: 1994 (1) SCR 37;** *Shivu and Anr. v. R.G. High Court of*

Karnataka **(2007) 4 SCC 713: 2007 (2) SCR 555;** *Shivaji @ Dadya Shankar Alhat* v. *State of Maharashtra* **AIR 2009 SC 56: 2008 (13) SCR 81– referred to.**

Case Law Reference:

1994 (1) SCR 37	**Referred to.**	**Para 16**
2007 (2) SCR 555	**Referred to.**	**Para 16**
2008 (13) SCR 81	**Referred to.**	**Para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 113-114 of 2010.

From the Judgment & Order dated 20.08.2009 of the High Court of Madhya Pradesh, Bench at Indore, in Criminal Appeal No. 734 of 2007 and Criminal Death Reference No. 2 of 2007.

Chanchal Kumar Ganguli, Chitanya S. for the Appellant.

S.K. Dubey, C.D. Singh, Sakshi Kakkar, Kusumanjali Sharma for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The present appeals are directed against the judgment of the High Court of Madhya Pradesh, Bench at Indore, confirming the judgment of conviction and order of sentence of imposition of extreme penalty of death by the Trial Court.

2. The disaster that can flow from unchastity of a woman and the suspicions of a man upon the character of his wife cannot be more pathetically stated than the facts emerging from the present case. As per the case of the prosecution, a man suspecting his wife of having illicit relations with his neighbor, killed his three young children, namely, Varsha, Lokesh and Mayank, who were asleep, sprinkled kerosene oil on his wife and put her on fire. However, when called upon to make a statement under Section 313 of the Code of Criminal

Procedure, 1973 (for short, Cr.P.C.), the accused rendered the following explanation :

> "There was illicit relationship between my wife, the deceased Aradhna and Liladhar, when on 27.02.2005 I came from the factory, at that time it was 11.00 – 11.30 O'clock at night, there was no fixed time coming and going from the factory. When I came to my house the door of the house was opened. My wife was not at the house and then I searched her here and there. I heard her voice in the house of Liladhar Tiwari, the voice of male was also coming. My children were sleeping in my house, when I shouted loudly and I hit the door of Liladhar Tiwari with foot, then the door opened then I saw that both were naked and then she came out then I threw her on the ground after catching her hair and then she started shouted and speaking cohabitedly and said that she would go with Tiwari Jee only and if I would stop her from meeting Tiwari Jee then she would kill the children and she would kill me also. Thus quarrel went on. After some time she came with knife from the kitchen and she inflicted injuries in the necks of the three children. I tried to snatch the knife from her and the in that process in my neck also the knife inflicted injury and then after taking that very knife I inflicted injury on the neck of deceased because she had inflicted the injury in the necks of children, Aradhna fell down on the back after being hit by the knife. My mental balance was upset and I put the kerosene oil kept there at myself, that some of that kerosene oil fell on me and some on the deceased, I was standing nearby. I ignited the match stick and at first I burnt myself and the match stick fell on the deceased, due to which she was also burnt and then in the burning condition after extinguishing the fire taking the knife I went towards the Bye-pass. After some time, I saw that one truck was coming, I was going to commit suicide under that truck but in the meantime police came there and the police brought me to the police station. I got the report written but as I had

said in the report it was not written like that. I have not killed the children."

3. From the above statement, it is clear that the accused neither disputes the attempt to murder, nor the consequent death of his three young children and wife, Aradhna. What this Court has to examine, with reference to the evidence on record, is as to which of the two versions is correct and stands established beyond reasonable doubt, i.e., whether the case of the prosecution is to be accepted as proved beyond reasonable probability or whether the defence of the appellant is to be accepted by the Court.

4. Before we dwell upon the issues before us, it will be appropriate to refer to the facts giving rise to the present appeal, as stated by the prosecution. The facts, as given, as well as the conduct of the appellant are somewhat strange in the present case as the appellant who is accused of this heinous crime, is himself the informant of the incident. Laconically, the factual matrix of the case that emerges from the record is that the appellant had lodged a report in respect of the commission of the crime at the Police Station, Industrial Area, District Dewas in the night intervening the 27/28th, February, 2005 at about 2.00 a.m. which was recorded by Sub-Inspector Mohan Singh Maurya, PW16. The appellant was serving in White Star Milk Product Factory, Dewas. Besides his wife and three young children, his brother-in-law was also residing with him who was serving in Sudarshan Factory. One Liladhar Tiwari was the neighbour of the appellant. In fact, both the appellant and Liladhar Tiwari stayed in two different rooms of the same flat, i.e., LIG Flat No.225, Vikas Nagar, Dewas which they had taken on rent from PW3, Smt. Kamal Kunwar. Smt. Aradhna, the deceased wife of the appellant, used to talk to Liladhar, to which the appellant had serious objections. He had forbidden her from doing so. Again, on the fateful day, he had allegedly stopped her from talking to Liladhar Tiwari, but she retorted that she would die and poured kerosene oil on her

person and then put herself on fire. The appellant claims to have made an effort to extinguish the fire. However, being under the impression that she was dying, he also caused injuries to his wife by a knife (chhuri) and killed her. The appellant also suffered burn injuries in his attempt to extinguish the fire. After killing his wife, he was concerned about what would be the fate of their children, who will now have to grow up without their mother. Thus, he killed them by the same process, i.e., inflicting injuries by knife to the throat of the children. After committing the murder of his own family members, he also tried to commit suicide by injuring his neck but could not succeed in his attempt. The incident is said to have occurred at 2330 hours on the night of 27th February, 2005.

5. PW4, Sri Ram Verma, Head Constable, was on patrolling duty and he, along with another constable, was patrolling by road by a Government vehicle bearing registration No. MP 03 – 5492 in the night between half past one and two O'clock. They saw a person on the bye-pass road. They stopped the said vehicle and interrogated him. Then they came to know that he was Brajendrasingh, the appellant. The appellant narrated the entire incident to the Police and informed them that he wanted to commit suicide. The Police Officers stopped him from doing so and brought him to the Police Station, Industrial Area in the same Government vehicle. Upon reaching the Police Station, the appellant lodged the report at 2.00 a.m. narrating the above facts to the Police.

6. On the basis of the statement of the appellant, First Information Report, Exhibit P27, under Section 302 of the Indian Penal Code (IPC), was registered on 27/28th February, 2005 at about 2.00 a.m. PW16, Mohan Singh Maurya, prepared the inquest report Exhibits P2 to P5 and the bodies of the deceased persons were taken into custody. The dead bodies were taken to the hospital for post mortem which was performed by Dr. Shakir Ali, PW12 and the post mortem reports were recorded as Exhibits P12 to P15. The doctor opined that the injuries on the person of the deceased could have been

caused by a knife. The appellant was also examined medically by Dr. Hari Singh Rana, PW14, who issued his medico-legal certificate report Exhibit P18. The clothes of the deceased persons were seized. The photographs of the spot were taken and the CDs of photography were seized vide Exhibits P7 to I/9. Blood stained and controlled earth (P4) was taken into custody vide Exhibit P10, knife, shirt and pant of the appellant were seized vide Exhibit P13. Seized articles were sent to the Forensic Science Laboratory, Sagar for chemical examination from which the reports Exhibits P22, P24 and P26 were received. As per the post mortem report of deceased Aradhna, Exhibit P12, the medical expert found 36 per cent burn injuries on her chest and abdomen. The Investigating Officer recorded the statement of 16 prosecution witnesses and after completing the investigation in all respects, he submitted the charge sheet before the Court. The accused was committed to the Court of Sessions as the offences were exclusively triable by the Court of Sessions being an offence under Sections 302 and 309 IPC. The accused stood trial and made a statement under Section 313 Cr.P.C. giving his stand and explanation as afore-indicated. The learned Trial Court, vide its judgment dated 15th June, 2007, acquitted the accused for the offence under Section 309 IPC. However, while returning a finding of being guilty for the offence under Section 302 IPC, the Court held that it does not appear to be appropriate to award any sentence less than death sentence to the appellant and, therefore, imposed upon him the extreme punishment of death under Section 302 IPC. This judgment of the Trial Court was challenged before the High Court which affirmed the judgment of conviction and order of sentence of death. Against these concurrent findings, the appellant has filed the present appeals.

7. We may notice here that against the acquittal of the appellant under Section 309 IPC, no appeal was preferred by the State, either before the High Court or before this Court.

8. The learned counsel appearing for the appellant has primarily raised the following two contentions :

(i) The courts have failed to appreciate the evidence in its correct perspective. The accused had stated that his wife had murdered the three children and that he had only inflicted injuries on her body under a belief that she was not going to survive. He had no intention to kill her. Thus, the applicant cannot be punished for murder of the entire family. It is also the contention of the appellant that the prosecution has not been able to prove its case beyond reasonable doubt.

(ii) The imposition of extreme penalty of death was not called for in the facts and circumstances of the present case. The incident even if, as stated by the prosecution, assumed to be correct, still it was an offence committed on extreme provocation and at the spur of the moment without any intent to kill any person.

9. Neither the death of three children nor that of his wife Aradhna is disputed and/or practically admitted by the appellant in his statement under Section 313 Cr.P.C. He has also admitted that he had inflicted injuries on the person of the deceased Aradhna with a knife. Only a part of his statement under Section 313 Cr.P.C. does not corroborate the prosecution evidence. According to the case of the prosecution, the appellant had inflicted injuries resulting in the death of three minor children and then he had poured the kerosene oil upon the deceased Aradhna as well as inflicted injury on her throat, whereas according to the appellant, it was the deceased Aradhna who had inflicted injuries upon their three minor children and poured kerosene on herself and thereafter set herself on fire.

10. It is a settled principle of law that the statement of an accused under Section 313 Cr.P.C. can be used as evidence against the accused, insofar as it supports the case of the prosecution. Equally true is that the statement under Section

313 Cr.P.C. simplicitor normally cannot be made the basis for conviction of the accused. But where the statement of the accused under Section 313 Cr.P.C. is in line with the case of the prosecution, then certainly the heavy onus of proof on the prosecution is, to some extent, reduced. We may refer to a recent judgment of this Court in the case of *Ramnaresh & Ors. v. State of Chhattisgarh,* (being pronounced today) wherein this Court held as under :

> "In terms of Section 313 Cr.P.C., the accused has the freedom to maintain silence during the investigation as well as before the Court. The accused may choose to maintain silence or complete denial even when his statement under Section 313 Cr.P.C. 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. Right to fair trial, presumption of innocence unless proven guilty and proof by the prosecution of its case beyond any reasonable doubt are the fundamentals of our criminal jurisprudence. When we speak of prejudice to an accused, it has to be shown that the accused has suffered some disability or detriment in relation to any of these protections substantially. Such prejudice should also demonstrate that it has occasioned failure of justice to the accused. 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. [Ref. *Rafiq Ahmed @ Rafi v. State of Uttar Pradesh* [(2011) 8 SCC 300].
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> It is a settled principle of law that the obligation to put material evidence to the accused under Section 313 Cr.P.C. is upon the Court. One of the main objects of recording of a statement under this provision of the Cr.P.C. is to give an opportunity to the accused to explain the circumstances appearing against him as well as to put

> forward his defence, if the accused so desires. But once he does not avail this opportunity, then consequences in law must follow. Where the accused takes benefit of this opportunity, then his statement made under Section 313 Cr.P.C., in so far as it supports the case of the prosecution, can be used against him for rendering conviction. Even under the latter, he faces the consequences in law."

11. Now, all that this Court is called upon to decide in the present case is that between the varying versions put forward by the prosecution and the accused which one is correct and has been proved in accordance with law.

12. As we have already noticed in the narration of facts above that the FIR was recorded by Sub-Inspector Mohan Singh Maurya, PW16 based on the statement of the appellant itself, made in the Police Station. This cannot be treated, in law and in fact, as a confessional statement made by the accused and it would certainly attain its admissibility in evidence as an FIR recorded by the competent officer in accordance with law.

13. There is no doubt that there is no eye witness in this case despite the fact that it occurred in an LIG flat and obviously some people must be living around that flat. However, to complete the chain of events and to prove the version given by the appellant in the FIR, it examined a number of witnesses. PW2 is the brother-in-law of the appellant and brother of the deceased Aradhna. He clearly stated that Brajendrasingh had been married to Aradhna 12-13 years before the date on which his statement was recorded and the couple had three children. He was staying with his sister and on 27th February, 2005, he had been in the house of the accused during the day and in the evening he left for the house of his brother Kamla Singh who was staying at Joshipura whereafter he went to Sudarshan Factory near Dewas to work. At about 2.30 a.m. in the night, while he was in the factory, he received a phone call from the Police Station informing him that his sister, nephews and niece had been murdered. He came back and went to the Police

Station where he found Brajendrasingh, the accused was also present.

14. PW3, Smt. Kamal Kunwar was examined to prove that the appellant was the tenant at a monthly rent of Rs.650/- and two rooms had been given to him on rent. According to her, one Liladhar Tiwari had also been residing in one room in the same building on rent.

15. PW5, Shobhna is again the sister of the deceased Aradhna. Her statement was similar to that of PW2. According to her, somebody from Vikas Nagar had come and told her that an altercation had taken place between Aradhna and the accused. He asked her to go there. After she reached near the house of the accused, she met two boys who told her that somebody had killed Aradhna and her three children. Upon hearing this, she fell unconscious. This witness was declared hostile and was subjected to cross-examination by the prosecution. Witness PW7, Veerendra Singh, who is the husband of PW5 and brother of the present appellant, also made a similar statement. PW10, Liladhar Tiwari, was also examined and he stated that he was residing in the same building in one room. When his children and wife used to go to village, he used to live alone in that room. According to him, the Police had come to his house at about 2.00 O'clock in the night, knocked at his door and informed him about the murder. He stated that wife of the accused used to inquire from him whenever he came late, "brother today you have come late" and I used to reply that because of heavy work I was late. PW12 is Dr. Shakir Ali who had performed post mortem examination upon the body of Aradhna and noticed various injuries on her body. According to him, both the lungs were having less blood and two portions of the heart were empty of blood. The upside down Carotid artery was incised. The membrane of the intestines was healthy. The liver, spleen and kidney all were blood less and all the injuries were ante mortem and fatal. According to the doctor, the cause of death was shock which

had resulted from excessive hemorrhage. Post mortem upon the other dead bodies was also performed by this witness and the cause of death was common. The incised wound of Lokesh was 1" x ½" x 2" below the jaw which resulted in excessive bleeding and death. PW16 is the Sub-Inspector in the Police Station, Industrial Area, Dewas. He, as already noticed, had recorded his statement at the Police Station and had conducted the investigation. He had prepared the site plan and seized the knife Exhibit P12. It is with the help of these witnesses that the prosecution has attempted to prove its case but the foundation of this case was laid on the basis of the information given by the appellant-accused himself. The statements of these witnesses have to be examined in light of the FIR, Exhibit P27, as well as the statement of the accused made under Section 313 Cr.P.C. But for Exhibit P27, it would have been difficult for the prosecution to demonstrate as to who was responsible for committing the murder of the three young children. To this extent, it is a case purely of circumstantial evidence.

16. There is no doubt that it is not a case of direct evidence but the conviction of the accused is founded on circumstantial evidence. It is a settled principle of law that the prosecution has to satisfy certain conditions before a conviction based on circumstantial evidence can be sustained. The circumstances from which the conclusion of guilt is to be drawn should be fully established and should also be consistent with only one hypothesis, i.e. the guilt of the accused. The circumstances should be conclusive and proved by the prosecution. There must be a chain of events so complete so as not to leave any substantial doubt in the mind of the Court. Irresistibly, the evidence should lead to the conclusion inconsistent with the innocence of the accused and the only possibility that the accused has committed the crime. To put it simply, the circumstances forming the chain of events should be proved and they should cumulatively point towards the guilt of the accused alone. In such circumstances, the inference of guilt can be justified only when all the incriminating facts and circumstances

are found to be incompatible with the innocence of the accused or the guilt of any other person. Furthermore, the rule which needs to be observed by the Court while dealing with the cases of circumstantial evidence is that the best evidence must be adduced which the nature of the case admits. The circumstances have to be examined cumulatively. The Court has to examine the complete chain of events and then see whether all the material facts sought to be established by the prosecution to bring home the guilt of the accused, have been proved beyond reasonable doubt. It has to be kept in mind that all these principles are based upon one basic cannon of our criminal jurisprudence that the accused is innocent till proven guilty and that the accused is entitled to a just and fair trial. [Ref. *Dhananajoy Chatterjee vs. State of W.B.* [JT 1994 (1) SC 33]; *Shivu & Anr. v. R.G. High Court of Karnataka* [(2007) 4 SCC 713]; and *Shivaji @ Dadya Shankar Alhat v. State of Maharashtra* [(AIR 2009 SC 56].

17. It is a settled rule of law that in a case based on circumstantial evidence, the prosecution must establish the chain of events leading to the incident and the facts forming part of that chain should be proved beyond reasonable doubt. They have to be of definite character and cannot be a mere possibility.

18. The circumstances in the present case, which have been proved, are that :

(1) The couple used to quarrel on the issue of deceased Aradhna speaking to Liladhar Tiwari even after the appellant having restrained her from doing so;

(2) The three children were sleeping at the time of occurrence;

(3) The injury on their necks just below the jaw was caused by a knife which was recovered and

exhibited as article 'L' in accordance with law.

(4) It was mentioned in Doctor's report that there were number of burn injuries on the body of Aradhna and the injuries on the throats of all the deceased. The cause of death was common to all, i.e., excessive hemorrhage.

19. These circumstantial evidences read with the statements of the prosecution witnesses and the statement of the appellant himself prove one fact without doubt, i.e., the accused had certainly murdered his wife. His stand is that since he believed that his wife may not survive the burn injuries, therefore, he killed her by inflicting the injury with knife on her throat similar to the one inflicted upon the throats of the three young children. Thus, there is no escape for the appellant from conviction for the offence under Section 302 IPC vis-à-vis the murder of his wife Aradhna.

20. Now, coming to the death of the children, according to the prosecution, they had been murdered by the appellant while according to the appellant, they had been murdered by his wife Aradhna. One very abnormal conduct on the part of the appellant comes to light from the evidence on record that a father, seeing his wife killing his children, would certainly have prevented the death of at least two out of the three children. He could have overpowered his wife and could even have prevented the murder of all the three children. This abnormal conduct of the appellant renders his defence unbelievable and untrustworthy. Upon appreciation of the evidence on record, we are more inclined to accept the story of the prosecution though it is primarily based on circumstantial evidence and there is no witness to give optical happening of events. Once these circumstances have been proved and the irresistible conclusion points to the guilt of the accused, the accused has to be held guilty of the offences. Normally, the injuries like the ones inflicted in the present case would not lead to instantaneous death. The excessive bleeding leading to death would be possible over a

short period. The injured would struggle before he succumbs to such injury. As alleged by the accused, if the wife caused death of all the three children, he could have certainly prevented death of at least two of them. When the deceased inflicted such severe injuries on the throat of the sleeping child, the child would have got up, there would have been commotion and disturbance in the room which would have provided enough opportunity to the appellant to protect his other two children. According to the prosecution, at that stage, none had suffered any injury. This unnatural conduct of the accused in not making an effort to protect the children and exhibiting helplessness creates a serious doubt and renders the entire case put forward by the defence as unreliable and of no credence. This abnormal conduct of exhibiting helplessness on the part of the appellant creates a serious doubt and entire case put forward by the defence loses its credibility.

21. The cumulative effect of the prosecution evidence is that the accused persisted with commission of the crime despite availability of an opportunity to check himself from indulging in such heinous crime. May be there was some provocation initially but nothing can justify his conduct. Whatever be the extent of his anger, revenge and temper, he still could have been kind to his own children and spared their life. He is expected to have overcome his doubts about the conduct of his wife, for the larger benefit of his own children. Though the appellant had stated that he lost his mind and did not know what he was doing, this excuse is not worthy of credence. Admittedly, he was not ailing from any mental disorder or frustration. He was a person who was earning his livelihood by working hard.

22. Having appreciated the evidence on record, we have no hesitation in holding that the appellant is guilty of an offence under Section 302 IPC for murdering his wife and three minor children. He deserves to be punished accordingly.

23. Now, coming to the question of quantum of sentence, it is always appropriate for this Court to remind itself of the need

for recording of special reasons, as contemplated under Section 354(3) Cr.P.C., where the Court proposes to award the extreme penalty of death to an accused. This leads us to place on record the principles governing exercise of such discretion which have been stated in a very recent judgment of this Bench in the case of *Ramnaresh* (supra) wherein the Court, after considering the entire law on the subject, recapitulated and enunciated the aggravating and mitigating circumstances as well as the principles that should guide the judicial discretion of the Court in such cases. This Court held as under :

> "The above judgments provide us with the dicta of the Court relating to imposition of death penalty. Merely because a crime is heinous per se may not be a sufficient reason for the imposition of death penalty without reference to the other factors and attendant circumstances.
>
> Most of the heinous crimes under the IPC are punishable by death penalty or life imprisonment. That by itself does not suggest that in all such offences, penalty of death should be awarded. We must notice, even at the cost of repetition, that in such cases awarding of life imprisonment would be a rule, while 'death' would be the exception. The term 'rarest of rare case' which is the consistent determinative rule declared by this Court, itself suggests that it has to be an exceptional case. The life of a particular individual cannot be taken away except according to the procedure established by law and that is the constitutional mandate. The law contemplates recording of special reasons and, therefore, the expression 'special' has to be given a definite meaning and connotation. 'Special reasons' in contra-distinction to 'reasons' simplicitor conveys the legislative mandate of putting a restriction on exercise of judicial discretion by placing the requirement of special reasons.
>
> Since, the later judgments of this Court have added to the principles stated by this Court in the case of *Bachan*

Singh (supra) and *Machhi Singh* (supra), it will be useful to re-state the stated principles while also bringing them in consonance, with the recent judgments.

The law enunciated by this Court in its recent judgments, as already noticed, adds and elaborates the principles that were stated in the case of *Bachan Singh* (supra) and thereafter, in the case of *Machhi Singh* (supra). The aforesaid judgments, primarily dissect these principles into two different compartments – one being the 'aggravating circumstances' while the other being the 'mitigating circumstance'. The Court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the Court. It will be appropriate for the Court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the Court as contemplated under Section 354(3) Cr.P.C.

Aggravating Circumstances :

1. The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

2. The offence was committed while the offender was engaged in the commission of another serious offence.

3. The offence was committed with the intention to create a fear psychosis in the public at large and was committed

in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

4. The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

5. Hired killings.

6. The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

7. The offence was committed by a person while in lawful custody.

8. The murder or the offence was committed, to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 Cr.P.C.

9. When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

10. When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

11. When murder is committed for a motive which evidences total depravity and meanness.

12. When there is a cold blooded murder without provocation.

13. The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating Circumstances :

1. The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

2. The age of the accused is a relevant consideration but not a determinative factor by itself.

3. The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

4. The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

5. The circumstances which, in normal course of life, would render such a behavior possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behavior that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

6. Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a pre-ordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

7. Where it is absolutely unsafe to rely upon the testimony of a sole eye-witness though prosecution has brought home the guilt of the accused.

While determining the questions relateable to sentencing policy, the Court has to follow certain principles

and those principles are the loadstar besides the above considerations in imposition or otherwise of the death sentence.

Principles :

1. The Court has to apply the test to determine, if it was the 'rarest of rare' case for imposition of a death sentence.

2. In the opinion of the Court, imposition of any other punishment, i.e., life imprisonment would be completely inadequate and would not meet the ends of justice.

3. Life imprisonment is the rule and death sentence is an exception.

4. The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant circumstances.

5. The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime.

Stated broadly, these are the accepted indicators for the exercise of judicial discretion but it is always preferred not to fetter the judicial discretion by attempting to make the excessive enumeration, in one way or another. In other words, these are the considerations which may collectively or otherwise weigh in the mind of the Court, while exercising its jurisdiction. It is difficult to state, it as an absolute rule. Every case has to be decided on its own merits. The judicial pronouncements, can only state the precepts that may govern the exercise of judicial discretion to a limited extent. Justice may be done on the facts of each case. These are the factors which the Court may

consider in its endeavour to do complete justice between the parties.

The Court then would draw a balance-sheet of aggravating and mitigating circumstances. Both aspects have to be given their respective weightage. The Court has to strike a balance between the two and see towards which side the scale/balance of justice tilts. The principle of proportion between the crime and the punishment is the principle of 'just deserts' that serves as the foundation of every criminal sentence that is justifiable. In other words, the 'doctrine of proportionality' has a valuable application to the sentencing policy under the Indian criminal jurisprudence. Thus, the court will not only have to examine what is just but also as to what the accused deserves keeping in view the impact on the society at large.

Every punishment imposed is bound to have its effect not only on the accused alone, but also on the society as a whole. Thus, the Courts should consider retributive and deterrent aspect of punishment while imposing the extreme punishment of death.

Wherever, the offence which is committed, manner in which it is committed, its attendant circumstances and the motive and status of the victim, undoubtedly brings the case within the ambit of 'rarest of rare' cases and the Court finds that the imposition of life imprisonment would be inflicting of inadequate punishment, the Court may award death penalty. Wherever, the case falls in any of the exceptions to the 'rarest of rare' cases, the Court may exercise its judicial discretion while imposing life imprisonment in place of death sentence."

24. First and the foremost, this Court has not only to examine whether the instant case falls under the category of 'rarest of rare' cases but also whether any other sentence,

except death penalty, would be inadequate in the facts and circumstances of the present case.

25. We have already held the appellant guilty of an offence under Section 302, IPC for committing the murder of his three children and the wife. All this happened in the spur of moment, but, of course, the incident must have continued for a while, during which period the deceased Aradhna received burn injuries as well as the fatal injury on the throat. All the three children received injuries with a knife similar to that of the deceased Aradhna. But one circumstance which cannot be ignored by this Court is that the prosecution witnesses have clearly stated that there was a rift between the couple on account of her talking to Liladhar Tiwari, the neighbor, PW10. Even if some credence is given to the statement made by the accused under Section 313 Cr.P.C. wherein he stated that he had seen the deceased and PW10 in a compromising position in the house of PW10, it also supports the allegation of the prosecution that there was rift between the husband and wife on account of PW10. It is also clearly exhibited in the FIR (P27) that the accused had forbidden his wife from talking to PW10, which despite such warning she persisted with and, therefore, he had committed the murder of her wife along with the children. It will be useful to refer to the conduct of the accused prior to, at the time of and subsequent to the commission of the crime. Prior to the commission of the crime, none of the prosecution witnesses, including the immediate blood relations of the deceased, made any complaint about his behaviour or character. On the contrary, it is admitted that he used to prohibit Aradhna from speaking to PW10 about which she really did not bother. His conduct, either way, at the time of commission of the crime is unnatural and to some extent even unexpected. However, subsequent to the commission of the crime, he was in such a mental state that he wanted to commit the suicide and even inflicted injuries to his own throat and also went to the bye-pass road with the intention of committing suicide, where he was stopped by PW4, Head Constable and taken to

the Police Station wherein he lodged the FIR Exhibit P27. In other words, he felt great remorse and was sorry for his acts. He informed the Police correctly about what he had done.

26. Still another mitigating circumstance is that as a result of the commission of the crime, the appellant himself is the greatest sufferer. He has lost his children, whom he had brought up for years and also his wife. Besides that, it was not a planned crime and also lacked motive. It was a crime which had been committed out of suspicion and frustration. The circumstances examined cumulatively would, to some extent, suggest the existence of a mental imbalance in the accused at the moment of committing the crime. It cannot be conceived much less accepted by any stretch of imagination that the accused was justified in committing the crime as he claims to have believed at that moment.

27. Considering the above aspects, we are of the considered view that it is not a case which falls in the category of 'rarest of rare' cases where imposition of death sentence is imperative. It is also not a case where imposing any other sentence would not serve the ends of justice or would be entirely inadequate.

28. Once we draw the balance-sheet of aggravating and mitigating circumstances and examine them in the light of the facts and circumstances of the present case, we have no hesitation in coming to the conclusion that this is not a case where this Court ought to impose the extreme penalty of death upon the accused. Therefore, while partially accepting the appeals only with regard to quantum of sentence, we commute the death sentence awarded to the accused to one of life imprisonment (21 years).

N.J. Appeals partly allowed.

RAMNARESH & ORS.
v.
STATE OF CHHATTISGARH
(Criminal Appeal Nos. 166-167 of 2010)

FEBRUARY 28, 2012

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

PENAL CODE, 1860: ss.302, 376(2)(g), 499 – Rape and murder – Four accused – Allegation against the accused that they raped victim-deceased and thereafter strangulated her to death – Testimony of servant aged 16 years (PW6) who was present at the time of incident and was threatened by the accused not to tell anyone about the incident – Conviction u/ ss.302, 376(2)(g), 499 based on testimony of PW6 and award of death sentence – On appeal, held: There was no contradiction in the testimony of PW6 – His statement was fully corroborated by medical evidence – Both the external and internal injuries that the deceased suffered as a consequence of rape and the strangulation clearly indicated that the crime could not have been committed by a single person – Once that possibility is ruled out, testimony of PW6, despite he being the sole eye-witness, need not be doubted – In statement made u/s.313, CrPC accused denied their presence on the spot, at the time of occurrence – Thus, it was for them to prove that they were not present at the place of occurrence and were entitled to plea of alibi – They miserably failed to establish this fact – Delay in lodging FIR duly explained – The cumulative effect of the oral/documentary and expert evidence was that the prosecution was able to prove its case beyond any reasonable doubt – The accused were guilty of committing the offence u/ss.499, 376(2)(g) and 302 – As regard sentencing, the possibility of their being reformed not ruled out – Considering the age of the accused, possibility of the death of the deceased occurring accidently and the

possibility of the accused reforming themselves, they cannot be termed as 'social menace' – All these accused committed a heinous and inhumane crime for satisfaction of their lust, but it cannot be held with certainty that the case fell in the 'rarest of rare' cases – Accordingly, the sentence of death commuted to that for life imprisonment (21 years).

SENTENCE/SENTENCING: Sentencing policy – Guiding principles – Death sentence and principles governing its conversion to life sentence – Held: The law requires Courts to record special reasons for awarding death sentence – Court has to consider matters like nature of the offence, how and under what circumstances it was committed, the extent of brutality with which the offence was committed, the motive for the offence, any provocative or aggravating circumstances at the time of commission of the crime, the possibility of the convict being reformed or rehabilitated, adequacy of the sentence of life imprisonment and other attendant circumstances – These factors cannot be similar or identical in any two given cases – Thus, it is imperative for the Court to examine each case on its own facts, in light of the enunciated principles – It is only upon application of these principles to the facts of a given case that the Court can arrive at a final conclusion whether the case is one of the 'rarest of rare' cases and imposition of death penalty alone shall serve the ends of justice – Both aspects have to be given their respective weightage – The Court has to strike a balance between the two and see towards which side the scale/balance of justice tilts – The principle of proportion between the crime and the punishment is the principle of 'just deserts' that serves as the foundation of every criminal sentence that is justifiable – In other words, the 'doctrine of proportionality' has a valuable application to the sentencing policy under the Indian criminal jurisprudence – Thus, the court will not only have to examine what is just but also as to what the accused deserves keeping in view the impact on the society at large – Every punishment imposed is bound to have its effect not only on the accused

alone, but also on the society as a whole – Thus, the Courts should consider retributive and deterrent aspect of punishment while imposing the extreme punishment of death.

WITNESSES: Sole witness – Testimony of – Evidentiary value of – Discussed.

The prosecution case was that on the fateful day, the victim-deceased was sleeping in her house. PW-6, the servant aged 16 years was watching television in the verandah. All the accused came to her house. One of the accused was the brother of PW-1 (the husband of the deceased). PW-1 was not in the house. Two accused sat with PW6 and the other two accused went inside the room where the deceased was sleeping and committed rape on her. After committing rape, they came out and sat with PW6 and the other two accused went inside and committed rape on her. The accused asked PW6 to go away to which he objected. Upon his objection, he was threatened of elimination. Thereafter PW6 went to the room of the deceased and saw that she was breathing heavily and was not able to speak and blood was oozing out from her mouth. PW6 came out and he was again threatened by all the accused. Thereafter all the accused asked PW6 to go to the mother of the deceased (PW12) and tell her that the deceased was not waking up. PW6 went to PW12 and narrated the incident as directed by the accused. PW12 went to the house of the deceased where she found the deceased lying dead. She called the neighbours and thereafter, information was given to PW1, husband of the deceased. PW1 stated in his statement under Section 161, Cr.P.C. that PW6 had not told him as to how the deceased had died. In his statement, he had also stated that he had not married the deceased and she was staying with him as his mistress and the deceased was married to one 'B'. He also stated that he suspected 'B' of committing the said crime. The other witnesses, i.e. PW2, PW5 and PW10, had seen the accused-brother of

PW1 and the other accused assembling outside the house of the deceased became hostile during their examination before the court. The trial court convicted the four accused (the appellants), for offences under Sections 499, 376(2)(g) and 302 read with Section 34, IPC and passed death sentence. The High Court upheld the conviction and the sentence. The instant appeal was filed challenging the order of the High Court.

Partly allowing the appeal, the Court

HELD: 1. PW6 who was the main witness of the prosecution, was about 16 years old at the time of recording of his statement in the Court. He fully supported the case of the prosecution and was subjected to a lengthy cross-examination. PW12 was the mother of the deceased and she corroborated the statement of PW6. PW1, PW6 and PW12 substantially supported the case of the prosecution and there was no substantial conflict or contradiction in their statements. The report of the FSL was inconclusive but not negative so as to provide the accused with any material benefit. [Paras 7, 9, 10, 11] [653-F; 654-C-E; 655-B-C]

Joseph v. *State of Kerala* **(2003) 1 SCC 465: 2002 (4) Suppl. SCR 439;** *State of Haryana* v. *Inder Singh & Ors.* **(2002) 9 SCC 537 – referred to.**

2. One very important aspect of the instant case was that the accused were not declared accused instantaneously. PW6 was kept in the Police Station for two days apparently for the purposes of verifying and investigating what he informed the police. The needle of suspicion pointed towards PW6 and 'B' for the reason that 'B' was earlier married to the deceased and PW6 with reference to the circumstances in existence at the spot and he being the only person available. The possibility of PW6 having committed the crime is ruled out in view

of the evidence collected during the investigation. It was nobody's case that there was even an iota of evidence pointing towards 'B' for commission of such an offence. [Paras 12, 13] [655-C-B, H; 656-A]

3. It is not the quantity but the quality of the witnesses which matters for determining the guilt or innocence of the accused. The testimony of a sole witness must be confidence-inspiring and beyond suspicion and should not leave any doubt in the mind of the Court and has to be corroborated by other evidence produced by the prosecution in relation to commission of the crime and involvement of the accused in committing such a crime. In the instant case, PW6, at the time of occurrence and even at the time of recording of the statement, was a young boy of 16 years. He had been serving in the house of PW1, for a number of years prior to the date of incident. It was his regular feature to have his meals as well as sleep in the *verandah* of the house of PW1. There existed no motive for him to commit the crime. He was kept under continuous threat to his life right from the time the accused entered the house of the deceased till the accused were taken in police custody after recording evidence of various persons, more importantly, PW1, PW12, PW6 and PW7. His statement clearly narrated how the offence was committed by the accused and there was nothing abnormal and inconsistent in his testimony. Furthermore, his statement was fully corroborated by medical evidence of PW7 and the testimony of PW12. The confirmation of blood on the piece of saree used for gagging the mouth of the deceased and the confirmation of presence of semen and human spermatozoa on the vaginal slides of the deceased and the findings during autopsy duly proved by PW7 and the corroboration of other witnesses including that of the Investigating Officer would leave no room for any doubt that the appellants had committed house trespass in the house of the

deceased and committed the offence with which they were charged. A very significant piece of evidence in the instant case was the medical evidence and the injuries inflicted upon the body of the deceased. Both, the external and internal injuries that the deceased suffered as a consequence of rape and the strangulation clearly indicated that the crime could not have been committed by a single person. Once that possibility is ruled out, it would attach greater reliability to the testimony of PW6. Thus, the statement of PW6, despite he being the sole eye-witness, need not be doubted. [Paras 14, 15, 16] [656-G; 657-B-H; 658-A-B]

State of Gujarat v. Patel Mohan Mulji **AIR 1994 SC 250 – distinguished.**

4. There were four or five prosecution witnesses who had been declared hostile during the course of hearing of the trial. These witnesses were not the witnesses to the scene of crime. They were witnesses only to support the fact that the accused persons were seen together near the house of the deceased after all others had gone to their respective houses, after watching television at the house of the deceased. This fact is not the determinative factor and does not demolish the case of the prosecution in its entirety or otherwise. The presence of the accused-brother of PW1 at the house of the deceased immediately after the occurrence and trying to keep a watch on PW6 clearly showed that the most likely and truthful witness in the case of the prosecution was PW6. PW6 had withstood the long cross-examination despite his young age, the threat extended to him by the accused and being the sole eye-witness of such a heinous crime. It goes to the credit of this witness that despite the fact that other five witnesses had turned hostile being the person of the village, he nevertheless stood to his testimony. [Para 17] [658-F-H; 659-A-C]

5. The occurrence took place at about 11 p.m. at night in a village area where normally by this time, people go to their respective houses and stay inside thereafter. After committing the rape on the deceased and her subsequent death which itself took a considerable time, the accused persons remained in the house for some time. Thereafter, they made it sure that PW6 goes to the house of PW12 and tells her incorrectly and without disclosing the true facts that the deceased was not waking up despite efforts, which he did and this fact was fully established by the statement of PW12. In the meanwhile, the news had spread and one 'A' rung up PW1 who came to the spot of occurrence. After seeing his wife in that horrible condition and doubting that 'B' might have committed the crime since by that time PW6 had not told him the correct story, he went to the Police Station and lodged the FIR. Police registered the FIR under Sections 376 and 302 IPC. Thus, there was plausible explanation available on record of the case file which explained the delay in lodging the FIR. [Para 18] [659-D-G]

6. Exhibit P/12 was the post mortem report which depicted various external and internal injuries on the body of the deceased. The cause of death of the deceased was asphyxia due to throttling. As per the post mortem report, petechial hemorrhage of lungs was present, the right side of heart was filled with blood while the left chamber was empty and bloody froth was oozing from nostrils and mouth of the deceased. The expert evidence clearly demonstrated, particularly in view of the injuries caused to the deceased during the heinous crime, that it could not have been done by a single person and, therefore, involvement of two or more persons was most probable and in line with the story of the prosecution. The cumulative effect of the oral/ documentary and expert evidence was that the

prosecution was able to prove its case beyond any reasonable doubt. [Para 19] [661-A-E]

7.1. It was a case where not only the entire incriminating material evidence was put to the accused while they were being examined under Section 313 Cr.P.C. but also that the accused examined two witnesses DW1, and DW2, wife of accused-brother of PW1. In their statements under Section 313 Cr.P.C., they had taken the stand that they were not present at the place of occurrence but, in fact, they were present in their respective houses and as such they were falsely implicated. The two witnesses were examined in support of this fact. DW1 stated that he lived near the house of the deceased and he did not hear any noise or cries on the fateful night. The cross examination of these two witnesses clearly created a doubt in regard to the authenticity of their statements. Firstly, as per the version of the prosecution and as is even clear from the medical evidence, the mouth of deceased had been gagged. Therefore, the question of hearing any noise or screaming would not arise and, secondly, DW2 is the wife of the accused and is bound to speak in his favour as an interested witness. Furthermore, both these witnesses had not informed the Police during the course of investigation and even when the accused were arrested that they had been present at their respective houses and not at the place of occurrence. In fact, this has not even been the suggestion of the defence while cross-examining the prosecution witnesses. [Para 20] [661-F-H; 662-B-D]

7.2. In terms of Section 313 Cr.P.C., the accused has the freedom to maintain silence during the investigation as well as before the Court. The accused may choose to maintain silence or complete denial even when his statement under Section 313 Cr.P.C. 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. Right to fair trial, presumption of innocence unless proven guilty and proof by the prosecution of its case beyond any reasonable doubt are the fundamentals of our criminal jurisprudence. When speaking of prejudice to an accused, it has to be shown that the accused has suffered some disability or detriment in relation to any of these protections substantially. Such prejudice should also demonstrate that it has occasioned failure of justice to the accused. 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. [para 21] [662-E-H; 663-A]

Rafiq Ahmed @ Rafi v. *State of Uttar Pradesh* **(2011) 8 SCC 300 – relied on.**

7.3. It is a settled principle of law that the obligation to put material evidence to the accused under Section 313 Cr.P.C. is upon the Court. One of the main objects of recording of a statement under this provision of the Cr.P.C. is to give an opportunity to the accused to explain the circumstances appearing against him as well as to put forward his defence, if the accused so desires. But once he does not avail this opportunity, then consequences in law must follow. Where the accused takes benefit of this opportunity, then his statement made under Section 313 Cr.P.C., in so far as it supports the case of the prosecution, can be used against him for rendering conviction. Even under the latter, he faces the consequences in law. In the instant case, the accused have denied their presence on the spot, at the time of occurrence. Thus, it was for them to prove that they were not present at the place of occurrence and were entitled

to plea of *alibi*. They miserably failed to establish this fact. On the contrary, the behaviour explained by the defence witnesses appeared to be somewhat unnatural in the social set up in which the accused, the deceased and even some of the prosecution witnesses were living. They knew each other very well and the normal course of life in a village is that they are quite concerned with and actively participate in each other's affairs, particularly sad occasions. The accused brother of PW1, was present at the place of occurrence and was holding one of the minor children of PW1. This supported the statement of PW6 that he was constantly under threat and watch from either of the accused. The version put forward by the accused in their statement under Section 313 Cr.P.C. was unbelievable and unacceptable. There was no cogent evidence on record to support their plea. The prosecution was able to prove its case beyond reasonable doubt. The accused were guilty of committing the offence under Sections 499, 376(2)(g) and 302 IPC. [Paras 22-24] [663-B-G; 664-A]

8.1. The death sentence and principles governing its conversion to life imprisonment

Despite the transformation of approach and radical changes in principles of sentencing across the world, it has not been possible to put to rest the conflicting views on sentencing policy. The sentencing policy being a significant and inseparable facet of criminal jurisprudence, has been inviting the attention of the Courts for providing certainty and greater clarity to it. Capital punishment has been a subject matter of great social and judicial discussion and castacism. From whatever point of view it is examined, one undisputable statement of law follows that it is neither possible nor prudent to state any universal formula which would be applicable to all the cases of criminology where capital

punishment has been prescribed. It shall always depend upon the facts and circumstances of a given case. This Court has stated various legal principles which would be precepts on exercise of judicial discretion in cases where the issue is whether the capital punishment should or should not be awarded. The law requires the Court to record special reasons for awarding such sentence. The Court, therefore, has to consider matters like nature of the offence, how and under what circumstances it was committed, the extent of brutality with which the offence was committed, the motive for the offence, any provocative or aggravating circumstances at the time of commission of the crime, the possibility of the convict being reformed or rehabilitated, adequacy of the sentence of life imprisonment and other attendant circumstances. These factors cannot be similar or identical in any two given cases. Thus, it is imperative for the Court to examine each case on its own facts, in light of the enunciated principles. It is only upon application of these principles to the facts of a given case that the Court can arrive at a final conclusion whether the case in hand is one of the 'rarest of rare' cases and imposition of death penalty alone shall serve the ends of justice. Further, the Court would also keep in mind that if such a punishment alone would serve the purpose of the judgment, in its being sufficiently punitive and purposefully preventive. [Paras 25-26] [664-B-H; 665-A-B]

8.2. Merely because a crime is heinous *per se* may not be a sufficient reason for the imposition of death penalty without reference to the other factors and attendant circumstances. Most of the heinous crimes under the IPC are punishable by death penalty or life imprisonment. That by itself does not suggest that in all such offences, penalty of death alone should be awarded. In such cases awarding of life imprisonment would be a rule, while 'death' would be the exception. The

term 'rarest of rare' case which is the consistent determinative rule declared by this Court, itself suggests that it has to be an exceptional case. The life of a particular individual cannot be taken away except according to the procedure established by law and that is the constitutional mandate. The law contemplates recording of special reasons and, therefore, the expression 'special' has to be given a definite meaning and connotation. 'Special reasons' in contra-distinction to 'reasons' *simplicitor* conveys the legislative mandate of putting a restriction on exercise of judicial discretion by placing the requirement of special reasons. [Paras 36-37] [677-B-E]

8.3. The judgments in *Bachan Singh* and *Machhi Singh* primarily dissect the principles into two different compartments – one being the 'aggravating circumstances' while the other being the 'mitigating circumstances'. The Court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the Court. It will be appropriate for the Court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the Court as contemplated under Section 354(3) Cr.P.C.

<u>Aggravating Circumstances</u> :

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 Cr.P.C.

(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a

niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(11) When murder is committed for a motive which evidences total depravity and meanness.

(12) When there is a cold blooded murder without provocation.

(13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating Circumstances :

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behavior possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behavior that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a pre-ordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eye-witness though prosecution has brought home the guilt of the accused.

While determining the questions relateable to sentencing policy, the Court has to follow certain principles and those principles are the loadstar besides the other considerations in imposition or otherwise of the death sentence.

Principles :

(1) The Court has to apply the test to determine, if it was the 'rarest of rare' case for imposition of a death sentence.

(2) If in the opinion of the Court, imposition of any other punishment, i.e., life imprisonment would be completely inadequate and would not meet the ends of justice.

(3) Life imprisonment is the rule and death sentence is an exception.

(4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant considerations.

(5) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime.

These are the accepted indicators for the exercise of judicial discretion but it is always preferred not to fetter the judicial discretion by attempting to make the excessive enumeration, in one way or another. In other words, these are the considerations which may collectively or otherwise weigh in the mind of the Court, while exercising its jurisdiction. It is difficult to state it as an absolute rule. Every case has to be decided on its own merits. The judicial pronouncements, can only state the precepts that may govern the exercise of judicial discretion to a limited extent. Justice may be done on the facts of each case. These are the factors which the Court may consider in its endeavour to do complete justice between the parties. The Court then would draw a balance-sheet of aggravating and mitigating circumstances. Both aspects have to be given their respective weightage. The Court has to strike a balance between the two and see towards which side the scale/ balance of justice tilts. The principle of proportion between the crime and the punishment is the principle of *'just deserts'* that serves as the foundation of every criminal sentence that is justifiable. In other words, the 'doctrine of proportionality' has a valuable application to the sentencing policy under the Indian criminal jurisprudence. Thus, the court will not only have to examine what is just but also as to what the accused deserves keeping in view the impact on the society at large. Every punishment imposed is bound to have its effect not only on the accused alone, but also on the society as a whole. Thus, the Courts should consider retributive and deterrent aspect of punishment while

imposing the extreme punishment of death. [paras 39-43] [677-G-H; 678-A-H; 679-A-H; 680-A-H; 681-A-H; 682-A-D]

8.4. Wherever, the offence which is committed, manner in which it is committed, its attendant circumstances and the motive and status of the victim, undoubtedly brings the case within the ambit of 'rarest of rare' cases and the Court finds that the imposition of life imprisonment would be inflicting of inadequate punishment, the Court may award death penalty. Wherever, the case falls in any of the exceptions to the 'rarest of rare' cases, the Court may exercise its judicial discretion while imposing life imprisonment in place of death sentence. In the instant appeals, accused were guilty of the offences under Sections 376(2)(g) and 302 read with Section 34 IPC. On the question of quantum of sentence, the argument raised on behalf of the appellants was that all the accused were of young age at the time of commission of the crime, i.e. 21 to 31 years of age. The possibility of their being reformed cannot be ruled out. The Court has to consider various parameters and balance the mitigating circumstances against the need for imposition of capital punishment. The factors to be considered could be different than the mitigating circumstances. The age of the accused, possibility of the death of the deceased occurring accidently and the possibility of the accused reforming themselves, they cannot be termed as 'social menace'. It is unfortunate but a hard fact that all these accused have committed a heinous and inhumane crime for satisfaction of their lust, but it cannot be held with certainty that this case falls in the 'rarest of rare' cases. Accordingly, the sentence of death is commuted to that for life imprisonment (21 years). [paras 44, 46, 49-50] [682-D-F, G-H; 683-A; 684-H; 685-A-D]

Machhi Singh & Ors. v. *State of Rajasthan* **(1983) 3 SCC 470: 1983 (3) SCR 413;** *Dhananjoy Chatterjee @ Dhana v.*

State of West Bengal **(1994) 2 SCC 220: 1994 (1) SCR 37;** *Surja Ram v. State of Rajasthan* **(1996) 6 SCC 271: 1996 (6) Suppl. SCR 783;** *Prajeet Kumar Singh v. State of Bihar* **(2008) 4 SCC 434: 2008 (5) SCR 969;** *B.A. Umesh v. Registrar General, High Court of Karnataka* **(2011) 3 SCC 85: 2011 (2) SCR 367;** *State of Rajasthan v. Kashi Ram* **(2006) 12 SCC 254: 2006 (8) Suppl. SCR 501;** *Atbir v. Government of NCT of Delhi* **(2010) 9 SCC 1: 2010 (7) SCR 424;** *Ronny @ Ronald James Alwaris Etc. v. State of Maharashtra* **(1998) 3 SCC 625: 1998 (2) SCR 162;** *Allauddin Mian & Ors. v. State of Bihar* **(1989) 3 SCC 5: 1989 (2) SCR 498;** *Bantu @ Naresh Giri v. State of M.P.* **(2001) 9 SCC 615: 2001 (4) Suppl. SCR 298 – relied on.**

Case Law Reference:

2002 (4) Suppl. SCR 439	**referred to**	**Para 14**
(2002) 9 SCC 537	**referred to**	**Para 14**
AIR 1994 SC 250	**Distinguished**	**Para 17**
(2011) 8 SCC 300	**relied on**	**Para 21**
1983 (3) SCR 413	**relied on**	**Para 28, 38,39**
1994 (1) SCR 37	**relied on**	**Para 29**
1996 (6) Suppl. SCR 783	**relied on**	**Para 31**
2008 (5) SCR 969	**relied on**	**Para 32**
2011 (2) SCR 367	**relied on**	**Para 32**
2006 (8) Suppl. SCR 501	**relied on**	**Para 32**
2010 (7) SCR 424	**relied on**	**Para 32**
1998 (2) SCR 162	**relied on**	**Para 33**
1989 (2) SCR 498	**relied on**	**Para 34**
2001 (4) Suppl. SCR 298	**relied on**	**Para 35**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 166-167 of 2010.

From the Judgment & Order dated 24.07.2009 of the High Court of Chhattisgarh at Bilaspur in Criminal Appeal No. 1117 of 2007 & Criminal Reference No. 3 of 2007.

Vias Upadhyay, Vikram Patralekh, B.S. Banthia for the Appellants.

Atul Jha, Sandeep Jha, Dharmendra Kumar Sinha for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The present appeals are directed against the concurrent judgments of conviction and award of capital punishment. The Additional Sessions Judge, Pendra Road, District Bilaspur, convicted the four accused (the appellants herein), for offences under Sections 499, 376(2)(g) and 302 read with Section 34 of the Indian Penal Code, 1860 (for short 'IPC') and sentenced them vide judgment and order of sentence dated 20th November, 2007 as follows:

Offences	**Punishment/Sentence**
302/34 IPC	Award of capital sentence and ordered that they be hanged till death.
376(2)(g) IPC	Life Imprisonment and fine of Rs.200/- each. In case of default in the payment of fine, each accused to further undergo an additional rigorous imprisonment of one month each.
449 IPC	Ten years rigorous imprisonment with fine of Rs.200/- and in default to undergo additional rigorous imprisonment for one month.

2. The Division Bench of the High Court vide its judgment dated 24th July, 2009 confirmed the judgment and order of sentence passed by the learned Additional Sessions Judge giving rise to the present appeal.

3. Learned counsel appearing for the appellant, *inter alia,* but primarily, has raised the following challenges to the judgments under appeal:

(1) That the prosecution has failed to prove its case beyond any reasonable doubt.

(2) That the sole witness, PW6, Dhaniram is not a credible witness and, in fact, he himself falls within the realm of suspicion as being an accused. Number of other witnesses including, PW2, Sunita, PW5, Bela Bai, and PW10, Kamlesh, turned hostile in the court. This clearly is indicative of false implication of the accused.

(3) That there are variations and serious contradictions in the statements of the witnesses, which have been relied upon by the courts, while convicting the accused.

(4) Furthermore, there is an inordinate and unexplained delay in lodging the FIR. Therefore, the conviction of the accused is unsustainable. The contention is that the linking evidence is missing in the present case. The incriminating evidence produced by the prosecution does not connect the appellants with the commission of crime.

(5) The High Court has erred in law in relying upon the statement of the witnesses which are not reliable. The courts are expected to examine statements of such witnesses and/or sole witness cautiously. The learned Trial Court as well as the High Court has failed to apply these settled principles correctly to

the facts of the present case.

(6) FSL report does not clearly state or link the appellants with the commission of the crime.

For these reasons and grounds, the appellant claims acquittal.

4. Before we proceed to discuss the merits or otherwise of the above contentions, it will be necessary for us to state the case of the prosecution and the evidence on record. Rajkumari (the deceased) was residing at Village *Gullidand*, Police Station *Marwahi*, with her husband Indrajeet and two infant children. On 8th August, 2006, her husband had gone to the house of his father at Rajnagar. Rajkumari was at her residence with her children. On 9th August, 2006, Rajkumari had called Dhaniram, their domestic servant, to sleep in their house in the night. It was the day of R*aksha Bandhan.* Anita (PW3), Savita (PW2) and Bela Bai (PW5), neighbours of Rajkumari, visited her house to view television in the night. At about 9 o'clock, they went back to their houses after viewing television. Ranjeet Kewat, is the brother of Indrajeet and brother-in-law of Rajkumari. He had a house near the house of Indrajeet. Vishwanath, Amar Singh, Kamlesh and Ramnaresh, who used to reside at the house of Ranjeet came to his house, sat there for some time and then went away. At about 11.30 p.m., they are stated to have again come to the house of Ranjeet and consumed alcohol. Thereafter, at about 12 o'clock in the night, when Rajkumari had gone to sleep in her room and the servant, Dhaniram, was watching television in the *verandah,* the accused persons, Ranjeet, Vishwanath, Amar Singh and Ramnaresh came into the house of Rajkumari and told Dhaniram that they would have illicit relations with Rajkumari and if he disclosed anything to anybody, he would be eliminated. Ramnaresh and Amar Singh sat down along with Dhaniram while Ranjeet and Vishwanath went into the room of Rajkumari and committed rape on her. After committing the offence, they

came out and took Dhaniram into the courtyard. Then Ramnaresh and Amar Singh entered the room of Rajkumari. They also committed rape on her and came out after some time. Then, the accused asked Dhaniram to go away to which he objected. Upon his objection, he was threatened of elimination. Thereafter, Dhaniram went to the room of Rajkumari and saw that she was breathing heavily, was not able to speak and blood was oozing from her mouth and nose. Dhaniram came out of the room and was again threatened by all the accused. Ranjeet asked him to go to the house of his aunt (bua), mother of Rajkumari and tell her that Rajkumari is not waking up. Before leaving, they extended the threat again and told him to act as per their directions. Dhaniram went to the house of Sugaribai, mother of Rajkumari, PW12 and narrated the incident as he was directed by the accused. Sugaribai asked him to stay at her house while she went to the house of Rajkumari. There she noticed that Rajkumari was lying dead. She called the neighbours and thereafter, the information was given to Indrajeet, husband of the deceased, who came in the morning. Indrajeet visited the Police Station Marwahi and informed about the death of Rajkumari vide Ex.P1. The police visited the spot and took the body of the deceased vide Ex.P3 and also collected other materials from the place of occurrence. Dr. Sheela Saha and Dr. Mahesh Raj conducted the postmortem of the dead body and submitted the postmortem report, Ex.P12, wherein it was opined that death of Rajkumari had taken place due to blockage of breathing on account of strangulation and the act of commission of rape on her was also established. The police registered a case under Section 376/ 302 IPC vide Ex.P16 and started its investigation. Statements of as many as 14 witnesses were recorded by the police. Various items like blood stained underwear and piece of yellow-coloured saree on which blood spots were visible at various places were also seized from the place of occurrence and were exhibited as Ex.P10. Slide of semen of the accused from the hospital was seized vide seizure memo Ex.P13. Thereafter, the accused were arrested. During further

investigation, clothes, shirts and underwear of the other accused persons and the petticot and saree of the deceased were also seized. After the medical examination of the accused, report of the FSL and recording of statements of the witnesses, the police filed the report before the court of competent jurisdiction. The accused were committed to the Court of Sessions and tried in accordance with law, which resulted in their conviction, as afore-noticed. As per Ex.P12, there were following injuries upon the person of the deceased:-

> "External Injury in the neck- (A) Abrasion with scratch mark by nail present. Abrasion in number, below the angle of right mandible and sternocleidomastoideus muscles present size measuring 0.5 x 0.5 cm (B) Scratch mark – length 1" present above mentioned area. Abrasion on the left side of Neck below the angle of mandible to mastoid process abrasion scratch mark 2 ½" present.
>
> (C) Abrasion in the thigh 1" x 0.5" and 1" x 1".
>
> 1" x 1" contusion on private part on medial side of the Rt. Present on both medial aspect of thigh.
>
> <u>ON P/V EXAMINAL</u>
>
> Laceration plus abrasion 3 to 4" in no. over perineum. Blood mix discharge present.
>
> P/V Ex-Uterus Anteverted normal size."

5. PW1, husband of the deceased had stated in his statement under Section 161 of the Code of Criminal Procedure (Cr.P.C.) that PW6 had not told him as to how Rajkumari had died. In his statement, he had also stated that he had not married Rajkumari and she was staying with him as his mistress. He had been married earlier to a girl from village Pyari. However, he did not remember the name of the girl, as it was more than 16 years ago. He further stated that the deceased Rajkumari was married to one Bhupendra, who

was from the village of her father, i.e. village Khongapani. He admitted that he had two children from Rajkumari and also that his relationship with Bhupendra were bitter on account of retaining Rajkumari as his mistress. He also stated that he had suspected Bhupendra of committing the said crime. According to this witness, he was informed by one Mr. Ashok of the incident. He stated that Dhaniram had been serving as a servant with them for the past three years and he used to have his meals and sleep in the verandah of the house. The broken pieces of bangles of Rajkumari were kept by Dhaniram when he cleaned the room.

6. The other witnesses, i.e. PW2, PW5 and PW10, who had seen Ranjeet and the other accused assembling outside the house of Rajkumari had been declared hostile during their examination before the court by the prosecutor. These witnesses, however, had admitted that they had acquaintance with the accused persons as well as with the deceased Rajkumari. PW5, Bela Bai stated that she had gone to watch television in the house of Rajkumari along with Anita and Savita and nobody else was there. It was at that stage that the witness was declared hostile and she denied the suggestion that she had seen the accused persons. This witness and all other witnesses live in and around the house of Rajkumari.

7. PW6 who is the main witness of the prosecution, was about 16 years old at the time of recording of his statement in the Court. He fully supported the case of the prosecution and was subjected to a lengthy cross-examination. According to him, he was watching television when Ranjeet along with other accused had come to the house of Rajkumari. He also stated that he did not raise hue and cry as he was under constant threat by the other co-accused, who were surrounding him. He also stated that he was confused and was unable to point out anything at that point of time. In his cross-examination, he was posed the following question, which adds to the veracity of his statement:

> "Question: - When Raj Kumari was restless due to pain, did you go to call up Ranjeet?
>
> Ans:- Why I should have gone to call up Ranjeet when he, in person, was involved in this incident."

8. As already noticed, this witness was subjected to a detailed cross-examination. He also admitted in his cross-examination "it is correct to say that I was afraid whether the police would not make me the accused."

9. PW12, Sugaribai, is the mother of the deceased and she had also supported the case of the prosecution and corroborated the statement of PW6. She stated that when she visited the house of Rajkumari, Ranjeet was holding the younger infant of Rajkumari in his lap and she had sent Ranjeet to call the people but instead he called Rewa Lohar, a witch doctor.

10. PW1, PW6 and PW12 had substantially supported the case of the prosecution and we are unable to notice any substantial conflict or contradiction in their statements. The semen, blood and blood-stained clothes, which had been seized during the investigation, had been sent for examination. The report of the FSL had been placed on record as Ex.P23. Such evidence would be admissible in terms of Section 293 Cr.P.C. The merit or otherwise of this report was examined by the High Court as follows:-

> "(8) During trial, report of the Forensic Science Laboratory, Raipur Ex.P-23 dated 31-7-2007 was produced and admitted in evidence under Section 293 of the Code by which presence of blood on Articles A, B, C, D, E, F1, F2 and presence of seminal stains and human spermatozoa on Articles C, D, E, F1, F2, G1, H1, I1, J1 and K1 was confirmed. Seminal stains and human spermatozoa was not found on Articles A and B. The seminal stains on Articles C, D, E, F1 and F2 were not sufficient for

serological examination. The Slides Articles G2, H2, I2, J2 and K2 were preserved if D.N.A. Test was felt necessary. The prosecution examined as many as 16 witnesses. The appellants/accused examined Samelal D.W.-1 and Kamla D.W.-2 wife of Ranjeet to establish that the appellants/ accused had slept in their respective houses between 9 to 10 P.M. on 9-8-2006."

11. As is evident from the above findings, the report of the FSL was inconclusive but not negative, which would provide the accused with any material benefit.

12. We have examined this case in light of the above ocular and documentary evidence. One very important aspect of the present case is that the accused were not declared accused instantaneously. Dhaniram had been kept in the Police Station for two days thereafter apparently for the purposes of verifying and investigating what he informed the police. The needle of suspicion pointed towards Dhaniram and Bhupendra for the reason that Bhupendra was earlier married to Rajkumari and Dhaniram with reference to the circumstances in existence at the spot and he being the only person available. It was argued that Dhaniram could have committed the crime as he was the only person present in the house when all the persons watching the television had left the house. Thus, the Investigating Agency had to conduct a proper investigation before it could identify the real suspects and the accused in the case, which in our opinion, the police did.

13. The fact that at a given point of time, some person other than the accused were suspected to have committed the offence would lose its relevance once the investigation is completed, report under Section 173 Cr.P.C. is filed before the Court of competent jurisdiction, of course, unless the Court, upon presentation of the report finds that some other person is also liable to be summoned as an accused or directs further investigation. In the present case, the possibility of PW6, Dhaniram, having committed the crime is ruled out in view of

the evidence collected during the investigation. It is nobody's case before us that there is even an iota of evidence which points towards Bhupendra for commission of such an offence.

14. Now, we may deal with the first contention raised on behalf of the appellants with reference to the credibility of the testimony of PW6. The learned counsel appearing for the appellants, contended that PW6, the sole eye-witness, cannot be relied upon to convict the accused for the reason that the witness, being a suspect himself, is not credible and has not spoken the truth before the Court. It is also contended that the Court should deal with the statement of a sole eye-witness cautiously and it may not be very safe to rely upon the testimony of such a witness. In support of his contention, he derives strength from the judgments of this Court in the cases of *Joseph* v. *State of Kerala* [(2003) 1 SCC 465] and *State of Haryana* v. *Inder Singh & Ors.* [(2002) 9 SCC 537]. In the case of *Joseph*, this Court has stated the principle that where there is a sole witness to the incident, his evidence has to be accepted with an amount of caution and after testing it on the touchstone of evidence tendered by other witnesses or the material evidences placed on record. This Court further stated that Section 134 of the Indian Evidence Act does not provide for any particular number of witnesses and it would be permissible for the Court to record and sustain a conviction on the evidence of a solitary eye-witness. But, at the same time, such a course can be adopted only if evidence tendered by such a witness is credible, reliable, in tune with the case of the prosecution and inspires implicit confidence. In the case of *Inder Singh* (supra), the Court held that it is not the quantity but the quality of the witnesses which matters for determining the guilt or innocence of the accused. The testimony of a sole witness must be confidence-inspiring and beyond suspicion, thus, leaving no doubt in the mind of the Court.

15. The principles stated in these judgments are indisputable. None of these judgments say that the testimony

of the sole eye-witness cannot be relied upon or conviction of an accused cannot be based upon the statement of the sole eye-witness to the crime. All that is needed is that the statement of the sole eye-witness should be reliable, should not leave any doubt in the mind of the Court and has to be corroborated by other evidence produced by the prosecution in relation to commission of the crime and involvement of the accused in committing such a crime.

16. In light of this principle, now we may examine the facts of the present case. PW6, at the time of occurrence and even at the time of recording of the statement, was a young boy of 16 years. He had been serving in the house of Indrajeet, PW1, for a number of years prior to the date of incident. It was his regular feature to have his meals as well as sleep in the *verandah* of the house of PW1. There existed no motive for him to commit the crime. He was kept under continuous threat to his life right from the time Ranjeet and others entered the house of the deceased Rajkumari till the accused were taken in police custody after recording evidence of various persons, more importantly, PW1 (Indrajeet), PW12 (Sugaribai), PW6 (Dhaniram) and PW7 (Dr. Shila Saha). His statement clearly narrates how the offence was committed by the accused and there is nothing abnormal and inconsistent in his testimony. Furthermore, his statement is fully corroborated by medical evidence of PW7, Dr. Shila Saha and the testimony of PW12, Sugaribai. The confirmation of blood on the piece of saree used for gagging the mouth of Rajmukari and the confirmation of presence of semen and human spermatozoa on the vaginal slides of Rajkumari and the findings during autopsy duly proved by PW7, Dr. Shila Saha and the corroboration of other witnesses including that of the Investigating Officer leave no room for any doubt that the appellants had committed house trespass in the house of Rajkumari and committed the offence with which they are charged. A very significant piece of evidence in the present case is the medical evidence and the injuries inflicted upon the body of the deceased. Both, the

external and internal injuries that the deceased suffered as a consequence of rape and the strangulation clearly indicate that the crime could not have been committed by a single person. Once that possibility is ruled out, it would attach greater reliability to the testimony of PW6. Thus, the statement of PW6, despite he being the sole eye-witness, need not be doubted by this Court. It fully satisfies the tests of law enunciated in the above judgments of this Court. Resultantly, we find no merit in this submission of the learned counsel appearing for the appellants.

17. The next contention is that there was inordinate delay in lodging the FIR which gave an opportunity to the police to falsely implicate the accused. Thus, the entire prosecution story being founded on the said FIR, needs to be disbelieved by the Court and the appellants be entitled to acquittal. In this regard, reliance has been placed upon the judgment of this Court in the case of *State of Gujarat v. Patel Mohan Mulji* [AIR 1994 SC 250]. At the very outset, we may notice that the facts of the case in *Patel Mohan Mulji* (supra) are significantly different from the facts of the case in hand. There, the Court had acquitted the accused not only for the sole reason of delay in recording the FIR but also for the reason that there was close relationship of witnesses with the deceased and the accused. There were discrepancies in the inquest report and clear conflict between the medical evidence and the oral evidence. The evidence of the prosecution was also found to be suffering from serious infirmities. In the present case, none of these exists. There are four or five prosecution witnesses, including PW2, PW3, PW4, PW5 and PW10, who had been declared hostile during the course of hearing of the trial. These witnesses were not the witnesses to the scene of crime. They were witnesses only to support the fact that the accused persons were seen together near the house of the deceased Rajkumari, after all others had gone to their respective houses, after watching television at the house of the deceased. This fact is not the determinative factor and does not demolish the case

of the prosecution in its entirety or otherwise. The presence of Ranjeet Kewat at the house of the deceased, Rajkumari, immediately after the occurrence and trying to keep a watch on PW6 clearly shows that the most likely and truthful witness in the case of the prosecution is PW6. PW6, as already noticed, had withstood the long cross-examination despite his young age, the threat extended to him by the accused and being the sole eye-witness of such a heinous crime. It goes to the credit of this witness that despite the fact that other five witnesses had turned hostile being the person of the village, he nevertheless stood to his testimony.

18. As far as the delay is concerned, we are not in agreement with the learned counsel appearing for the appellants that the delay does not stand explained in the present case. The occurrence took place at about 11 p.m. at night in a village area where normally by this time, people go to their respective houses and stay inside thereafter. After committing the rape on the deceased and her subsequent death which itself took a considerable time, the accused persons remained in the house for some time. Thereafter, they made it sure that PW6 goes to the house of PW12 and tells her incorrectly and without disclosing the true facts that the deceased was not waking up despite efforts, which he did and this fact is fully established by the statement of PW12. In the meanwhile, the news had spread and one Ashok had rung up PW1 who came to the spot of occurrence. After seeing his wife in that horrible condition and doubting that Bhupendra might have committed the crime since by that time PW6 had not told him the correct story, he went to the Police Station and lodged the FIR at about 10.50 a.m. on 10th August, 2006. Police registered the FIR under Sections 376 and 302 IPC vide Exhibit P16. Thus, there is plausible explanation available on record of the case file which explains the delay in lodging the FIR. We also cannot lose sight of the statement of PW4, father of PW6, who stated that when he went to the Police Station, he found his son there who informed him that he was in the Police Station

since the past two days. His son had challenged all the four accused persons in his presence and later he was informed by the Police that his son was a witness in the case. This witness knew the accused persons as well as the deceased Rajkumari. He was a party to the seizure memo, Exhibit P/7 to P/10 though in the Court he stated that nothing was seized in his presence and, at this stage, he was declared hostile. The statement of PW6 does not suffer from any legal or factual infirmity and appears to be the true and correct version of what actually happened at the scene of occurrence. The delay, if any, in lodging the FIR, thus, stands explained and is, in no way, fatal to the case of the prosecution.

19. Now, we would deal with the contention that the recoveries effected during the period of investigation are improper and inadmissible. The report submitted by the FSL, as per Exhibit P/23, does not indicate or connect the accused with the commission of the crime and, therefore, the case of the prosecution should essentially fail. This argument, again, is without any merit. Firstly, Exhibit P/23 and the effect of the FSL Report have been appropriately discussed by the High Court in its judgment. The articles seized, the human blood noticed on Articles A, B, C, D, E, F1 and F2 and presence of seminal stains and human spermatozoa on Articles C, D, E, F1, F2, G1, H1, I1, J1 and K1 confirmed. Seminal stains and human spermatozoa were not found on Articles A and B. The seminal stains on Articles C, D, E, F1 and F2 were not sufficient for serological examination. This was so recorded in Exhibit P23. This document further stated that Articles G2, H2, I2, J2 and K2 were not examined by the FSL, Raipur. It was further recorded that in case of necessity, the DNA test could be performed at Hyderabad. The report also stated that the articles with regard to the blood group and serum had been sent to Kolkata Laboratory for futher investigation. Indefinite conclusion of the expert to this extent, cannot be treated as a report entirely in favour of the accused which *ipso facto* would entitle them for an order of acquittal. This expert report, has to be examined in

conjunction with the oral evidence and particularly the medical evidence. Exhibit P/12 is the post mortem report which has depicted various external and internal injuries on the body of the deceased as afore-noticed. It is also clear that the cause of death of Rajkumari was asphyxia due to throttling. It is further clear from the findings in the post mortem report that petechial hemorrhage of lungs was present, the right side of heart was filled with blood while the left chamber was empty and bloody froth was oozing from nostrils and mouth of the deceased. There has to be a very strong and compelling reason for the Court to disbelieve an eye-witness. Statement of PW6 does not suffer from any contradictions nor is at variance with the case of the prosecution. He was being kept under a constant watch inasmuch as he was the servant of PW1, whose brother Ranjeet was one of the accused. Accused was even present near the dead body of Rajkumari till she was taken for post mortem. We have already noticed that the expert evidence clearly demonstrates, particularly in view of the injuries caused to the deceased during the heinous crime, that it could not have been done by a single person and, therefore, involvement of two or more persons is most probable and in line with the story of the prosecution. The cumulative effect of the oral/documentary and expert evidence is that the prosecution has been able to prove its case beyond any reasonable doubt.

20. It is a case where not only the entire incriminating material evidence was put to the accused while they were being examined under Section 313 Cr.P.C. but also that the accused examined two witnesses DW1, Samelal Kewat and DW2, Kamla, wife of Ranjeet Singh. In their statements under Section 313 Cr.P.C., they have taken the stand that they were not present at the place of occurrence but, in fact, they were present in their respective houses and as such they have been falsely implicated. The two witnesses were examined in support of this fact. DW1 has stated that he lives nearby the house of Rajkumari and he did not hear any noise or cries on the fateful night. He also stated that Ramnaresh came to his house at

about 10:00 o'clock when he was going to attend the Ramayana. He further stated that Ramnaresh was in his house and, thus, he could not have committed the crime. DW2 is the wife of Ranjeet. She stated that his husband was sleeping in the house only and on the said date Ramnaresh, Vishwanath and Amar Singh had not visited their house. The cross examination of these two witnesses has clearly created a doubt in regard to the authenticity of their statements. Firstly, as per the version of the prosecution and as is even clear from the medical evidence, the mouth of deceased Rajkumari had been gagged. Therefore, the question of hearing any noise or screaming would not arise and, secondly, DW2 is the wife of the accused and is bound to speak in his favour as an interested witness. Furthermore, both these witnesses had not informed the Police during the course of investigation and even when the accused were arrested that they had been present at their respective houses and not at the place of occurrence. In fact, this has not even been the suggestion of the defence while cross-examining the prosecution witnesses.

21. In terms of Section 313 Cr.P.C., the accused has the freedom to maintain silence during the investigation as well as before the Court. The accused may choose to maintain silence or complete denial even when his statement under Section 313 Cr.P.C. 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. Right to fair trial, presumption of innocence unless proven guilty and proof by the prosecution of its case beyond any reasonable doubt are the fundamentals of our criminal jurisprudence. When we speak of prejudice to an accused, it has to be shown that the accused has suffered some disability or detriment in relation to any of these protections substantially. Such prejudice should also demonstrate that it has occasioned failure of justice to the accused. 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. [Ref. *Rafiq Ahmed @ Rafi v. State of Uttar Pradesh [(2011*) 8 SCC 300].

22. It is a settled principle of law that the obligation to put material evidence to the accused under Section 313 Cr.P.C. is upon the Court. One of the main objects of recording of a statement under this provision of the Cr.P.C. is to give an opportunity to the accused to explain the circumstances appearing against him as well as to put forward his defence, if the accused so desires. But once he does not avail this opportunity, then consequences in law must follow. Where the accused takes benefit of this opportunity, then his statement made under Section 313 Cr.P.C., in so far as it supports the case of the prosecution, can be used against him for rendering conviction. Even under the latter, he faces the consequences in law.

23. In the present case, the accused have denied their presence on the spot, at the time of occurrence. Thus, it was for them to prove that they were not present at the place of occurrence and were entitled to plea of *alibi*. In our considered opinion, they have miserably failed to establish this fact. On the contrary, the behaviour explained by the defence witnesses appears to be somewhat unnatural in the social set up in which the accused, the deceased and even some of the prosecution witnesses were living. They knew each other very well and the normal course of life in a village is that they are quite concerned with and actively participate in each other's affairs, particularly sad occasions. Ranjeet was present at the place of occurrence and was holding one of the minor children of PW1. This supports the statement of PW6 that he was constantly under threat and watch from either of the accused. The version put forward by the accused in their statement under Section 313 Cr.P.C. is unbelievable and unacceptable. There is no cogent evidence on record to support their plea.

24. For the reasons afore-recorded, we have no hesitation

in holding that the prosecution has been able to prove its case beyond reasonable doubt. The accused are guilty of committing the offence under Sections 499, 376(2)(g) and 302 IPC. We hold them guilty of committing these offences.

The death sentence and principles governing its conversion to life imprisonment

25. Despite the transformation of approach and radical changes in principles of sentencing across the world, it has not been possible to put to rest the conflicting views on sentencing policy. The sentencing policy being a significant and inseparable facet of criminal jurisprudence, has been inviting the attention of the Courts for providing certainty and greater clarity to it. Capital punishment has been a subject matter of great social and judicial discussion and catechism. From whatever point of view it is examined, one undisputable statement of law follows that it is neither possible nor prudent to state any universal formula which would be applicable to all the cases of criminology where capital punishment has been prescribed. It shall always depend upon the facts and circumstances of a given case. This Court has stated various legal principles which would be precepts on exercise of judicial discretion in cases where the issue is whether the capital punishment should or should not be awarded.

26. The law requires the Court to record special reasons for awarding such sentence. The Court, therefore, has to consider matters like nature of the offence, how and under what circumstances it was committed, the extent of brutality with which the offence was committed, the motive for the offence, any provocative or aggravating circumstances at the time of commission of the crime, the possibility of the convict being reformed or rehabilitated, adequacy of the sentence of life imprisonment and other attendant circumstances. These factors cannot be similar or identical in any two given cases. Thus, it is imperative for the Court to examine each case on its own facts, in light of the enunciated principles. It is only upon

application of these principles to the facts of a given case that the Court can arrive at a final conclusion whether the case in hand is one of the 'rarest of rare' cases and imposition of death penalty alone shall serve the ends of justice. Further, the Court would also keep in mind that if such a punishment alone would serve the purpose of the judgment, in its being sufficiently punitive and purposefully preventive.

27. In order to examine this aspect in some greater depth and with objectivity, it is necessary for us to reiterate the various guiding factors. Suffices it to make reference to a recent judgment of this Court in the case of *State of Maharashtra v. Goraksha Ambaji Adsul* [(2011) 7 SCC 437], wherein this Court discussed the law in some detail and enunciated the principles as follows :

> "**30.** The principles governing the sentencing policy in our criminal jurisprudence have more or less been consistent, right from the pronouncement of the Constitution Bench judgment of this Court in *Bachan Singh v. State of Punjab. Awarding* punishment is certainly an onerous function in the dispensation of criminal justice. The court is expected to keep in mind the facts and circumstances of a case, the principles of law governing award of sentence, the legislative intent of special or general statute raised in the case and the impact of awarding punishment. These are the nuances which need to be examined by the court with discernment and in depth.
>
> **31.** The legislative intent behind enacting Section 354(3) CrPC clearly demonstrates the concern of the legislature for taking away a human life and imposing death penalty upon the accused. Concern for the dignity of the human life postulates resistance to taking a life through law's instrumentalities and that ought not to be done, save in the rarest of rare cases, unless the alternative option is unquestionably foreclosed. In exercise of its discretion, the court would also take into consideration the mitigating

circumstances and their resultant effects.

> **32.** The language of Section 354(3) demonstrates the legislative concern and the conditions which need to be satisfied prior to imposition of death penalty. The words, "*in the case of sentence of death, the special reasons for such sentence*" unambiguously demonstrate the command of the legislature that such reasons have to be recorded for imposing the punishment of death sentence. This is how the concept of the rarest of rare cases has emerged in law. Viewed from that angle, both the legislative provisions and judicial pronouncements are at ad idem in law. The death penalty should be imposed in the rarest of rare cases and that too for special reasons to be recorded. To put it simply, a death sentence is not a rule but an exception. Even the exception must satisfy the prerequisites contemplated under Section 354(3) CrPC in light of the dictum of the Court in *Bachan Singh*.
>
> **33.** The Constitution Bench judgment of this Court in *Bachan Singh* has been summarised in para 38 in *Machhi Singh* v. *State of Punjab* and the following guidelines have been stated while considering the possibility of awarding sentence of death: (*Machhi Singh case*, SCC p. 489)
>
> > "(*i*) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
> >
> > (*ii*) Before opting for the death penalty the circumstances of the '*offender*' also requires to be taken into consideration along with the circumstances of the 'crime'.
> >
> > (*iii*) Life imprisonment is the rule and death sentence is an exception. … death sentence must be imposed only when life imprisonment appears

to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

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

(emphasis supplied)

34. The judgment in *Bachan Singh*, did not only state the above guidelines in some elaboration, but also specified the mitigating circumstances which could be considered by the Court while determining such serious issues and they are as follows: (SCC p. 750, para 206)

"*206*. ... '*Mitigating circumstances*.—In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

(*1*) That the offence was committed under the influence of extreme mental or emotional disturbance.

(*2*) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(*3*) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(*4*) The probability that the accused can be reformed and rehabilitated.

The State shall by evidence prove that the accused does not satisfy Conditions (*3*) and (*4*) above.

(*5*) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(*6*) That the accused acted under the duress or domination of another person.

(*7*) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."

35. Now, we may examine certain illustrations arising from the judicial pronouncements of this Court.

36. In *D.K. Basu v. State of W.B. thi*s Court took the view that custodial torture and consequential death in custody was an offence which fell in the category of the rarest of rare cases. While specifying the reasons in support of such decision, the Court awarded death penalty in that case.

37. In *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* this Court also spelt out in paras 56 to 58 that nature, motive, impact of a crime, culpability, quality of evidence, socio-economic circumstances, impossibility of rehabilitation are the factors which the court may take into consideration while dealing with such cases. In that case the friends of the victim had called him to see a movie and after seeing the movie, a ransom call was made, but with the fear of being caught, they murdered the victim. The Court felt that there was no evidence to show that the criminals were incapable of reforming themselves, that it was not a rarest of the rare case, and therefore, declined

to award death sentence to the accused.

38. Interpersonal circumstances prevailing between the deceased and the accused was also held to be a relevant consideration in *Vashram Narshibhai Rajpara v. State of Gujarat whe*re constant nagging by family was treated as the mitigating factor, if the accused is mentally unbalanced and as a result murders the family members. Similarly, the intensity of bitterness which prevailed and the escalation of simmering thoughts into a thirst for revenge and retaliation were also considered to be a relevant factor by this Court in different cases.

39. This Court in *Satishbhushan Bariyar* also considered various doctrines, principles and factors which would be considered by the Courts while dealing with such cases. The Court discussed in some elaboration the applicability of the doctrine of rehabilitation and the doctrine of prudence. While considering the application of the doctrine of rehabilitation and the extent of weightage to be given to the mitigating circumstances, it noticed the nature of the evidence and the background of the accused. The conviction in that case was entirely based upon the statement of the approver and was a case purely of circumstantial evidence. Thus, applying the doctrine of prudence, it noticed the fact that the accused were unemployed, young men in search of job and they were not criminals. In execution of a plan proposed by the appellant and accepted by others, they kidnapped a friend of theirs. The kidnapping was done with the motive of procuring ransom from his family but later they murdered him because of the fear of getting caught, and later cut the body into pieces and disposed it off at different places. One of the accused had turned approver and as already noticed, the conviction was primarily based upon the statement of the approver.

40. Basing its reasoning on the application of doctrine of

prudence and the version put forward by the accused, the Court, while declining to award death penalty and only awarding life imprisonment, held as under: (*Satishbhushan Bariyar case*, SCC pp. 551 & 559-60, paras 135, 168-69 & 171-73)

> "*135*. Right to life, in its barest of connotation would imply right to mere survival. In this form, right to life is the most fundamental of all rights. Consequently, a punishment which aims at taking away life is the gravest punishment. Capital punishment imposes a limitation on the essential content of the fundamental right to life, eliminating it irretrievably. We realise the absolute nature of this right, in the sense that it is a source of all other rights. Other rights may be limited, and may even be withdrawn and then granted again, but their ultimate limit is to be found in the preservation of the right to life. Right to life is the essential content of all rights under the Constitution. If life is taken away, all other rights cease to exist.
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> * * *
>
> *168*. We must, however, add that in a case of this nature where the entire prosecution case revolves round the statement of an approver or is dependant upon the circumstantial evidence, the prudence doctrine should be invoked. For the aforementioned purpose, at the stage of sentencing evaluation of evidence would not be permissible, the courts not only have to solely depend upon the findings arrived at for the purpose of recording a judgment of conviction, but also consider the matter keeping in view the evidences which have been brought on record on behalf of the parties and in particular the accused for imposition of a lesser

punishment. A statement of approver in regard to the manner in which crime has been committed vis-à-vis the role played by the accused, on the one hand, and that of the approver, on the other, must be tested on the touchstone of the prudence doctrine.

169. The accused persons were not criminals. They were friends. The deceased was said to have been selected because his father was rich. The motive, if any, was to collect some money. They were not professional killers. They have no criminal history. All were unemployed and were searching for jobs. Further, if age of the accused was a relevant factor for the High Court for not imposing death penalty on Accused 2 and 3, the same standard should have been applied to the case of the appellant also who was only two years older and still a young man in age. Accused 2 and 3 were as much a part of the crime as the appellant. Though it is true, that it was he who allegedly proposed the idea of kidnapping, but at the same time it must not be forgotten that the said plan was only executed when all the persons involved gave their consent thereto.

* * *

171. Section 354(3) of the Code of Criminal Procedure requires that when the conviction is for an offence punishable with death or in the alternative with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and in the case of sentence of death, the special reasons thereof. We do not think that the reasons assigned by the courts below disclose any special reason to uphold the death penalty. The discretion granted to

the courts must be exercised very cautiously especially because of the irrevocable character of death penalty. Requirements of law to assign special reasons should not be construed to be an empty formality.

172. We have previously noted that the judicial principles for imposition of death penalty are far from being uniform. Without going into the merits and demerits of such discretion and subjectivity, we must nevertheless reiterate the basic principle, stated repeatedly by this Court, that life imprisonment is the rule and death penalty an exception. Each case must therefore be analysed and the appropriateness of punishment determined on a case-by-case basis with death sentence not to be awarded save in the '*rarest of the rare*' case where reform is not possible. Keeping in mind at least this principle we do not think that any of the factors in the present case discussed above warrants the award of the death penalty. There are no special reasons to record the death penalty and the mitigating factors in the present case, discussed previously, are, in our opinion, sufficient to place it out of the '*rarest of rare*' category.

173. For the reasons aforementioned, we are of the opinion that this is not a case where death penalty should be imposed. The appellant, therefore, instead of being awarded death penalty, is sentenced to undergo rigorous imprisonment for life. Subject to the modification in the sentence of the appellant (A-1) mentioned hereinbefore, both the appeals of the appellant as also that of the State are dismissed."

(emphasis in original)

41. The above principle, as supported by case illustrations, clearly depicts the various precepts which would govern the exercise of judicial discretion by the courts within the parameters spelt out under Section 354(3) CrPC. Awarding of death sentence amounts to taking away the life of an individual, which is the most valuable right available, whether viewed from the constitutional point of view or from the human rights point of view. The condition of providing special reasons for awarding death penalty is not to be construed linguistically but it is to satisfy the basic features of a reasoning supporting and making award of death penalty unquestionable. The circumstances and the manner of committing the crime should be such that it pricks the judicial conscience of the court to the extent that the only and inevitable conclusion should be awarding of death penalty."

28. In *Machhi Singh & Ors. v. State of Rajasthan* [(1983) 3 SCC 470], this Court stated certain relevant considerations like the manner of commission of murder, motive for commission of murder, anti-social or socially abhorrent nature of the crime, magnitude of crime and the personality of the victim of murder. These considerations further demonstrate that the matter has to be examined with reference to a particular case, for instance, murder of an innocent child who could not have or has not provided even an excuse, much less a provocation for murder. Similarly, murder of a helpless woman who might be relying on a person because of her age or infirmity, if murdered by that person, would be an indicator of breach of relationship or trust as the case may be. It would neither be proper nor probably permissible that the judicial approach of the court in such matters treat one of the stated considerations or factors as determinative. The court should examine all or majority of the relevant considerations to spell comprehensively the special reasons to be recorded in the order, as contemplated under Section 354(3) of the Cr.P.C.

29. In the case of *Dhananjoy Chatterjee @ Dhana v. State of West Bengal* [(1994) 2 SCC 220] while affirming the award of death sentence by the High Court, this Court noticed that 'in recent years, the rising crime rate-particularly violent crime against women has made the criminal sentencing by the courts a subject of concern'. The Court reiterated the principle that it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime, as also the society, has the satisfaction that justice has been done to it. The Court held as follows:-

> "15. In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment."

30. In this case, the Court was concerned with the case of a security guard who had been transferred at the complaint of a lady living in the flats with regard to teasing of her young girl child. The security guard went up to the flat of the lady, committed rape on her daughter and then murdered her brutally. The Court found it to be a fit case for imposition of capital punishment.

31. Again, in the case of *Surja Ram v. State of Rajasthan* [(1996) 6 SCC 271], this Court affirmed the death sentence awarded by the High Court primarily taking into consideration that there was no provocation and the manner in which the

crime was committed was brutal. Noticing that the Court has to award a punishment which is just and fair by administering justice tempered with such mercy not only as the criminal may justly deserve but also to the rights of the victims of the crime to have the assailant appropriately punished and the society's reasonable expectation from the court for the appropriate deterrent punishment conforming to the gravity of the offence and consistent with the public abhorrence for the heinous crime committed by the accused. The Court further held as under:-

> "18. After giving our anxious consideration to the facts and circumstances of the case, it appears to us that 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 in a dispassionate manner. Such act of balancing is indeed a difficult task. It has been very aptly indicated in Dennis Councle McGautha v. State of California 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 of murder. 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 crime of murder, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished."

32. This Court in *Prajeet Kumar Singh v. State of Bihar* [(2008) 4 SCC 434], *B.A. Umesh v. Registrar General, High Court of Karnataka* [(2011) 3 SCC 85], *State of Rajasthan v. Kashi Ram* [(2006) 12 SCC 254] and *Atbir v. Government of NCT of Delhi* [(2010) 9 SCC 1] had confirmed the death sentence awarded by the High Courts for different reasons after

applying the principles enunciated in one or more afore-referred judgments.

33. Now, we may notice the cases which were relied upon by the learned counsel appearing for the appellants and wherein this Court had declined to confirm the imposition of capital punishment treating them not to be the rarest of rare cases.

34. In *Ronny @ Ronald James Alwaris Etc. v. State of Maharashtra* [(1998) 3 SCC 625], the Court while relying upon the judgment of this Court in the case of *Allauddin Mian & Ors. v. State of Bihar* [(1989) 3 SCC 5], held that the choice of the death sentence has to be made only in the 'rarest of rare' cases and that where culpability of the accused has assumed depravity or where the accused is found to be an ardent criminal and menace to the society. The Court also noticed the above-stated principle that the Court should ordinarily impose a lesser punishment and not the extreme punishment of death which should be reserved for exceptional cases only. The Court, while considering the cumulative effect of all the factors such as the offences not committed under the influence of extreme mental or emotional disturbance and the fact that the accused were young and the possibility of their reformation and rehabilitation could not be ruled out, converted death sentence into life imprisonment.

35. Similarly, in the case of *Bantu @ Naresh Giri v. State of M.P.* [(2001) 9 SCC 615] while dealing with the case of rape and murder of a six year old girl, this Court found that the case was not one of the 'rarest of rare' cases. The Court noticed that, accused was less than 22 years at the time of commission of the offence, there were no injuries on the body of the deceased and the death probably occurred as a result of gagging of the nostril by the accused. Thus, the Court while noticing that the crime was heinous, commuted the sentence of death to one of life imprisonment.

36. The above judgments provide us with the dicta of the Court relating to imposition of death penalty. Merely because a crime is heinous *per se* may not be a sufficient reason for the imposition of death penalty without reference to the other factors and attendant circumstances.

37. Most of the heinous crimes under the IPC are punishable by death penalty or life imprisonment. That by itself does not suggest that in all such offences, penalty of death alone should be awarded. We must notice, even at the cost of repetition, that in such cases awarding of life imprisonment would be a rule, while 'death' would be the exception. The term 'rarest of rare' case which is the consistent determinative rule declared by this Court, itself suggests that it has to be an exceptional case. The life of a particular individual cannot be taken away except according to the procedure established by law and that is the constitutional mandate. The law contemplates recording of special reasons and, therefore, the expression 'special' has to be given a definite meaning and connotation. 'Special reasons' in contra-distinction to 'reasons' *simplicitor* conveys the legislative mandate of putting a restriction on exercise of judicial discretion by placing the requirement of special reasons.

38. Since, the later judgments of this Court have added to the principles stated by this Court in the case of *Bachan Singh* (supra) and *Machhi Singh* (supra), it will be useful to re-state the stated principles while also bringing them in consonance, with the recent judgments.

39. The law enunciated by this Court in its recent judgments, as already noticed, adds and elaborates the principles that were stated in the case of *Bachan Singh* (supra) and thereafter, in the case of *Machhi Singh* (supra). The aforesaid judgments, primarily dissect these principles into two different compartments – one being the 'aggravating circumstances' while the other being the 'mitigating

circumstances'. The Court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the Court. It will be appropriate for the Court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the Court as contemplated under Section 354(3) Cr.P.C.

Aggravating Circumstances :

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want

only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 Cr.P.C.

(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(11) When murder is committed for a motive which evidences total depravity and meanness.

(12) When there is a cold blooded murder without provocation.

(13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating Circumstances :

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behavior possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behavior that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a pre-ordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eye-witness though prosecution has brought home the guilt of the accused.

40. While determining the questions relateable to sentencing policy, the Court has to follow certain principles and those principles are the loadstar besides the above considerations in imposition or otherwise of the death sentence.

Principles :

(1) The Court has to apply the test to determine, if it was the 'rarest of rare' case for imposition of a death sentence.

(2) In the opinion of the Court, imposition of any other punishment, i.e., life imprisonment would be completely inadequate and would not meet the ends of justice.

(3) Life imprisonment is the rule and death sentence is an exception.

(4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant considerations.

(5) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime.

41. Stated broadly, these are the accepted indicators for the exercise of judicial discretion but it is always preferred not to fetter the judicial discretion by attempting to make the excessive enumeration, in one way or another. In other words, these are the considerations which may collectively or otherwise weigh in the mind of the Court, while exercising its jurisdiction. It is difficult to state it as an absolute rule. Every case has to be decided on its own merits. The judicial pronouncements, can only state the precepts that may govern the exercise of judicial discretion to a limited extent. Justice may be done on the facts of each case. These are the factors which the Court may consider in its endeavour to do complete justice between the parties.

42. The Court then would draw a balance-sheet of aggravating and mitigating circumstances. Both aspects have

to be given their respective weightage. The Court has to strike a balance between the two and see towards which side the scale/balance of justice tilts. The principle of proportion between the crime and the punishment is the principle of *'just deserts'* that serves as the foundation of every criminal sentence that is justifiable. In other words, the 'doctrine of proportionality' has a valuable application to the sentencing policy under the Indian criminal jurisprudence. Thus, the court will not only have to examine what is just but also as to what the accused deserves keeping in view the impact on the society at large.

43. Every punishment imposed is bound to have its effect not only on the accused alone, but also on the society as a whole. Thus, the Courts should consider retributive and deterrent aspect of punishment while imposing the extreme punishment of death.

44. Wherever, the offence which is committed, manner in which it is committed, its attendant circumstances and the motive and status of the victim, undoubtedly brings the case within the ambit of 'rarest of rare' cases and the Court finds that the imposition of life imprisonment would be inflicting of inadequate punishment, the Court may award death penalty. Wherever, the case falls in any of the exceptions to the 'rarest of rare' cases, the Court may exercise its judicial discretion while imposing life imprisonment in place of death sentence.

45. Guided by the above principles, now, we shall proceed to deal with the contentions raised on behalf of the appellants that the present case is not one of the 'rarest of rare' cases where the Court should find that imposition of life imprisonment would be entirely inadequate, even if the accused are held guilty of the offences charged.

46. We have already held that all the accused in the present appeals are guilty of the offences under Sections 376(2)(g) and 302 read with Section 34 IPC. On the question of quantum of sentence, the argument raised on behalf of the

appellants is that all the accused were of young age at the time of commission of the crime, i.e. 21 to 31 years of age. They had no intention to kill the deceased and it was co-accidental that the death of the deceased occurred. Even if the accused are held guilty for the offences under Sections 376(2)(g) and 302 IPC, still it is not the 'rarest of rare' case which would justify imposition of capital punishment, particularly in the facts and circumstances of the case.

47. To the contra, the learned counsel for the State has contended that the crime has been committed brutally. Accused-Ranjeet, being the brother-in-law of the deceased owed a duty to protect rather than expose her to such sexual assault and death, along with his friends. The manner in which the crime has been committed and the attendant circumstances fully justify imposition of death sentence upon the accused. The crime is heinous and has been committed brutally, without caring for the future of the two infants of the deceased, who were sleeping by her side at the time of the crime. There cannot be two opinions that the offence committed by the appellants is very heinous and all of them have taken advantage of the helplessness of a mother of two infants at that odd hour of the night and in the absence of her husband.

48. There are certain circumstances, which if taken collectively, would indicate that it is not a case where the Court would inevitably arrive at only one conclusion, and no other, that imposition of death penalty is the only punishment that would serve the ends of justice. Firstly, the age of all the appellants is one of the relevant considerations before the Court. Secondly, according to PW1, Indrajeet, the deceased Rajkumari was his mistress and he had not married her, though he had two children with her. According to him, she was earlier married to one Bhupendra and he was not maintaining good relations with the said Bhupendra on account of his living with the deceased. This may have been a matter of some concern for the family, including Ranjeet, the brother of PW1. Thirdly, it

has come in evidence that during investigation, the Investigating Officer recovered a piece of saree from the place of occurrence, which was blood-stained. According to the statement of the PW7, Dr. Shila Saha, there were external injuries on the body of the deceased. Petechial hemorrhage was present in the left and right lungs. Blood mixed with froth was flowing out from the mouth of the deceased which was indicative of the possibility of the accused persons having gagged her mouth with the piece of the saree while committing rape upon her. Thus, the possibility of death of the deceased occurring co-accidentally as a result of this act committed on her by the accused cannot be ruled out. In similar circumstances, in the case of *Bantu @ Naresh Giri* (supra) (supra), this Court took the view that it was not a death caused intentionally, despite the fact that it was a case of rape being committed on a minor girl. Lastly, there is no attempt made by the prosecution to prove on record that these accused are criminals or are incapable of being reformed even if given a chance to improve themselves. While relying upon the judgment of this Court in the case of *Goraksha Ambaji Adsul* (supra), the contention raised on behalf of the accused is that, it is not a case where no other alternative is available with the Court except to award death sentence to the accused and that they are likely to prove a menace to the society. It is further stated that the statement of the sole witness is not credible as he himself fell within the range of suspicion and a number of other witnesses had turned hostile. There are contradictions and discrepancies in the statements of the witnesses. The accused are neither previous convicts nor involved in any other crime. Thus, given a chance, they are capable of being reformed and be law-abiding citizens.

49. Having dealt with these contentions at some length in the earlier part of the judgment, we do not consider it necessary to again deliberate on these questions. Suffices it to note that the accused are guilty of the offences for which they were charged. It is correct that the possibility of their being reformed

cannot be ruled out. The Court has to consider various parameters afore-stated and balance the mitigating circumstances against the need for imposition of capital punishment. The factors to be considered could be different than the mitigating circumstances. While we cumulatively examine the various principles and apply them to the facts of the present case, it appears to us that the age of the accused, possibility of the death of the deceased occurring accidently and the possibility of the accused reforming themselves, they cannot be termed as 'social menace'. It is unfortunate but a hard fact that all these accused have committed a heinous and inhumane crime for satisfaction of their lust, but it cannot be held with certainty that this case falls in the 'rarest of rare' cases. On appreciation of the evidence on record and keeping the facts and circumstances of the case in mind, we are unable to hold that any other sentence but death would be inadequate.

50. Accordingly, while commuting the sentence of death to that for life imprisonment (21 years), we partially allow their appeals only with regard to the quantum of sentence.

D.G. Appeal partly allowed.

MANO DUTT & ANR.
v.
STATE OF U.P.
(Criminal Appeal No. 77 of 2007)

FEBRUARY 29, 2012

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

Penal Code, 1860:

ss.302/34 – Murder – Dispute over land – Six accused – Murderous assault on the deceased with lathis – Brother and father of the deceased trying to rescue deceased also received serious injuries – Out of six accused, four convicted u/s.302 r/w s.34 by trial court – One accused died during pendency of the appeal before High Court – High Court upheld the conviction of rest three u/s.302 r/w s.34 – Separate appeal by one convict before Supreme Court already dismissed – On appeal by other two convicts, held: All the accused persons had come prepared, mentally and physically, to assault the deceased and in furtherance to their common intention, had even given exhortation to kill the deceased – This incident was witnessed by natural witnesses, the father/brother of the deceased who also received number of injuries – The defence miserably failed to prove commission of the offence in self-defence – Dispute had not arisen at the spur of the moment as the evidence clearly showed that the accused had gone to the site in question with a common intention and with the preparedness to assault and even kill the deceased – Prosecution was able to prove its case beyond reasonable doubt and has brought home the guilt of the accused u/s.302 r/w s.34.

s.34 – Applicability of – Held: In the instant case, six accused were charge-sheeted u/s.302 r/w ss.149 and 323 – However, two of the accused were acquitted by trial court and

remaining were convicted of an offence u/ss.302/34 and 323/34 – High Court acquitted all the accused of offence u/ss.302/34 – One of the accused died during the pendency of that appeal – Because the alleged number of accused having become less than five, nature of the offences were changed from offence u/s.149 to s.34 – In the circumstances of the case, the possibility of presence of all other persons in the appellants' party cannot be excluded – Even where there are less than five persons who are accused, but the facts and the evidence of the case is convincing as in the instant case, where the accused had returned to the place of occurrence with complete preparedness and after giving lalkar had attacked the deceased there, they have to be held liable for commission of the crime – It cannot be ignored that the extent of participation, even in a case of common intention covered u/s.34 would not depend on the extent of overt act – If all the accused have committed the offence with common intention and inflicted injuries upon the deceased in a pre-planned manner, the provisions of s.34 would be applicable to all.

Evidence:

Right of self defence – Held: It is a settled canon of evidence jurisprudence that one who alleges a fact must prove the same – When a person claims exercise of private self-defence, the onus lies on him to show that there were circumstances and occasions for exercising such a right.

Non-explanation of injuries sustained by the accused persons – Effect on prosecution case – Held: The normal rule is that whenever the accused sustains injury in the same occurrence in which the complainant suffered the injury, the prosecution should explain the injury upon the accused – But, it is not a rule without exception that if the prosecution fails to give explanation, the prosecution case must fail – Before the non-explanation of the injuries on the person of the accused, by the prosecution witnesses, may be held to affect the prosecution case, the Court has to be satisfied of the

existence of two conditions: that the injuries on the person of the accused were also of a serious nature; and that such injuries must have been caused at the time of the occurrence in question – Where the evidence is clear, cogent and creditworthy; and where the court can distinguish the truth from falsehood, the mere fact that the injuries on the person of the accused are not explained by the prosecution cannot, by itself, be a sole basis to reject the testimony of the prosecution witnesses and consequently, the whole case of the prosecution.

Witnesses:

Interested witness – Evidentiary value of – Held: When the statement of witnesses, who are relatives, or are parties known to the affected party, is credible, reliable, trustworthy, admissible in accordance with the law and corroborated by other witnesses or documentary evidence of the prosecution, there would hardly be any reason for the Court to reject such evidence merely on the ground that the witness was family member or interested witness or person known to the affected party.

Injured witness – Evidentiary value of – Held: Normally, an injured witness would enjoy greater credibility because he is the sufferer himself and thus, there will be no occasion for such a person to state an incorrect version of the occurrence, or to involve anybody falsely and in the bargain, protect the real culprit.

Sole witness – Evidentiary value of – Held: The court can convict an accused on the statement of a sole witness, even if he is a relative of the deceased and thus, an interested party – It is only when the Courts find that the single eye-witness is a wholly unreliable witness that his testimony is discarded in toto and no amount of corroboration can cure its defect.

The prosecution case was that the accused persons

were related to each other. On the fateful day, the victim-deceased was doing earth filling in front of his sariya (a place of tethering cattle). The four accused, 'RD', 'TP', 'RN', 'MD' out of the six named accused came there and asked the deceased not to do earth filling. The deceased told them that it was his land and he would not stop the work of land filling. Thereupon, the deceased called villagers. The matter was discussed with the villagers, all of whom said that the land was that of the deceased and he could carry on with land filling on his own land. After deciding this, the villagers went away and the deceased resumed the filling of the earth. Thereafter all the six accused persons armed with *lathis*, came there and chased the deceased. The deceased was able to run for a short distance away, whereafter all the accused surrounded him. Accused 'RD', 'TP', 'MD' and 'RN' started beating the deceased with their *lathis*. The father of the deceased and his brother rushed towards the deceased to rescue him. They were also beaten up by the accused. The deceased fell down after getting the *lathi* blows. Meanwhile, his wife, 'B' and village Pradhan came there. Pradhan snatched the *lathis* of the four accused, who then fled away from the scene. The deceased sustained serious injuries. The father and the brother of the deceased also sustained injuries. The deceased narrated the incident to PW-3 and based on that FIR was prepared. The deceased died after two days. One of the accused 'RD' had also allegedly lodged a report against the deceased and his father and brothers. After registering the FIR, the Investigating Officer in his report had also stated that the accused 'RD' had sustained some injuries on his person.

The trial court charged the accused with various offences under IPC. Out of the six accused, four were convicted by the trial court under Sections 302/34 and 323/34 IPC. One accused 'RD' died during pendency of

the appeal before the High Court and all the other accused were acquitted of the offences under Section 323/34 IPC, but convicted for offences under Section 302/34 IPC. The two accused 'MD' and 'RN' filed the instant appeals.

Dismissing the appeals, the Court

HELD: 1. The record showed that 'RD' had lodged a complaint of the incident. According to this report, the accused in that complaint (i.e., the deceased and his family members) had been putting earth on RD's *sariya*, which he had forbade. There was verbal altercation between the parties and then the accused in that complaint (i.e., the deceased) started assaulting him with *lathis* and it was only by raising an alarm that the people of the village came to the place of occurrence and his life was saved. According to this complaint, he had suffered injuries on his head. This complaint was not proved by 'RD' during the trial. Accordingly, the concurrent view taken by the courts below that this document cannot be relied in evidence, cannot be faulted with. Furthermore, 'RD' did not examine a single witness in his defence to prove that he was attacked by the deceased and his family members or that they were putting earth at the door of *sariya* of 'RD'. No doubt, 'RD' was subjected to medical examination by the Medical Officer. He had suffered lacerated wounds on the central and other regions of skull, and had complained of pain in left leg. This would show that 'RD' had suffered some injuries but where and how these injuries were suffered, was for him to establish, particularly when he had taken a specific stand that the deceased and his family members were at fault and were aggressive. He claims that they had caused serious injuries to his person and this incident happened in the presence of the villagers. It is a settled canon of evidence jurisprudence that one who alleges a

fact must prove the same. The contention of the appellant cannot be accepted that the prosecution had not explained the injuries on the accused and, therefore, the attack with *lathis* was in exercise of self-defence was a circumstance which created a serious doubt in the story of the prosecution. When a person claims exercise of private self-defence, the onus lies on him to show that there were circumstances and occasions for exercising such a right. In other words, these basic facts must be established by the accused. Just because one circumstance exists amongst the various factors, which appears to favour the person claiming right of self-defence, does not mean that he gets the right to cause the death of the other person. Even the right of self-defence has to be exercised directly in proportion to the extent of aggression. As per the medical report, the injuries on the body of 'RD' were found to be 'simple in nature'. The bone of contention between the parties was the statement of the deceased, that he was filling the earth over some land, which he claimed to be his land; according to the accused, the earth-filling was carried out in front of the door of 'RD'. According to both the parties, the villagers came to the spot. Out of the two versions, the one put forward by the prosecution and the other in the defence of the accused, the version of the prosecution, as was disclosed by the eye-witnesses, is trustworthy, reliable and entirely plausible in the facts and circumstances of the case. The mere fact that the Investigating Officer has not been produced, or that there was no specific explanation on record as to how 'RD' suffered the injuries, would not vitiate the trial or the case of the prosecution in its entirety. It is not always mandatory for the prosecution to examine the Investigating Officer, provided it can establish its case beyond reasonable doubt even in his absence. Where the accused lead no defence, they cannot take benefit of the fact that the prosecution did not examine any

independent witnesses. The accused would be deemed to have been aware of the consequences in law when they gave a statement admitting the occurrence but attributing aggression and default to the deceased and his family members. [paras 15-17] [705-F-H; 706-A-H; 707-A-H]

2. Accused 'TP' was also stated to own a *sariya* and was also allegedly using his *lathi* in self-defence, as according to their story, four persons with the deceased and his family members had attacked them. Strangely, 'TP' suffered no injury. These were the circumstances which, examined cumulatively, would provide support to the case of prosecution. The pleas on behalf of the accused/appellants that only family members of the deceased were examined as witnesses and they being interested witnesses cannot be relied upon and that the prosecution did not examine any independent witnesses and, therefore, the prosecution has failed to establish its case beyond reasonable doubt were without much substance. There is no bar in law in examining family members, or any other person, as witnesses. More often than not, in such cases involving family members of both sides, it is a member of the family or a friend who comes to rescue the injured. Those alone are the people who take the risk of sustaining injuries by jumping into such a quarrel and trying to defuse the crisis. Besides, when the statement of witnesses, who are relatives, or are parties known to the affected party, is credible, reliable, trustworthy, admissible in accordance with the law and corroborated by other witnesses or documentary evidence of the prosecution, there would hardly be any reason for the Court to reject such evidence merely on the ground that the witness was family member or interested witness or person known to the affected party. There can be cases where it would be but inevitable to examine such witnesses, because, as the events

occurred, they were the natural or the only eye witness available to give the complete version of the incident. [Paras 18-19] [708-A-G]

3. PW5, the doctor who examined the deceased when he was brought to hospital stated that he had examined the father and the brother of the deceased on the fateful day itself and noticed as many as five injuries on the brother of the deceased and four injuries upon the person of the father of the deceased. These injuries were suffered by them from a blunt object. The brother of the deceased was examined as PW2 and his statement was cogent, coherent, reliable and fully supported the case of the prosecution. However, the other injured witness was not examined. Non-examination of the father of the deceased, to which the accused raised the objection, would not materially affect the case of the prosecution. Normally, an injured witness would enjoy greater credibility because he is the sufferer himself and thus, there will be no occasion for such a person to state an incorrect version of the occurrence, or to involve anybody falsely and in the bargain, protect the real culprit. It is wrong to state that the material witness having not been examined and the entire prosecution story being based upon the statements of PW1 and PW2, who were the interested witnesses, the entire prosecution evidence suffered from a patent infirmity in law. Non-examination of any independent witness, in the facts of the instant case was not fatal to the case of the prosecution. The court can convict an accused on the statement of a sole witness, even if he is a relative of the deceased and thus, an interested party. The condition precedent to such an order is that the statement of such witness should satisfy the legal parameters stated by this Court in a catena of judgments. Once those parameters are satisfied and the statement of the witness is trustworthy, cogent and corroborated by other evidence

produced by the prosecution, oral or documentary, then the Court would not fall in error of law in relying upon the statements of such witness. It is only when the Courts find that the single eye-witness is a wholly unreliable witness that his testimony is discarded *in toto* and no amount of corroboration can cure its defect. [paras 22-23, 25-26] [710-F-H; 711-A-B; 713-B-G]

Namdeo v. State of Maharashtra **(2007) 14 SCC 150: 2007 (3) SCR 939;** *Balraje @ Trimbak v. State of Maharashtra* **(2010) 6 SCC 673: 2010 (6) SCR 764;** *Satbir Singh & Ors. v. State of Uttar Pradesh* **(2009) 13 SCC 790: 2009 (3) SCR 406;** *Abdul Sayeed v. State of Madhya Pradesh* **(2010) 10 SCC 259: 2010 (13) SCR 3;** *Anil Phukan v State of Assam* **(1993) 3 SCC 282: 1993 (2) SCR 389 – relied on**

4. The FIR was lodged by the deceased along with PW3 who transcribed the same at the police station itself. The deceased was seriously injured, but was fully aware of what he was doing and he had no reason to falsely implicate any person. His father and brother had also been injured in the occurrence. It was specifically recorded in the statement of these witnesses that when the appellant 'MD' and other accused came for the second time, to the place where the deceased was filling the earth at the *sariya*, they gave a *lalkar* '*Maro sale ko*' and then assaulted him with *lathis*. When he tried to run away, he fell to the ground. The blood-stained earth was collected by the Investigating Officer. Thereafter, the villagers had come and taken the *lathis* away from the accused persons. The deceased was taken to the police station and then to the hospital, where he died. It is evident that all the accused persons had come prepared, mentally and physically, to assault the deceased and in furtherance to their common intention, had even given a *lalkar* to kill the deceased. This incident was witnessed

by natural witnesses the father and the brother of the deceased as well as wife of the deceased PW1. When brother/father of the deceased even intervened and tried to protect their son/brother, but in the process, they also received number of injuries, as is clear from the medical evidence produced on record. As per the medical report and statement of PW5, the deceased had suffered a number of injuries and not only three. The collection of the bloodstained earth itself is a relevant piece of evidence and provided the link in the commission and the place of crime. [paras 27-28] [713-G-H; 714-A-E, G-H]

5. Effect of non-explanation of injuries sustained by the accused persons. The normal rule is that whenever the accused sustains injury in the same occurrence in which the complainant suffered the injury, the prosecution should explain the injury upon the accused. But, it is not a rule without exception that if the prosecution fails to give explanation, the prosecution case must fail. Before the non-explanation of the injuries on the person of the accused, by the prosecution witnesses, may be held to affect the prosecution case, the Court has to be satisfied of the existence of two conditions: that the injuries on the person of the accused were also of a serious nature; and that such injuries must have been caused at the time of the occurrence in question. Where the evidence is clear, cogent and creditworthy; and where the court can distinguish the truth from falsehood, the mere fact that the injuries on the person of the accused are not explained by the prosecution cannot, by itself, be a sole basis to reject the testimony of the prosecution witnesses and consequently, the whole case of the prosecution. PW4 had clearly noticed that injury on the person of the deceased, his father and brother were all caused by a blunt weapon. He had specifically observed that the injuries were sufficient, in the ordinary course of time, to

cause death and had, in fact, resulted in the death of the deceased. [Paras 29, 30, 31] [716-D-H; 717-A-C]

Rajender Singh & Ors. v. State of Bihar **(2000) 4 SCC 298: 2000 (2) SCR 1073;** *Ram Sunder Yadav & Ors. v. State of Bihar* **(1998) 7 SCC 365;** *Vijayee Singh v. Stateo of U.P.* **(1990) 3 SCC 190: 1990 (2) SCR 573 – relied on.**

6. The High Court and the trial court recorded reasons for returning the concurrent finding of guilt. The appellant argued that one of the accused, 'RD' who is now dead had in his statement under Section 313 CRPC stated that the land in between the house of the parties was his and that despite his protest, the villagers were putting earth on that land and when he objected all of them ran after him and started beating him and in view of this stand the other accused cannot be said to have been involved in the commission of crim. This argument is self serving submission. All the accused were related to each other. Once the plea of self-defence is disbelieved, then a statement of a co-accused under Section 313 CrPC cannot be of any advantage to the co-accused, as the prosecution has been able to establish its case beyond any reasonable doubt. In the instant case, in the chain of events, nowhere does the plea of self-defence as sought to be raised by the appellant-accused or other accused, fit in. The defence miserably failed to prove any fact or any need for resorting to commission of the offence in self-defence. The police had charged this accused for an offence under Section 302 read with Section 149 and 323 of the IPC. However, two of the accused were acquitted by the trial court and the remaining were convicted of an offence under the said Sections 302/34 and 323/34, IPC. The High Court acquitted all the accused of offence under Section 302/ 34 IPC and unfortunately, 'RD' died during the pendency

of that appeal. Because the alleged number of accused had become less than five, nature of the offences were changed from offence under Section 149 to Section 34, IPC. In face of the acquittal of the two accused, which was not assailed by the State, it must be taken that they were not present. Then remain three accused, 'TD' and the appellants. Thus, in the circumstances of the case, the possibility of presence of all other persons in the appellants' party cannot be excluded. It is also not quite possible that the accused have deposed incorrectly before the Court in regard to the number of persons and their participation. Even where there are less than five persons who are accused, but the facts and the evidence of the case is convincing as in the instant case, where the accused had returned to the place of occurrence with complete preparedness and after giving *lalkar* had attacked the deceased there, they have to be held liable for commission of the crime. It cannot be ignored that the extent of participation, even in a case of common intention covered under Section 34 IPC would not depend on the extent of overt act. If all the accused have committed the offence with common intention and inflicted injuries upon the deceased in a pre-planned manner, the provisions of Section 34 would be applicable to all. [Para 32] [717-D-H; 718-A-H; 719-A]

7. It was not a dispute which arose at the spur of the moment as the evidence clearly showed that the accused had gone again to the site in question with a common intention and with the preparedness to assault and even kill the deceased. Even the site plan clearly showed that all these places, i.e. the land on which the deceased was putting the earth, the house of the accused and that of the deceased were all nearby. This was even fully corroborated by the oral evidence. Thus, on the basis of the documentary and ocular evidence, the prosecution was able to prove its case beyond reasonable doubt and

has brought home the guilt of the accused under Section 302 read with Section 34, IPC. [Paras 33] [719-C-E]

Kartar Singh v. State of Punjab **AIR 1961 SC 1787: 1962 SCR 395 – relied on.**

Marimuthu & Ors. v. State of Tamil Nadu **(2008) 3 SCC 205: 2008 (1) SCR 547 – Distinguished.**

Yunis @ Kariya v. State of M.P. **(2003) 1 SCC 425 – held inapplicable.**

Case Law Reference:

2007 (3) SCR 939	**relied on**	**Para 19**
2009 (3) SCR 406	**relied on**	**Para 20**
2010 (6) SCR 764	**relied on**	**Para 21, 24**
2010 (13) SCR 3	**relied on**	**Para 23**
1993 (2) SCR 389	**relied on**	**Para 26**
1962 SCR 395	**relied on**	**Para 28**
2000 (2) SCR 1073	**relied on**	**Para 30**
(1998) 7 SCC 365	**relied on**	**Para 30**
1990 (2) SCR 573	**relied on**	**Para 30**
(2003) 1 SCC 425	**held inapplicable**	**Para 32**
2008 (1) SCR 547	**Distinguished**	**Para 33**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 77 of 2007.

From the Judgment & Order dated 21.03.2006 of the High Court of Judicature at Allahabad at Lucknow in Criminal Appeal No. 19 of 1982.

P.N. Misra, K.K. Tyagi, Iftekhar Ahmad, P. Narasimhan for the Appellants.

R.K. Gupta, Rajeev Dubey, Kamlendra Mishra for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The present appeal is directed against the judgment and order dated 21st March, 2006 of the High Court of Judicature at Allahabad, Lucknow Bench, which had partially accepted the appeal by acquitting the accused persons of the offence under Section 323 read with Section 34 of the Indian Penal Code, 1860 (hereafter, 'IPC'), but affirmed the imposition of life imprisonment for the offence under Section 302 read with Section 34, IPC as awarded by the learned trial court vide its judgment dated 6th January, 1982. The trial court had found the four accused Ram Dutt (now dead), Thakur Prasad, Mano Dutt and Ram Narain guilty of an offence under Section 302, read with Section 34, IPC and also offence under Section 323, read with Section 34, IPC and had awarded them life imprisonment for the first offence and a fine of Rs.1,000/- for the second, in default of which, to undergo rigorous imprisonment for three months.

2. This is a case where the incident, on 22nd October, 1977, which resulted in the death of Siya Ram, is admitted between the parties. The primary question that falls for determination is, as to which of the parties was the aggressor, besides determining the merits of the contentions raised on behalf of the appellant. Before noticing the prosecution version, we may notice that in the present case, six accused were charged and tried for an offence under Sections 302 and 323, both read with Section 34 IPC. Learned trial court, vide its judgment dated 6th January, 1982 had acquitted accused Sher Bahadur and Jagdish, while it convicted Ram Dutt, Thakur Prasad, Mano Dutt and Ram Narain for both the afore-stated offences. During the pendency of the appeal before the High

Court, Ram Dutt died and the Court convicted the other accused vide its judgment under appeal.

3. Thakur Prasad had filed a separate appeal challenging the said judgment of the High Court, being SLP (Crl.) No.3929 of 2006 titled *Thakur Prasad* v. *State of U.P.* which came to be dismissed by order of this Court dated 18th August, 2006. In other words, the conviction of the accused Thakur Prasad under Section 302 read with Section 34 IPC attained finality. However, vide the same order, this Court granted leave to appeal in the case of Mano Dutt and Ram Narain. This is how the present appeal has come up for final hearing before us.

4. The case of the prosecution is that Mano Dutt, Ram Narain and Jagdish are real brothers while Ram Dutt and Thakur Prasad are their cousins. On 22nd October, 1977 during day time, Siya Ram was doing earth filling in front of his *sariya* (a place of tethering cattle). The four accused, namely, Ram Dutt, Thakur Prasad, Ram Narain and Mano Dutt out of the six named accused had come there and asked Siya Ram not to do earth filling. Siya Ram told them that it was his land and he would not stop the work of land filling. Thereupon, Siya Ram called certain villagers. The matter was discussed with the villagers, all of whom said that the land was that of Siya Ram and he could carry on with land filling on his own land. After deciding this, the villagers went away and Siya Ram resumed the filling of the earth. Accused Ram Dutt, Thakur Prasad, Mano Dutt, Ram Narain, Jagdish and Sher Bahadur, armed with *lathis*, came there and chased Siya Ram. They said that they would finish Siya Ram. Siya Ram was able to run for a short distance away, whereafter all the accused surrounded him in front of the house of one Fateh Mohmad. Accused Ram Dutt, Thakur Prasad, Mano Dutt and Ram Narain started beating Siya Ram with their *lathis*. The father of Siya Ram, Nankoo and brother Salik Ram rushed towards Siya Ram to rescue him. Accused Sher Bahadur and Jagdish intercepted them in front of one Chiddan's door and beat them with their *lathis*. Siya

Ram fell down after getting the *lathi* blows. Siya Ram raised alarm, but still these accused persons continued to beat him and in the meanwhile, Smt. Sangam Devi, Bhurey and Pradhan came there. The Pradhan snatched the *lathis* of the four accused, who then fled away from the scene. Siya Ram sustained serious injuries. Nankoo and Salik Ram also sustained injuries. Pradhan and the other villagers took the injured to the Police Station.

5. The incident was narrated in the form of a report of occurrence, by the deceased Siya Ram, who was in an injured state at that time. The same was transcribed by Panna Lal Pandey, PW3 and submitted to the Police Station, where a First Information Report (hereafter, 'FIR') Exhibit Ka7 was prepared.

6. On this statement, the officer present at the police station had registered a case under Section 308, IPC and the investigation was taken over by C.R. Malviya. During investigation, C.R. Malviya recorded the statements of a number of witnesses as well as sent Siya Ram to the hospital. Siya Ram succumbed to his injuries on 24th October, 1977 at about 8.00 a.m. in the District Hospital, Faizabad. Upon his death, the offence was converted to one under Section 302, IPC. The Investigating Officer visited the spot, recovered blood-stained earth, Ex. Ka-8 and prepared the site plan, Ext. Ka-9 and examined various witnesses. After completion of the investigation, the charge sheet was filed before the court of competent jurisdiction. The trial Court vide its order dated 30th July, 1980 charged the accused with offences under Sections 147, 304/149 and 323/149. However, subsequently, the charge was amended and all the accused were charged with offences under Sections 302/149-147 and 323/149, IPC. The accused pleaded not guilty and faced trial before the Court of Sessions. As already noticed, out of the six accused, four were convicted by the trial court. One accused, namely Ram Dutt, died during pendency of the appeal before the High Court and all the other

accused were acquitted of the offences under Section 323/34 IPC, but convicted for offences under Section 302/34 IPC. For the reasons afore-recorded in the present appeal, we are only concerned with the two accused, namely Mano Dutt, and Ram Narain.

7. The prosecution had examined Smt. Sangam Devi, PW-1 (wife of the deceased), Salik Ram, PW-2 (injured witness). Panna Lal Pandey, PW-3 (scribe of Siya Ram's statement) and two doctors, Dr. S.N. Rai (P.W.-4) and Dr. Surya Bhan Singh (P.W. 5), besides examining the formal witnesses.

8. Dr. Surya Bhan Singh, PW-5 had examined Salik Ram when he was brought to the hospital on the evening of 22nd October, 1977 at about 4.30 p.m. He had noticed lacerated bone-deep wound, 3 cm x 0.5 cm, on the frontal region of the scalp, from which blood was oozing. The doctor described the injuries on the body of the deceased as follows:-

"(1) Lacerated wound mark 3 cm x 0.5 cm on the left side of head on the parietal region.

(2) Bruise 9 cm x 1.5 cm in the left scapula region.

(3) Bruise 12 cm x 1.5 cm in the right scapula region of scalp.

(4) Bruise 9 cm x 2 cm in the right scapular region of scalp.

(5) Bruise 19 cm x 2 cm in the right scapular region of scalp."

9. This very doctor had examined Salik Ram, son of Nankoo and had noticed as many as five injuries on his body. He had also examined Nankoo and noticed four injuries on his person. The injuries on the bodies of Nankoo and Salik Ram both were found to be simple injuries and were caused with blunt object like lathi, while Siya Ram was transferred to the

specialist for obtaining expert opinions on his injuries and for his treatment.

10. After the death of Siya Ram on 24th October, 1977, the post-mortem on the body of the deceased was performed by Dr. S.N. Rai, PW-4, who noticed four ante-mortem injuries as follows:-

"(1) Lacerated wound 2.5 cm x ¾ cm x bone deep, on Rt. side head, 6.5 cm above the eyebrow of right eye.

(2) Lacerated wound 2.5 cm x 1 cm x bone deep injures 1-2 cm on the left side of the head.

(3) Contusion 6 cm x 4 cm in the right side of the face involving whole orbital area.

(4) Diffused, swelling on the Rt. Side of head parietal region."

11. Upon internal examination of the body of the deceased, he also found the following internal injuries:-

"1. Comminuted fracture in the area of 11.5 cm x 10 cm on the right Parietal Region of the skull.

2. Comminuted fracture in the area of 6.5 cm x 6.5 cm in the frontal Bone was found.

3. Comminuted fracture in the area of 10 cm x 4 cm on the left side of temporo parietal Region was found.

4. Large quantity of blood was accumulated on the right side of head between skin and bone."

12. The doctor stated that, in his opinion, the cause of death was a shock due to ante-mortem injuries and loss of blood. He specifically stated that all the injuries are possible

by blows of *lathis*. In his cross-examination, he clearly stated that these injuries are ordinarily sufficient to cause death.

13. It needs to be noticed that one of the appellants, namely Ram Dutt, had also allegedly lodged a report against the deceased Siya Ram, injured Nankoo, and two other sons of Nankoo, i.e., Salik Ram and Ram Dhiraj. After registering the FIR, the Investigating Officer in his report had also stated that the accused Ram Dutt had sustained some injuries on his person.

14. The conviction of the accused and the impugned judgment have been challenged *inter alia*, but primarily, on the following grounds:-

(i) The prosecution did not examine the material witnesses like the investigating officer as well as other witnesses who, as per the case of the prosecution, were actually present at the time of occurrence of the incident.

(ii) According to the prosecution, PW-1 and PW-2 both are eye-witnesses but they are the widow and brother of the deceased, and therefore, are interested witnesses and their statement cannot be relied upon by the Court.

(iii) The accused persons themselves had lodged a counter report against the deceased, PW-2 and other relations of the deceased, alleging attack/aggression. This was not a counter blast but a true and correct happening of events as reported by the accused, against the complainants, in which the accused Ram Dutt had suffered injuries. For these reasons, the accused should be entitled to the benefit of doubt and consequently, to an order of acquittal.

(iv) Even if the entire prosecution story is assumed to be correct, even then it does not constitute an offence under Section 302, IPC. In the facts and circumstances of the case, at the worst, the accused could be held guilty of an offence punishable under Section 304, Part-I, IPC.

(v) The deceased had only three injuries, therefore, on the one hand, the story that six accused had assaulted him with *lathis* even when he was lying on the ground is not physically possible and on the other hand, the prosecution has failed to explain the injuries suffered by Ram Dutt, accused. Thus, it creates a specific doubt in the story of the prosecution.

(vi) Lastly, it is contended that the dismissal of the other Special Leave Petition filed by Thakur Prasad does not have any bearing on the fate of the present appeal, inasmuch as the Court is vested with wide powers in terms of Section 38, IPC, to deal with the case of the present appellants on distinct and different footing. Even if Thakur Prasad's conviction for an offence under Section 302 read with Section 34 IPC has attained finality, the appellants may still be acquitted.

15. We have already noticed that the incident in question is admitted. According to the accused, the fight was started by the deceased and his relations and they had exercised their right of private self-defence, to protect themselves. To the contrary, according to the witnesses of the prosecution as well as according to the version given by the deceased, the accused were aggressive and had attacked the deceased and his family members after deliberately planning to assault and kill them. It is not a case where the circumstances, even remotely, can be construed to have satisfied the ingredients of self-defence. We may examine few of the circumstances in this case. From the record, it appears that Ram Dutt had lodged a complaint of the incident that took place on 22nd October, 1977 at about 12.00 p.m. According to this report the accused in that complaint (i.e., the deceased and his family members) had been putting earth on Ram Dutt's *sariya*, which he had forbade. There was verbal altercation between the parties and then the accused in that complaint (i.e., the deceased herein) started assaulting him with *lathis* and it was only by raising an alarm that the people of the village came to the place of occurrence and his life was saved. According to this complaint, he had suffered injuries on his head.

16. Firstly, this complaint had not been proved by Ram Dutt during the trial. Accordingly, the concurrent view taken by the courts below, that this document cannot be relied in evidence, cannot be faulted with. Furthermore, Ram Dutt did not examine a single witness in his defence to prove that he was attacked by the deceased and his family members or that they were putting earth at the door of Ram Dutt's *sariya*. No doubt, Ram Dutt was subjected to medical examination by the Medical Officer vide Ex.Kha 1. It was noticed that he had suffered lacerated wounds on the central and other regions of skull, and had complained of pain in left leg. This would show that Ram Dutt had suffered some injuries but where and how these injuries were suffered, was for him to establish, particularly when he had taken a specific stand that the deceased and his family members were at fault and were aggressive. He claims that they had caused serious injuries to his person and this incident happened in the presence of the villagers. It is a settled canon of evidence jurisprudence that one who alleges a fact must prove the same. It is also his case that the prosecution has not explained the injuries on his person and, therefore, the argument impressed upon the Court is that the attack with *lathis* was in exercise of self-defence and the failure of the prosecution to explain injuries on the person of Ram Dutt is a circumstance which creates a serious doubt in the story of the prosecution. We are not impressed with this contention primarily for the above reasons and also because of the fact that if the police was not investigating into the complaint, Ram Dutt was not helpless or remediless in law. He could have filed an application before the concerned Magistrate in accordance with the provisions of Code of Criminal Procedure, 1973 (Cr.P.C.) for directing the police to investigate and even to summon the accused in that complaint. But none of the accused, including Ram Dutt, took any of the steps available to them in law. When a person claims exercise of private self-defence, the onus lies on him to show that there were circumstances and occasions for exercising such a right. In other words, these basic facts must be established by the

accused. Just because one circumstance exists amongst the various factors, which appears to favour the person claiming right of self-defence, does not mean that he gets the right to cause the death of the other person. Even the right of self-defence has to be exercised directly in proportion to the extent of aggression.

17. As per the medical report, the injuries on the body of Ram Dutt were found to be 'simple in nature'. On the other hand, we have a complete version of the prosecution, duly supported by witnesses, out of which PW1 and PW2 are eye-witnesses to the occurrence. The bone of contention between the parties was the statement of the deceased, that he was filling the earth over some land, which he claimed to be his land; according to the accused, the earth-filling was carried out in front of the door of Ram Dutt. According to both the parties, the villagers came to the spot. Out of the two versions, the one put forward by the prosecution and the other in the defence of the accused, the version of the prosecution, as has been disclosed by the eye-witnesses, is trustworthy, reliable and entirely plausible in the facts and circumstances of the case. The mere fact that the Investigating Officer has not been produced, or that there is no specific explanation on record as to how Ram Dutt suffered these injuries, would not vitiate the trial or the case of the prosecution in its entirety. These claims of the accused would have been relevant considerations, provided the accused had been able to establish the other facts alleged by them. It is not always mandatory for the prosecution to examine the Investigating Officer, provided it can establish its case beyond reasonable doubt even in his absence. The present case certainly falls in the latter class. Where the accused lead no defence, they cannot take benefit of the fact that the prosecution did not examine any independent witnesses. The accused would be deemed to have been aware of the consequences in law when they gave a statement admitting the occurrence but attributing aggression and default to the deceased and his family members.

18. Accused Thakur Prasad is also stated to own a *sariya* and was also allegedly using his *lathi* in self-defence, as according to their story, four persons with the deceased and his family members had attacked them. Strangely, Thakur Prasad suffered no injury. These are the circumstances which, examined cumulatively, would provide support to the case of prosecution.

19. Another contention raised on behalf of the accused/appellants is that only family members of the deceased were examined as witnesses and they being interested witnesses cannot be relied upon. Furthermore, the prosecution did not examine any independent witnesses and, therefore, the prosecution has failed to establish its case beyond reasonable doubt. This argument is again without much substance. Firstly, there is no bar in law in examining family members, or any other person, as witnesses. More often than not, in such cases involving family members of both sides, it is a member of the family or a friend who comes to rescue the injured. Those alone are the people who take the risk of sustaining injuries by jumping into such a quarrel and trying to defuse the crisis. Besides, when the statement of witnesses, who are relatives, or are parties known to the affected party, is credible, reliable, trustworthy, admissible in accordance with the law and corroborated by other witnesses or documentary evidence of the prosecution, there would hardly be any reason for the Court to reject such evidence merely on the ground that the witness was family member or interested witness or person known to the affected party. There can be cases where it would be but inevitable to examine such witnesses, because, as the events occurred, they were the natural or the only eye witness available to give the complete version of the incident. In this regard, we may refer to the judgments of this Court, in the case of *Namdeo v. State of Maharashtra*, [(2007) 14 SCC 150]. This Court drew a clear distinction between a chance witness and a natural witness. Both these witnesses have to be relied upon subject to their evidence being trustworthy and admissible in

accordance with the law. This Court, in the said judgment, held as under:

> **"28.** From the aforesaid discussion, it is clear that Indian legal system does not insist on plurality of witnesses. Neither the legislature (Section 134 of the Evidence Act, 1872) nor the judiciary mandates that there must be particular number of witnesses to record an order of conviction against the accused. Our legal system has always laid emphasis on *value*, *weight* and *quality* of evidence rather than on *quantity*, *multiplicity* or *plurality* of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence. The bald contention that no conviction can be recorded in case of a solitary eyewitness, therefore, has no force and must be negatived.
>
> **29.** It was then contended that the only eyewitness, PW 6 Sopan was none other than the son of the deceased. He was, therefore, "highly interested" witness and his deposition should, therefore, be discarded as it has not been corroborated in material particulars by other witnesses. We are unable to uphold the contention. In our judgment, a witness who is a relative of the deceased or victim of a crime cannot be characterised as "interested". The term "interested" postulates that the witness has some direct or indirect "interest" in having the accused somehow or the other convicted due to animus or for some other oblique motive."

20. It will be useful to make a reference of another judgment of this Court, in the case of *Satbir Singh & Ors. v. State of Uttar Pradesh,* [(2009) 13 SCC 790], where this Court held as under:

> **"26.** It is now a well-settled principle of law that only

> because the witnesses are not independent ones may not by itself be a ground to discard the prosecution case. If the prosecution case has been supported by the witnesses and no cogent reason has been shown to discredit their statements, a judgment of conviction can certainly be based thereupon. Furthermore, as noticed hereinbefore, at least Dhum Singh (PW 7) is an independent witness. He had no animus against the accused. False implication of the accused at his hand had not been suggested, far less established."

21. Again in a very recent judgment in the case of *Balraje @ Trimbak v. State of Maharashtra* [(2010) 6 SCC 673], this Court stated that when the eye-witnesses are stated to be interested and inimically disposed towards the accused, it has to be noted that it would not be proper to conclude that they would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically. The Court would be required to analyse the evidence of related witnesses and those witnesses who are inimically disposed towards the accused. But if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same.

22. As per PW5, Dr. Surya Bhan Singh, he had examined Salik Ram Yadav as well as Nankoo on 22nd October, 1977 itself and noticed as many as five injuries on Salik Ram and four injuries upon the person of Nankoo. He stated that the deceased was the son of Nankoo, while Salik Ram was his brother. These injuries were suffered by them from a blunt object. Salik Ram was examined as PW2 and his statement is cogent, coherent, reliable and fully supports the case of the prosecution. However, the other injured witness, Nankoo, was not examined.

23. In our view, non-examination of Nankoo, to which the

accused raised the objection, would not materially affect the case of the prosecution. Normally, an injured witness would enjoy greater credibility because he is the sufferer himself and thus, there will be no occasion for such a person to state an incorrect version of the occurrence, or to involve anybody falsely and in the bargain, protect the real culprit. We need not discuss more elaborately the weightage that should be attached by the Court to the testimony of an injured witness. In fact, this aspect of criminal jurisprudence is no more *res integra*, as has been consistently stated by this Court in uniform language. We may merely refer to the case of *Abdul Sayeed v. State of Madhya Pradesh* [(2010) 10 SCC 259], where this Court held as under:

> **"28.** The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness." [Vide *Ramlagan Singh v. State of Bihar*, *Malkhan Singh v. State of U.P.*, *Machhi Singh v. State of Punjab, Appabhai v. State of Gujarat, Bonkya v. State of Maharashtra, Bhag Singh, Mohar v. State of U.P. (SCC p. 606b-c), Dinesh Kumar v. State of Rajasthan, Vishnu v. State of Rajasthan, Annareddy Sambasiva Reddy v. State of A.P.* and *Balraje v. State of Maharashtra*.]
>
> **29.** While deciding this issue, a similar view was taken in *Jarnail Singh v. State of Punjab*, where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under: (SCC pp. 726-27, paras 28-29)

> "*28*. Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In *Shivalingappa Kallayanappa v. State of Karnataka* this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.
>
> *29*. In *State of U.P. v. Kishan Chand* a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide *Krishan v. State of Haryana*). Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below."

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are

strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein."

24. To the similar effect is the judgment of this Court in the case of *Balraje @ Trimbak* (supra).

25. Another argument with regard to appreciation of evidence is that the material witness having not been examined and the entire prosecution story being based upon the statements of PW1 and PW2, who are the interested witnesses, the entire prosecution evidence suffers from a patent infirmity in law.

26. Again, we are not impressed by this contention, primarily for the reasons afore-recorded. Furthermore, it may also be noticed that non-examination of any independent witness, in the facts of the present case, is not fatal to the case of the prosecution. The Court can convict an accused on the statement of a sole witness, even if he was a relative of the deceased and thus, an interested party. The condition precedent to such an order is that the statement of such witness should satisfy the legal parameters stated by this Court in a catena of judgments. Once those parameters are satisfied and the statement of the witness is trustworthy, cogent and corroborated by other evidence produced by the prosecution, oral or documentary, then the Court would not fall in error of law in relying upon the statements of such witness. It is only when the Courts find that the single eye-witness is a wholly unreliable witness that his testimony is discarded *in toto* and no amount of corroboration can cure its defect. Reference in this regard can be made to the judgment of this Court, in the case of *Anil Phukan v State of Assam* [(1993) 3 SCC 282].

27. Now we may examine as to the place and manner in which the incident occurred. It is a very important aspect of this case that the FIR itself was lodged by the deceased along with PW3 Panna Lal Pandey who transcribed the same at the police station itself. The deceased was seriously injured, but was fully

aware of what he was doing and he had no reason to falsely implicate any person. His father and brother had also been injured in the occurrence. It is specifically recorded in the statement of these witnesses that when the appellant Mano Dutt and other accused came for the second time, to the place where the deceased was filling the earth at the *sariya*, they gave a *lalkar* '*Maro sale ko*' and then assaulted him with *lathis*. When he tried to run away, he fell to the ground near the house of one Fateh Mohd. The blood-stained earth was collected from the front of Fateh Mohd. doors by the Investigating Officer vide Ext. Ka-8. Thereafter, the villagers had come and taken the *lathis* away from the accused persons. The deceased was taken to the police station and then to the hospital, where he died on 24th October, 1977. It is evident that all the accused persons had come prepared, mentally and physically, to assault the deceased and in furtherance to their common intention, had even given a *lalkar* to kill the deceased. This incident was witnessed by natural witnesses Nankoo and PW2 Salik Ram, as well as PW1 Smt. Sangam Devi. Nankoo and Yadav even intervened and tried to protect their son/brother, but in the process, they also received number of injuries, as is clear from the medical evidence produced on record. During the course of argument, the learned counsel for the appellant tried to take advantage of the fact that the deceased ought to have suffered a number of injuries, if six people had, at the same time, attacked him with *lathis*, but he had actually received only three injuries. Thus, the story of the prosecution was improbable.

28. We have no hesitation in rejecting this argument, primarily for the reason that, as per the medical report and statement of PW5 Dr. Surya Bhan Singh, the deceased had suffered a number of injuries and not only three. The collection of the bloodstained earth itself is a relevant piece of evidence and provides the link in the commission and the place of crime. In the case of *Kartar Singh v. State of Punjab* [AIR 1961 SC 1787] this Court took the following view:

"13. It follows therefore that the finding of the courts below that the appellant's party formed an unlawful assembly and that the appellant is constructively liable of the offences under ss. 302 and 307 IPC, in view of Section 149, is correct.

14. The second contention that in a free fight each is liable for an individual act cannot be accepted in view of the decision of this Court in *Gore Lal v. State of U.P.* This Court said in that case:

> "In any event, on the finding of the court of first instance and of the High Court that both the parties had prepared themselves for a free fight and had armed themselves for that purpose, the question as to who attacks and who defends is wholly immaterial,"

and confirmed the conviction under Section 307 read with Section 149 IPC It may, however, be noted that it does not appear to have been urged in that case that each appellant could be convicted for the individual act committed by him. When it is held that the appellant's party was prepared for a fight and to have had no right of private defence, it must follow that their intention to fight and cause injuries to the other party amounted to their having a common object to commit an offence and, therefore, constituted them into an unlawful assembly. The injuries they caused to the other party are caused in furtherance of their common object. There is then no good reason why they be not held liable, constructively, for the acts of the other persons of the unlawful assembly, in circumstances which makes s. 149 IPC, applicable to them.

15. Even if the finding that there were more than five persons in the appellant's party be wrong, we are of opinion that the facts found that the appellant and his companions who were convicted had gone from the village

armed and determined to fight, amply justified the conclusion that they had the common intention to attack the other party and to cause such injuries which may result in death. Darshan had two incised wounds and one punctured wound. Nand Lal had two incised wounds and one punctured wound and two abrasions. The mere fact that Kartar Singh was not connected with the dispute about the plot of land is not sufficient to hold that he could not have formed a common intention with the others, when he went with them armed. The conviction under ss. 302 and 307 read with s. 149, can be converted into one under ss. 302 and 307 read with s. 34 IPC

16. We, therefore, see no force in this appeal and accordingly dismiss it."

29. The question, raised before this Court for its consideration, is with respect to the effect of non-explanation of injuries sustained by the accused persons. In this regard, this Court has taken a consistent view that the normal rule is that whenever the accused sustains injury in the same occurrence in which the complainant suffered the injury, the prosecution should explain the injury upon the accused. But, it is not a rule without exception that if the prosecution fails to give explanation, the prosecution case must fail. Before the non-explanation of the injuries on the person of the accused, by the prosecution witnesses, may be held to affect the prosecution case, the Court has to be satisfied of the existence of two conditions:

(i) that the injuries on the person of the accused were also of a serious nature; and

(ii) that such injuries must have been caused at the time of the occurrence in question.

30. Where the evidence is clear, cogent and creditworthy; and where the court can distinguish the truth from falsehood,

the mere fact that the injuries on the person of the accused are not explained by the prosecution cannot, by itself, be a sole basis to reject the testimony of the prosecution witnesses and consequently, the whole case of the prosecution. Reference in this regard can be made to *Rajender Singh & Ors. v. State of Bihar*, [(2000) 4 SCC 298], *Ram Sunder Yadav & Ors. v. State of Bihar*, [(1998) 7 SCC 365, and *Vijayee Singh v. Stateo of U.P.* [(1990) 3 SCC 190].

31. PW4 had clearly noticed that injury on the person of the deceased, Salik Ram Yadav and Nankoo were all caused by a blunt weapon. He had specifically observed that the injuries were sufficient, in the ordinary course of time, to cause death and had, in fact, resulted in the death of the deceased.

32. The High Court and the trial court have recorded reasons for returning the concurrent finding of guilt. The learned counsel for the appellant strenuously argued that one of the accused, namely Ram Dutt, who is now dead, had in his statement under Section 313 Cr.P.C., stated that the land in between the house of the parties was his and that despite his protest, Salik Ram, Siya Ram, Ram Dhiraj and Nankoo were putting earth on that land when he again objected, all of them ran after him, rounded him up at the door of Fateh Mohd. and started beating him. Thakur Prasad, cousin of Ram Dutt, came and in response, wielded the *lathi* in his defence. To similar effect is the statement of Thakur Prasad. In view of this stand, the other accused cannot be said to have been involved in the commission of the crime. This argument is a self-serving submission. All the accused are related to each other. Once the plea of self-defence is disbelieved, then a statement of a co-accused under Section 313 CrPC cannot be of any advantage to the co-accused, as the prosecution has been able to establish its case beyond any reasonable doubt. In the present case, in the chain of events, nowhere does the plea of self-defence as sought to be raised by the appellant-accused or other accused, fit in. The defence has miserably failed to

prove any fact or any need for resorting to commission of the offence in self-defence. To begin with, the police had charged this accused for an offence under Section 302 read with Section 149 and 323 of the IPC. However, two of the accused were acquitted by the trial court and the remaining were convicted of an offence under the said Sections 302/34 and 323/34, IPC. The High Court acquitted all the accused of offence under Section 302/34 IPC and unfortunately, Ram Dutt died during the pendency of that appeal. Because the alleged number of accused had become less than five, nature of the offences were changed from offence under Section 149 to Section 34, IPC. In face of the acquittal of the two accused, which was not assailed by the State, it must be taken that they were not present. Then remain three accused, Thakur Dass and the present appellants. Thus, in the circumstances of the case, the possibility of presence of all other persons in the appellants' party cannot be excluded. It is also not quite possible that the accused have deposed incorrectly before the Court in regard to the number of persons and their participation. Even where there are less than five persons who are accused, but the facts and the evidence of the case is convincing as in the present case, where the accused had returned to the place of occurrence with complete preparedness and after giving *lalkar* had attacked the deceased there, they have to be held liable for commission of the crime (Refer : *Kartar Singh vs. State of Punjab*, AIR 1961 SC 1787). The learned counsel for the respondent-State also relied upon the judgment in the *Yunis @ Kariya v. State of M.P.* [(2003) 1 SCC 425] to contend that an overt act on the part of one of the accused is immaterial when his presence, as part of the unlawful assembly, is established. This case was for an offence under Section 302/149 IPC and, therefore, would not squarely apply to the present case as it has been held by the Court that the accused was not constituting an unlawful assembly of five or more persons. However, it cannot be ignored that the extent of participation, even in a case of common intention covered under Section 34 IPC would not depend on the extent of overt act. If all the accused have

committed the offence with common intention and inflicted injuries upon the deceased in a pre-planned manner, the provisions of Section 34 would be applicable to all.

33. The learned counsel had also relied upon the judgment of this Court in *Marimuthu & Ors. v. State of Tamil Nadu* [(2008) 3 SCC 205] to contend that this was a fight at the spur of the moment and the conviction of the appellants could be converted into that under Section 304, Part I of the IPC. This judgment is distinguishable on facts and has no application to the present case. It was not a dispute which arose at the spur of the moment as the evidence clearly shows that the accused had gone again to the site in question with a common intention and with the preparedness to assault and even kill the deceased. Even the site plan, Ex.Ka9 clearly shows that all these places, i.e. the land on which the deceased was putting the earth, the house of Fateh Mohd., the house of the accused and that of the deceased were all nearby. This is even fully corroborated by the oral evidence. Thus, on the basis of the documentary and ocular evidence, we are fully satisfied that the prosecution has been able to prove its case beyond reasonable doubt and has brought home the guilt of the accused under Section 302 read with Section 34, IPC.

34. Having come to the above finding, we do not consider it necessary to dwell on the question as to what is the effect in law of dismissal of Thakur Prasad's Special Leave Petition by this Court, vide Order dated 18th August, 2006.

35. What shall be the correct interpretation of Section 34 with reference to Section 38 IPC, in view of the facts of the present case, or even otherwise, is left undecided.

36. For the reasons afore-recorded, this appeal is dismissed.

D.G. Appeal dismissed.

THE ACCOUNTANT GENERAL, M.P.
v.
S.K. DUBEY & ANR.
(Civil Appeal No. 5322 of 2005)

FEBRUARY 29, 2012

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

Consumer Protection Act, 1986 – ss. 16(2), 30(2), 31, 2(jj), 2(n) – Retired High Court judge appointed as President of State Consumer Dispute Redressal Commission – Rendered service as President, State Commission for 4 years, 10 months and 22 days – Pension for the said subsequent period – Entitlement to – Whether in absence of any specific provision therefor in the State Rules for grant of pension, it is open to the State Government to have provided by way of an executive order that the service rendered by the respondent as President of the State Commission would be counted as pensionable service – Held: In view of difference of opinion, matter referred to the larger Bench – Reference to larger bench – Madhya Pradesh Consumer Protection Rules, 1987 – r. 6 – Constitution of India, 1950 – Article 162.

The question which arose for consideration in the instant appeal was whether the first respondent who functioned as the President of the State Consumer Disputes Redressal Commission, in Madhya Pradesh for a period of about 4 years and 11 months, after his retirement as a High Court Judge, was entitled to receive pension for this subsequent period in the absence of any specific provision therefor in the Madhya Pradesh Consumer Protection Rules, 1987 framed under the Consumer Protection Act, 1986 and whether in the absence of any express rule in the State Rules, was it open to the State of Madhya Pradesh to have provided by way of an Executive order dated April 5, 2002 that the

service rendered by the respondent as President of the State Commission would be counted as pensionable service.

Referring the matter to larger bench, the Court

HELD: Per Lodha,J.:

1.1. For the purposes of computation of pension payable to the respondent his different services, namely, service as a Judge of the High Court and service as President, State Commission cannot be clubbed. The respondent is entitled to pension as a High Court Judge only for the period rendered by him in that capacity. The subsequent service rendered by him as President, State Commission cannot be charged to the Consolidated Fund of India. This position was not disputed by the respondent in the High Court nor it is disputed before this Court. [Para 21] [741-A-C]

1.2. The State Government of Madhya Pradesh in exercise of the power conferred by sub-section (2) of Section 30 of the Consumer Protection Act, 1986 has framed the State Rules for the subjects enumerated therein including Section 16(2). Rule 6 of the M.P. Consumer Protection Rules, 1987 thereof provides for salary and other allowances and terms and conditions of the President and Members of the State Commission. The said Rule does not provide that service of the President, State Commission is a pensionable service and, therefore, despite the office order dated April 5, 2002 issued by the State Government to the effect that service rendered by the respondent as President of the State Commission was pensionable service, the respondent is not entitled to any pension for the service he rendered as President, State Commission. It is clear from the Rule 6 that it does not make any provision in making the service of the President and Members of the State

Commission a pensionable service. State Rules are totally silent in this regard. [Paras 23, 30] [741-G-H; 742-A-B; 746-H; 747-A]

1.3. Subject to the provisions of the Constitution, the executive power of a State extends to the matters with respect to which the Legislature of the State has power to make laws. This is what is provided in Article 162 of the Constitution. In other words, the executive power of the State Executive is co-extensive with that of the State Legislature. [Para 31] [747-C]

Sant Ram Sharma vs. State of Rajasthan **AIR 1967 SC 1910: 1968 SCR 111;** *Lalit Mohan Deb vs.Union of India* **1973 (3) SCC 862;** *Union of India and Anr. v. Central Electrical and Mechanical Engineering Service (CE&MES) Group 'A' (Direct Recruits) Association, CPWD and Ors.* **(2008) 1 SCC 354: 2007 (11) SCR 863 – referred to.**

1.4. The statutory provision contained in Section 16(2) is quite clear. It provides that the salary or honorarium and other allowances payable to, and the other terms and conditions of service of, the members of the State Commission shall be such as may be prescribed by the State Government. The term 'member' includes the President of the State Commission. That pension can be made a condition of service is beyond any question. As regards the meaning of the expression, 'as may be prescribed by the State Government' occurring in Section 16(2), the expression 'as may be prescribed by the State Government' in Section 16(2) has to be read as prescribed by the rules framed by the State Government, if any. This is the plain meaning of the said expression. If the Parliament intended that salary or honorarium and other allowances and other terms and conditions of service of the President and the Members of the State Commission have to be provided in the rules by the State Government in exercise of its powers under Section 30(2)

and in no other manner, the provision in Section 16(2) would have read, 'the salary or honorarium and other allowances payable to, and the other terms and conditions of service of the members of the State Commission shall only be in accordance with the rules framed by the State Government'. The words 'shall be such' followed by the expression 'as may be prescribed' clearly indicate the legislative intent of 'may' being directory and the expression 'as may be prescribed' to mean, 'if any'. [Paras 35 and 36] [748-C-H; 749-A]

Orissa State (Prevention & Control of Pollution) Board v. Orient Paper Mills and Anr. **(2003) 10 SCC 421: 2003 (2) SCR 741;** *Surinder Singh v. Central Government and Ors.* **(1986) 4 SCC 667: 1986 (3) SCR 946;** *T. Cajee v. U. Jormanik Siem and Anr.* **AIR 1961 SC 276:1961 SCR 750 – referred to.**

1.5. There is no difference in the legal position in a case where power conferred on the State Government for framing rules has been exercised but such rules remain silent on certain aspects although it had power to make rules with regard to those aspects and in the situation where no rules have been framed in exercise of the power conferred on it, insofar as executive power of the State is concerned. The power that vests in the State Government in Section 30(2) to carry out the provisions contained in Section 16(2) does not take away its executive power to make provision for the subjects covered in Section 16(2) for which no rules have been framed by it. The exercise of such power by the State Government, obviously, must not be inconsistent with the constitutional provisions or statutory provision in Section 16(2) or the State Rules framed by it. In the instant case, the exercise of power by the State Government by issuance of the order dated April 5, 2002 does not suffer from any such vice. [Para 38] [750-C-F]

1.6. As to whether the laying of rules and regulations before the Parliament is mandatory or directory or whether laying is a condition precedent to their operation or be neglected without prejudice to the effect of the rules, it is now well settled that each case must depend on its own circumstances or the wording of the statute under which the rules are made. This Court had an occasion to deal with the policy and object underlying the provisions relating to laying the delegated legislation made. In light of said legal position, if Section 31(2) of the 1986 Act is seen, it leaves no manner of doubt that the said provision is directory. The submission that having regard to the provision contained in Section 31(2), the executive power of the State Government to fill in the gaps in the rules can only be exercised in generality cannot be accepted. [Paras 41, 42 and 43] [751-C-D; 752-C-D]

Hukum Chand Etc. v Union of India and others **(1972) 2 SCC 601;** *M/s. Atlas Cycle Industries Ltd. and Ors. v. The State of Haryana* **(1979) 2 SCC 196: 1979 (1) SCR 1070 ;** *Jan Mohammad Noor Mohammad Begban v. State of Gujarat and Anr.***(1966) 1 SCR 505;** *Narendra Kumar and Ors. v. The Union of India and Ors.* **(1960) 2 SCR 375 – referred to.**

Craies on Statute Law, **Seventh Edition – referred to.**

1.7. The State Government has power to issue executive order or administrative instructions with regard to subject/s provided in Section 16(2) of the 1986 Act where the State Rules are silent on any of such subject. There is nothing in Section 30(2) or Section 31 of the 1986 Act that abridges the power of the State Government to issue executive order or administrative instructions with regard to pensionable service of the President and Members of the State Commission, although State Rules have been framed but such Rules are silent on the aspect

of the pensionable service. In other words, in the absence of any provision in the State Rules relating to the pensionable service of the President and Members of the State Commission, there is no bar for the State Government in issuing executive order or administrative instructions regarding pensionable service of the President, State Commission. [Para 44] [753-D-G]

1.8. Insofar as the order dated April 5, 2002 issued by the Government of Madhya Pradesh according sanction for counting the service of the respondent on the post of President, State Commission for pension is concerned, the same being not inconsistent with the statutory provision contained in Section 16(2) and the State Rules, the view of the High Court that the respondent was entitled to pension from the State Government as per the terms and conditions of appointment cannot be faulted. The High Court rightly observed that the respondent was entitled to pension from the State Government insofar as service rendered by him as the President, State Commission was concerned to the extent provided in the order dated April 5, 2002. Obviously such service shall not be clubbed with the service of the respondent as a High Court Judge and shall not be charged to Consolidated Fund of India.[Para 45] [752-H; 753-A-C]

Justice P. Venugopal v. Union of India and Ors. **(2003) 7 SCC 726: 2003 (1) Suppl. SCR 286;** *State of Uttar Pradesh v. Singhara Singh and Ors.* **AIR 1964 SC 358;** *Chandra Kishore Jha v. Mahavir Prasad and Ors.* **(1999) 8 SCC 266: 1999 (2) Suppl. SCR 754;** *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. and Anr.* **(2005) 7 SCC 234: 2005 (2) Suppl. SCR 699;** *Tamilselvan v. State represented by Inspector of Police, Tamil Nadu* **(2008) 7 SCC 755: 2008 (11) SCR 888;** *Bar Council of Maharashtra v. M.V. Dabholkar and Ors.* **(1975) 2 SCC 702: 11976 (1) SCR 306;** *Jasbhai*

Motibhai Desai v. Roshan Kumar, Haji Bashir Ahmed and Ors. **(1976) 1 SCC 671: 1976 (3) SCR 58;** *Thammanna v. K. Veera Reddy and Ors.* **(1980) 4 SCC 62: 1981 (1) SCR 73;** *Lalit Mohan Deb and Ors. v. Union of India and Ors.* **(1973) 3 SCC 862;** *Delhi Airtech Services Private Limited and Anr. v. State of Uttar Pradesh and Anr.* **(2011) 9 SCC 354;** *Union of India and Ors. v. Pratibha Bonnerjea and Anr.* **(1995) 6 SCC 765: 1995 (5) Suppl. SCR 511;** *V.S. Mallimath v. Union of India and Anr.* **(2001) 4 SCC 31: 2001 (2) SCR 567 – referred to.**

PER H.L. GOKHALE, J:

1.1. The appellant was joined as the first respondent in the Writ Petition in the High Court. He is in charge of the accounts in the State and represents the Comptroller and Auditor General of India, who is a Constitutional Functionary. The payment of pension and its supervision is a part of his responsibility. His letters/orders were challenged in the writ petition, and if it was his view that the decision of the High Court was erroneous, there is no reason as to why he should not be held eligible to challenge the decision. He is an administrative authority and his decision was approved by the Ministry of Law and Justice. Such petitions have been filed by the Accountant Generals in the past also. Thus, there is no substance in the objection to the maintainability of the appeal at the instance of the appellant. [Para 10] [758-G-H; 759-A-C]

Accountant General of Orissa Vs. R. Ramamurthy **2006 (12) SCC 557: 2006 (9) Suppl. SCR 776 – referred to.**

1.2. Section 30 of the Consumer Protection Act, 1986 which lays down the power of the Central Government or that of the State Government to make the rules, specifically provides under Sub-section (2) that amongst others, the State Government may by a notification make

rules for carrying out the provisions of Sub-section (2) of Section 16 of the Act. This being so, whatever is prescribed in the rules are the various terms and conditions of service, for the members of the State Commission. This does not mean that the State Government cannot frame additional rules either granting pension or other benefits. However, wherever it is done without framing rules, it would be difficult to say that it is authorized by the statute. As far as the Madhya Pradesh Consumer Protection Rules, 1987 are concerned, there is no difficultly in noting that the rules do not provide for pension either to the President or to the members. Rules 6 (1) to (3) are the relevant rules with regard to Salary and other allowances and terms and conditions of the President and Members of the State Commission. [Paras 11 and 12] [759-G-H; 760-A-D]

1.3. Article 162 of the Constitution of India does lay down in its principal part that the executive power of the State shall extend to the matters with respect to which the Legislature of a State has the power to make laws. However, the proviso to this Article lays down that in such matters the executive power of the State shall be subject to and limited by the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof. In the instant case, the State Govt. was expressly given the power under Section 30 (2) to make rules for carrying out the provisions of Section 16 (2) of the Act. Therefore, the State has to exercise its executive power subject to and as limited by this law meaning thereby in conformity therewith. [Para 15] [762-B-G]

1.4. When the statute provides that the 'terms and conditions shall be such as may be prescribed, and 'prescribed' means prescribed by the rules, it is implied that these rules shall be of general application. If pension

is to be covered under the concept of terms and condition of service under Section 16 (2), there has to be a general rule concerning the same. Pension denotes a periodical payment to be made available to the employee after his retirement, after long years of service which are governed by the relevant rules. [Para 16] [762-H; 763-A-B]

State of Uttar Pradesh Vs. Singhara Singh **AIR 1964 SC 358;** *Sant Ram Sharma vs. State of Rajasthan* **AIR 1967 SC 1910: 1968 SCR 111;** *Orissa State (Prevention and Control of Pollution) Board Vs. Orient Paper Mills* **2003 (10) SCC 421: 2003 (2) SCR 741;** *Pepsu Road Transport Corporation, Patiala Vs. Mangal Singh* **2011 (11) SCC 702 – referred to.**

1.5. In the instant case, there are general rules laying down the terms and conditions framed under the concerned statute but they do not make any provision for pension. As far as the grant of pension is concerned, in his first letter dated 10.12.2003, the appellant raised the issue with respect to the rate at which the pension is to be calculated. It was submitted that if the service in the consumer commission is not to be clubbed, and even if the State Government is to bear the responsibility, it would also have to be provided as to how many years of service in the commission would qualify for pension. It is not enough merely to provide that the two pensions combined together shall not exceed the maximum of the pension prescribed for Judges of the Hon'ble High Court. These issues can be dealt with if rules are made and not otherwise. Nothing prevents the State Government from making rules in this behalf specifically for this purpose. A provision for pension has thus, been made when the legislature so wanted it, as can be seen in the case of Central Administrative Tribunal, Rule 8 of the Central Administrative Tribunal (Salaries and Allowances and Conditions of Service of Chairman, Vice Chairman and Members) Rules, 1985. [Paras 16 and 17] [763-C-F]

1.6. A clubbing of additional services, if any, for the purpose of computation of pension is not contemplated. As seen from the calculations tendered by the first respondent it is very clear that he was clubbing his service as a High Court Judge and as the President of the State Commission, to claim the pension, though not exceeding the maximum of the pension prescribed for Judges of the High Court. It is not stated in the Calculation Sheet as to which portion of the proposed pension was to be paid by the State Government and which would be payable for the services as a High Court Judge. Thus, on these facts the pension claimed was clearly inadmissible. The provisions of the statute and the rules in the instant case are clear, and therefore, the appellant could not be faulted for raising the queries with respect to the claim of the first respondent for the pension as the President of the State Commission, in the absence of specific provision in the rules. [Para 18] [764-E-H; 765-B-C]

Orissa State (Prevention and Control of Pollution) Board Vs. Orient Paper Mills **2003 (10) SCC 421: 2003 (2) SCR 741 – distinguished.**

Justice P. Venugopal Vs. Union of India **2003(7) SCC 726: 2003 (1) Suppl. SCR 286;** *Sant Ram Sharma vs. State of Rajasthan* **AIR 1967 SC 1910: 1968 SCR 111;** *Lalit Mohan Deb Vs.Union of India* **1973 (3) SCC 862;** *Union of India and Anr. Vs. Central Electrical and Mechanical Engineering Service (CE&MES) Group 'A' (Direct Recruits) Association, CPWD and others* **2008 (1) SCC 354: 2007 (11) SCR 863 – referred to.**

1.7. In the instant case, rules have been framed. It is not a case of absence of rules. It is a case where there is no concept of pension at all in the concerned rules. There are rules framed for the purpose of Section 16 (2) of the Act read with Section 30 (2) of the Act. The rules do not

provide for any pension, and if they do not so provide, the concept and the obligation thereunder cannot be brought in through an executive order. When Section 16 (2) lays down that the terms and conditions of service shall be such as may be prescribed, there is an element of authoritativeness, and a requirement to act in a particular way. The provision of Section 31 of the Act is to be looked at from this point of view. It provides for the rules and regulations to be laid before each House of Parliament and State Legislature. In the instant case, it is difficult to say that this provision is merely directory. But in any case, what Section 31 indicates is that the Union Parliament or the State Legislature is to be kept informed about the rules. This is because it concerns the public finance and the functioning of the authorities under the Act. It is a welfare enactment and it cannot be said that these provisions are such which can be ignored. This is only to emphasize that one has to function within the four corners of law, and the executive power cannot be used to act outside thereof. It cannot be ignored that the provisions of statute and the rules are to be read as they are. [Paras 21, 22 and 23] [767-E-F-H; 768-A-E]

M/s Atlas Cycle Industries Ltd. vs. State of Haryana **1979 (2) SCC 196: 1979 (1) SCR 1070;** *Crawford vs. Spooner 4 Moo Ind. App.* **179;** *Nalinakhya vs. Shyam Sunder* **AIR 1953 SC 148;** *State of Kerala Vs. K. Prasad* **2007 (7) SCC 140 – referred to.**

Principles of Statutory Interpretation by Justice G.P. Singh **13th Edn. Chapter 2 p 64 – referred to.**

1.8. The first respondent was undoubtedly entitled to receive pension for his tenure of service as a High Court Judge. The question is with respect to payability of pension for the service as the President of the State Commission. It is a matter concerning public finance, and such a grant cannot be made at the instance of the State

Government when the rules do not prescribe the same. In the instant case, the order according sanction to pension does not prescribe any period for eligibility nor any rate at which the pension is to be paid. This is apart from the fact that as seen from the Calculation Sheet tendered by the first respondent, the subsequent period of his service as the President of the State Commission was sought to be clubbed with the period of his service as a High Court Judge, which is impermissible. Such an order for the benefit of an individual cannot be considered to be a valid one. Any such exception being made by exercising executive power would be violative of Article 14 of the Constitution of India. Thus, the impugned judgment and order passed by the High Court is required to be set-aside. The additional pension paid to the first respondent as the President of the State Commission till the end of February 2012, would not be recovered from him. However, from March, 2012 onwards the first respondent would be entitled to receive pension only for the service rendered by him as a High Court Judge. [Paras 24, 25, 26] [769-C-G; 770-F]

Justice P. Venugopal Vs. Union of India **2003(7) SCC 726: 2003 (1) Suppl. SCR 286;** *Yogeshwar Prasad Vs. National Institute of Education Planning and Admn.* **2010 (14) SCC 323: 2010 (14) SCR 22;** *Sahib Ram Vs. State of Haryana* **1995 Supp. (1) SCC 18: 1994 (3) Suppl. SCR 674 – referred to.**

Case Law Reference:

Lodha, J:

2003 (1) Suppl. SCR 286	**Referred to.**	**Para 9, 20**
AIR 1964 SC 358	**Referred to.**	**Para 14**
1999 (2) Suppl. SCR 754	**Referred to.**	**Para 14**

2005 (2) Suppl. SCR 699	**Referred to.**	**Para 14**
2008 (11) SCR 888	**Referred to.**	**Para 14**
1976 (1) SCR 306	**Referred to.**	**Para 15**
1976 (3) SCR 58	**Referred to.**	**Para 15**
1981 (1) SCR 73	**Referred to.**	**Para 15**
1968 SCR 111	**Referred to.**	**Para 32**
(1973) 3 SCC 862	**Referred to.**	**Para 32**
1979 (1) SCR 1070	**Referred to.**	**Para 41**
2003 (2) SCR 741	**Referred to.**	**Para 37, 38**
(2011) 9 SCC 354	**Referred to.**	**Para 17**
1995 (5) Suppl. SCR 511	**Referred to.**	**Para 20**
2001 (2) SCR 567	**Referred to.**	**Para 20**
2007 (11) SCR 863	**Referred to.**	**Para 34**
1986 (3) SCR 946	**Referred to.**	**Para 36**
1961 SCR 750	**Referred to.**	**Para 37**
1973 (1) SCR 896	**Referred to.**	**Para 40**
(1966) 1 SCR 505	**Referred to.**	**Para 41**
(1960) 2 SCR 375	**Referred to.**	**Para 41**

Gokhale, J:

2003 (1) Suppl. SCR 286	**Referred to.**	**Para 9, 18**
2006 (9) Suppl. SCR 776	**Referred to.**	**Para 10**
AIR 1964 SC 358	**Referred to.**	**Para 13**
2003 (2) SCR 741	**Referred to.**	**Para 13**

2011 (11) SCC 702	**Referred to.**	**Para 16**
1968 SCR 111	**Distinguished.**	**Para 19**
1973 (3) SCC 862	**Referred to.**	**Para 21**
2007 (11) SCR 863	**Referred to.**	**Para 21**
1979 (1) SCR 1070	**Referred to.**	**Para 22**
2007 (8) SCR 115	**Referred to.**	**Para 23**
2010 (14) SCR 22	**Referred to.**	**Para 26**
1994 (3) Suppl. SCR 674	**Referred to.**	**Para 26**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5322 of 2005.

From the Judgment & Order dated 08.02.2005 of the High Court of Madhya Pradesh at Jabalpur in Writ Petition (S) No. 13302 of 2004.

A. Mariarputham, Sunita Sharma, Yusuf Khan, Kanstubh Sinha, Sushma Suri, Anil Katiyar for the Appellant.

Amrendra Sharan, Ravindra Shrivastava, Akshat Shrivastava, P.P. Singh, Vikas Upadhyay (for B.S. Banthia) for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. The Accountant General, Madhya Pradesh is in appeal, by special leave, aggrieved by the judgment and order dated February 8, 2005 passed by the High Court of Madhya Pradesh at Jabalpur in the writ petition filed by the respondent in that Court.

2. The respondent is a former Judge of the Madhya Pradesh High Court. He was appointed on March 2, 1998. He

rendered service of more than 10 years and retired on August 13, 1998.

3. By a notification issued on September 18, 1998, the respondent was appointed as the President, State Consumer Disputes Redressal Commission, Madhya Pradesh (for short, 'State Commission') established under clause (b) of Section 9 of the Consumer Protection Act, 1986 (for short, '1986 Act'). The respondent assumed office on September 21, 1998 and continued to hold that office until the end of the working hours on August 12, 2003. When he demitted the office of the President, State Commission, he had rendered service of 4 years 10 months and 22 days as President, State Commission.

4. The pension for the period of service rendered by the respondent as Judge of the High Court has been determined under the First Schedule of the High Court Judges (Salaries and Conditions of Service) Act, 1954 (for short, '1954 Act'). That is not the controversy here. The respondent's entitlement to pension for his service rendered as President, State Commission under the office order dated April 5, 2002 issued by the State Government is in issue.

5. By order dated June 3, 1999, the Department of Food, Civil Supplies and Consumer Protection, Government of Madhya Pradesh addressed to the President, State Commission prescribed the terms and conditions of the appointment of the respondent as President, State Commission. Inter alia, it provided that during the currency of his appointment, the respondent shall be paid salary as payable to a Judge of the High Court minus pension payable.

6. On April 5, 2002, the Department of Food, Civil Supplies and Consumer Protection, Government of Madhya Pradesh issued another order for counting the period of service as President, State Commission for the purposes of payability and determination of the pension. It provided as follows:

"In continuation of Departmental Order of even No. F.5-24/96/2 dated 03-06-99 the State Government now accords sanction for counting the services of the post of President Madhya Pradesh State Consumer Dispute Redressal Commission, Bhopal for pension provided that the pension on this post and the pension received earlier from the State Government or Central Government the two pensions combined together shall not exceed the maximum of the pension prescribed for judges of honourable High Court.

2. This sanction has been endorsed to the Accountant General M.P. Gwalior vide Finance Department endorsement No. 553/853/2002/C Char dated 5.4.2002.

By order and in the name of Governor of Madhya Pradesh."

7. It is the case of the respondent that in accordance with the above orders of the State Government, the necessary papers for payment of pension and gratuity to the respondent were prepared in the prescribed form and submitted to the office of the Accountant General, Madhya Pradesh (appellant) on August 29, 2003 by the Registrar of the State Commission. The Department of Food, Civil Supplies and Consumer Protection, Government of Madhya Pradesh also recommended and forwarded the pension case of the respondent to the appellant.

8. The appellant, however, raised the objection that pension and gratuity were not payable to the respondent as proposed and recommended. The correspondence ensued between the appellant and the Department of Food, Civil Supplies and Consumer Protection, Government of Madhya Pradesh. The appellant reiterated its position that pension and gratuity were not payable to the respondent for the period he served as the President, State Commission.

9. The above position taken by the appellant compelled the respondent to file a writ petition before the High Court challenging the letters dated December 10, 2003 and September 23, 2004 addressed to the Madhya Pradesh State Government and letter dated November 4, 2004 addressed to the respondent that pension and gratuity were not payable to the respondent. In that writ petition, the appellant and the State of Madhya Pradesh were impleaded as respondent – 1 and respondent – 2 respectively. In its counter affidavit in opposition to the writ petition, the appellant set up the case that there was no provision for pension under the 1986 Act or the Madhya Pradesh Consumer Protection Rules, 1987 (for short, 'State Rules') for payment of pension to the President, State Commission. Relying upon the decision of this Court in the case of *Justice P. Venugopal v. Union of India and Others*[1], the appellant stated before the High Court that the respondent was not entitled to clubbing of the two services. The appellant said that if the State Government intended to grant pension to the petitioner (respondent herein) for the service rendered by him as President, State Commission then requisite statutory rule would have to be framed and duly ratified by the State Legislature as required under Section 30(2) of the 1986 Act. The State Rules framed by the State Government do not have any provision for payment of pension.

10. The High Court of Madhya Pradesh, on consideration of the matter, vide its judgment dated February 8, 2005 allowed the writ petition filed by the present respondent. The High Court held that by office order dated April 5, 2002, the State Government had passed an order that the service rendered by the petitioner (respondent herein) as President, State Commission would be counted as pensionable service. The High Court, accordingly, did not accept the view of the appellant and directed it to finalize the pension of the petitioner (respondent herein) and make payment of pension and other admissible dues within a period of two months.

1. (2003) 7 SCC 726.

11. It is from this order that the present appeal has arisen.

12. This Court granted leave in the matter on August 25, 2005 but refused to grant any stay. It was, however, clarified that the payment made to the respondent, pursuant to the judgment of the High Court, would be subject to the decision in the appeal.

13. We have heard Mr. A. Mariarputham, learned senior counsel for the appellant and Mr. Amrendra Sharan, learned senior counsel for the respondent.

14. Mr. A. Mariarputham, learned senior counsel referred to Sections 2(jj), 2(h), 16(2), 30(2) and 31 of the 1986 Act and submitted that there was no statutory provision for grant of pension to the President of the State Commission. The State Rules, learned senior counsel would submit, do not make any provision for pension to the President of the State Commission and, therefore, no order for payment of pension to the respondent could have been passed. He argued that when an act is required to be done in a particular manner, then it must be done in that manner and in no other manner. In this regard, he relied upon the decisions of this Court in *State of Uttar Pradesh v. Singhara Singh and Others*[2], *Chandra Kishore Jha v. Mahavir Prasad and Others*[3], *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. and Another*[4] and *Tamilselvan v. State represented by Inspector of Police, Tamil Nadu*[5].

15. Mr. Amrendra Sharan, learned senior counsel for the respondent raised the preliminary objection of the maintainability of the appeal at the instance of the appellant. He submitted that the appellant was not an 'aggrieved person' and, therefore, appeal was not maintainable. He relied upon the rulings of this Court in *Bar Council of Maharashtra v. M.V.*

2. AIR 1964 SC 358.
3. (1999) 8 SCC 266.
4. (2005) 7 SCC 234.
5. (2008) 7 SCC 755.

Dabholkar and Others[6], *Jasbhai Motibhai Desai v. Roshan Kumar, Haji Bashir Ahmed and Others*[7] and *Thammanna v. K. Veera Reddy and Others*[8].

16. With reference to Article 162 of the Constitution of India, learned senior counsel for the respondent submitted that executive power of the State was coextensive with the legislative power and when rules are silent, the executive can always fill the gaps by issuing executive order. In this regard, he relied upon decisions of this Court in *Sant Ram Sharma v. State of Rajasthan and Others*[9] and *Lalit Mohan Deb and Others v. Union of India and Others*[10].

17. Mr. Amrendra Sharan, learned senior counsel for the respondent argued that the use of words 'shall' and 'may' in Section 16(2) was indicative of the legislative intention that 'may' be read as directory. He submitted that firstly, framing of rules by the State Government under Section 16(2) read with Section 30(2) was not mandatory and secondly, the State Rules having been framed for the subjects enumerated in Section 16(2), the power of the State Government to exercise its executive power in respect of the subjects not provided in the State Rules is not taken away. He relied upon the decisions of this Court in *M/s. Atlas Cycle Industries Ltd. and Others v. The State of Haryana*[11], *Orissa State (Prevention & Control of Pollution) Board v. Orient Paper Mills and Another*[12] and *Delhi Airtech Services Private Limited and Another v. State of Uttar Pradesh and Another*[13].

6. (1975) 2 SCC 702.
7. (1976) 1 SCC 671.
8. (1980) 4 SCC 62.
9. AIR 1967 SC 1910.
10. (1973) 3 SCC 862.
11. (1979) 2 SCC 196.
12. (2003) 10 SCC 421.
13. (2011) 9 SCC 354..

18. In rejoinder, Mr. A. Mariarputham, learned senior counsel submitted that appeal was maintainable at the instance of appellant. According to him, the appellant, Accountant General, Madhya Pradesh, is one of the arms of the Comptroller and Auditor General — a constitutional functionary – which monitors and controls all activities connected with audit, accounts and entitlement functions of the Indian Audit and Accounts Department. He submitted that authorizing pension was the function of the appellant. In this regard, he referred to material titled 'Supreme Audit Institution of India – A Brief Introduction' to show that there are 29 offices of the Accounts and Entitlements (A&E) headed by Accountants General (A & E) engaged in maintaining accounts of the State Governments and authorizing GPF and pension payments of their employees. Learned senior counsel submitted that for maintaining the appeal under Article 136 of the Constitution before this Court, it was not necessary that the appellant must be an 'aggrieved person'. In any case, the appellant was impleaded as respondent 1 in the writ petition and it was the appellant's action that was challenged in the writ petition before the High Court and, therefore, the appeal was maintainable.

19. Initially I thought of considering the preliminary objection but since an important question relating to the power of the State Government in making the service rendered by the respondent as President of the State Commission pensionable by an Executive order although State Rules are in place, has been raised and which I intend to decide, I do not think it necessary to consider the preliminary objection.

20. I shall first refer to the legal position exposited by this Court in the case of *Justice P. Venugopal*[1]. The question for consideration in that matter was as to whether the period during which Justice P. Venugopal served as the Commission of Inquiry or as the Commissioner of Payments under the Madras Race Club (Acquisition and Transfer of Undertaking) Act, 1986 could be taken into consideration for computing the pensionary

benefits. This Court, while dealing with the above question, referred to constitutional provisions, namely, Articles 112(3)(d)(iii), 217(1), 221 and 224A, the provisions contained in the 1954 Act, particularly, Sections 14, 15 and 16 thereof and the First Schedule appended thereto and decisions of this Court in *Union of India and Others v. Pratibha Bonnerjea and Another*[14] and *V.S. Mallimath v. Union of India and Another*[15] and held that a High Court Judge was entitled to pensionary benefits only in terms of the 1954 Act and not otherwise. The Court went on to observe (para 16; pgs. 732-733):

> "…….A High Court Judge is entitled to pensionary benefits only in terms of the said Act and not otherwise. The said Act is a self-contained code. It does not contemplate grant of pension to a retired High Court Judge for holding any other office of profit. Clubbing of services for the purpose of computation of pension is not contemplated under the said Act and, thus, the court cannot by process of interpretation of statutory or constitutional provisions hold so."

In para 26 of the Report (Pg. 736), this Court said :

> "…….for the purpose of computation of pension, different services of the petitioner could not have been clubbed in terms of Act 28 of 1954. The pension payable to a High Court Judge would be only for the period rendered in that capacity which would constitute charge to the Consolidated Fund of India and services rendered subsequent thereto in terms of the order made by a State Government would not be charged to the Consolidated Fund. The question as to whether such a person would be entitled to pension from the State concerned or not would depend upon the statute or the terms and conditions of appointment."

14. (1995) 6 SCC 765.

15. (2001) 4 SCC 31.

21. In view of the above legal position, there is no doubt that for the purposes of computation of pension payable to the respondent his different services, namely, service as a Judge of the High Court and service as President, State Commission cannot be clubbed. The respondent is entitled to pension as a High Court Judge only for the period rendered by him in that capacity. The subsequent service rendered by him as President, State Commission cannot be charged to the Consolidated Fund of India. This position was not disputed by the respondent in the High Court nor it is disputed before me. The question is, whether respondent is entitled to pension from the State of Madhya Pradesh for the service rendered by him as President of the State Commission of that State.

22. The High Court has recorded in paragraph 15 of the impugned order as follows :

> "15. In the instant case, it is not in dispute that State Govt. has made it a part of condition of appointment of petitioner/ Justice S.K. Dubey as per Order (P. 2) dated 5th April, 2002 that service rendered by him as President of the State Commission is to be counted as pensionable service modifying Order (P. 1) dated 03.06.1999. Thus, Order (P. 2) forms part of condition of appointment of petitioner that it was further ordered that pension payable by the State Govt. or from the Consolidated Fund of Govt. of India shall not exceed the maximum pension payable to a High Court Judge……."

23. The above statement has not been disputed by Mr. A. Mariarputham. The argument of Mr. A. Mariarputham is that the State Government of Madhya Pradesh in exercise of the power conferred by sub-section (2) of Section 30 of the 1986 Act has framed the State Rules for the subjects enumerated therein including Section 16(2). Rule 6 thereof provides for salary and other allowances and terms and conditions of the President and Members of the State Commission. The said Rule does not

provide that service of the President, State Commission is a pensionable service and, therefore, despite the office order dated April 5, 2002 issued by the State Government to the effect that service rendered by the respondent as President of the State Commission was pensionable service, the respondent is not entitled to any pension for the service he rendered as President, State Commission.

24. Section 16 of the 1986 Act deals with the composition of the State Commission. For the present purposes, the only relevant provision is sub-section (2) of Section 16 which reads as follows :

> "S. 16. Composition of the State Commission.—
>
> (1) xxx xxx xxx xxx
>
> (2) The salary or honorarium and other allowances payable to, and the other terms and conditions of service of, the members of the State Commission shall be such as may be prescribed by the State Government.
>
> Provided that the appointment of a member on whole-time basis shall be made by the State Government on the recommendation of the President of the State Commission taking into consideration such factors as may be prescribed including the work load of the State Commission.
>
> (3) xxx xxx xxx xxx
>
> (4) xxx xxx xxx xxx"

25. Section 2(jj) defines 'member' as follows :

> "S.2(jj) "member" includes the President and a member of the National Commission or a State Commission or a District Forum, as the case may be;"

26. Wherever the word 'prescribed' occurs in the 1986 Act,

by virtue of Section 2(n), it means prescribed by rules made by the State Government, or as the case may be, by the Central Government.

27. Section 30 deals with the power of the Central Government and the State Government to make rules. As I am concerned with power of the State Government, sub-section (2) of Section 30 is reproduced which reads :

"S. 30. Power to make rules.—

(1) xxx xxx xxx xxx

(2) The State Government may, by notification, make rules for carrying out the provisions contained in clause (b) of sub-section (2) and sub-section (4) of section 7, clause (b) of sub-section (2) and sub-section (4) of section 8A, clause (b) of sub-section (1) and sub-section (3) of section 10, clause (c) of sub-section (1) of section 13, clause (hb) of sub-section (1) and sub-section (3) of section 14, section 15 and clause (b) of sub-section (1) and sub-section (2) of section 16 of this Act.".

28. Section 31 makes a provision that rules and regulations made under the 1986 Act shall be laid before each House of Parliament. It reads as under :

"S. 31.- Rules and regulations to be laid before each House of Parliament. – (1) Every rule and every regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified

form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.

(2) Every rule made by a State Government under this Act shall be laid, as soon as may be after it is made, before the State Legislature."

29. As noticed above, in the State Rules framed by the Madhya Pradesh State Government, provision has been made in Rule 6 with regard to salary and other allowances and terms and conditions of the President and Members of the State Commission. Rule 6 of the State Rules reads as under :

"**R.6.- Salary and other allowances and terms and conditions of the President and Members of the State Commission** :-

(1) President of the State Commission shall receive the salary of the Judge of the High Court, if appointed on whole-time basis or a consolidated honorarium of Rs. 200/- per day for the sitting if appointed on part-time basis. Other members, if sitting on whole-time basis, shall receive a consolidated honorarium of Rs. 3,000 per month and if sitting on part-time basis, a consolidated honorarium of Rs. 150 per day for the sitting.

(2) The president and the members of the State Commission shall be eligible for such travelling allowance and daily allowance on official tour as are admissible to grade 1 Officer of the State Government.

(3) The salary, honorarium, other allowances shall be defrayed out of the Consolidated Fund of the State Government.

(4) President and the Members of the State Commission shall hold office for a term of five years or up to the age of

67 years whichever is earlier and shall not be eligible for re-nomination:

Provided that President and / or Members may:

(a) by writing under his hand and addressed to the State Government resign his office any time;

(b) be removed from his office in accordance with provisions of sub-rule (5).

(5) The State Government may remove from office, President or any Member of the State Commission who,-

(a) has been adjudged an insolvent; or

(b) has been convicted of an offence which in the opinion of the State Government, involves moral turpitude; or

(c) has become physically or mentally incapable of acting as such Member; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions as a Member, or

(e) has so abused his position as to render his continuance in office prejudicial to the public interest:

(f) is absent himself from five consecutive sittings of the Commission, except for a reasonable cause.

Provided that the President or a Member shall not be removed from his office on the ground specified in Clauses (d) and (e) of sub-rule (5) except on an inquiry held by State Government, in accordance with such procedure as it may specify in this behalf and finds the Member to be guilty of such ground.

(6) Before appointment, President and a Member of the State Commission shall have to take an undertaking that he does not and will not have any such financial or other interest as is likely to affect prejudicially his functions as such Member.

(7) The terms and conditions of the service of the President and the Members of the State Commission shall not be varied to their disadvantage during their tenure of office.

(8) Every vacancy caused by resignation and removal of the President or any other Member of the State Commission under sub-rule (4) or otherwise shall be filled by fresh appointment.

(9) Where any such vacancy occurs in the office of the President of the State Commission, the senior-most (in order of appointment) Member, holding office for the time being, shall discharge the functions of the President until a person appointed to fill such vacancy assumes the office of the President of the State Commission.

(10) When the President of the State Commission is unable to discharge the functions owing to absence, illness or any other cause, the senior-most (in order of the appointment) Member of the State Commission shall discharge the functions of the President until the day on which the President resumes the charge of his functions.

(11) The President or any Member ceasing to hold office as such shall not hold any appointment in or be connected with the management or administration of an organization which have been subject of any proceeding under the Act during his tenure for a period of five years from the date on which he ceases to hold such office."

30. It is clear from the above Rule that it does not make any provision in making the service of the President and Members of the State Commission a pensionable service.

State Rules are totally silent in this regard. The moot question that falls for determination in this appeal is, whether in the absence of any express rule in the State Rules, was it open to the State Government of Madhya Pradesh to have provided by way of an Executive order dated April 5, 2002 that the service rendered by the respondent as President of the State Commission would be counted as pensionable service. The incidental question is whether such order is inconsistent with Section 16(2) or the State Rules.

31. Subject to the provisions of the Constitution, the executive power of a State extends to the matters with respect to which the Legislature of the State has power to make laws. This is what is provided in Article 162 of the Constitution. In other words, the executive power of the State Executive is coextensive with that of the State Legislature.

32. In the case of *Sant Ram Sharma*[9] this Court negated the arguments advanced on behalf of the appellant therein that in the absence of any statutory rules governing promotions to selection grade posts the Government cannot issue administrative instructions and such administrative instructions cannot impose any restrictions not found in the rules already framed. The Court stated:

"….It is true that Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed."

33. The above legal position has been followed and reiterated by this Court time and again. The Constitution Bench of this Court in *Lalit Mohan Deb*[10] (para 9; pg. 867) said :

"9. It is true that there are no statutory rules regulating the selection of Assistants to the selection grade. But the absence of such rules is no bar to the Administration giving

instructions regarding promotion to the higher grade as long as such instructions are not inconsistent with any rule on the subject…….".

34. In *Union of India and another v. Central Electrical and Mechanical Engineering Service (CE&MES) Group 'A' (Direct Recruits) Association, CPWD and others*[16], this Court held that the executive instructions could fill in gaps not covered by rules but such instructions cannot be in derogation of the statutory rules.

35. The statutory provision contained in Section 16(2) is quite clear. It provides that the salary or honorarium and other allowances payable to, and the other terms and conditions of service of, the members of the State Commission shall be such as may be prescribed by the State Government. The term 'member' includes the President of the State Commission. That pension can be made a condition of service is beyond any question. What is the meaning of the expression, 'as may be prescribed by the State Government' occurring in Section 16(2).

36. In my opinion, the expression 'as may be prescribed by the State Government' in Section 16(2) has to be read as prescribed by the rules framed by the State Government, if any. This is the plain meaning of the above expression. If the Parliament intended that salary or honorarium and other allowances and other terms and conditions of service of the President and the Members of the State Commission have to be provided in the rules by the State Government in exercise of its powers under Section 30(2) and in no other manner, the provision in Section 16(2) would have read, 'the salary or honorarium and other allowances payable to, and the other terms and conditions of service of the members of the State Commission shall only be in accordance with the rules framed by the State Government'. The words 'shall be such' followed by the expression 'as may be prescribed' clearly indicate the

16. (2008) 1 SCC 354.

legislative intent of 'may' being directory and the expression 'as may be prescribed' to mean, 'if any'. The construction that I have put to the expression, 'as may be prescribed' gets support from the decisions of this Court in *Surinder Singh v. Central Government and others*[17] and *Orissa State (Prevention and Control of Pollution) Board*[12].

37. In *Orissa State (Prevention & Control of Pollution) Board*[12], this Court was seized with the question, whether as long as the manner is not prescribed under the Rules for declaration of an area as the air pollution control area, the valid notification under Section 19 of the Air (Prevention and Control of Pollution) Act, 1981 could be published in the official gazette or not. Section 19 under consideration read, 'the State Government may, after consultation with the State Board, by notification in the Official Gazette, declare in such manner as may be prescribed, any area or areas within the State as air pollution control area or areas for the purposes of this Act'. Section 2(n) of that Act defines the word 'prescribed' which means prescribed by rules made by the Central Government or, as the case may be, the State Government. Section 54 of that Act provides for power of the State Government to make rules. In light of these provisions and few decisions of this Court viz; *T. Cajee v. U. Jormanik Siem & another*[18] and *Surinder Singh*[17], the Court considered the expression 'as may be prescribed' and held that this expression means 'if any'. This is what this Court said (para12; pg. 429):

> " . . . . .In one of the cases decided by this Court, to be referred later in this judgment "as may be prescribed" has been held to mean "if any". It is thus clear that such expression leaves the scope for some play for the workability of the provision under the law. The meaning of the word "as" takes colour in context with which it is used and the manner of its use as prefix or suffix etc. There is

17. (1986) 4 SCC 667.

18. AIR 1961 SC 276.

> no rigidity about it and it may have the meaning of a situation of being in existence during a particular time or contingent, and so on and so forth. That is to say, something to happen in a manner, if such a manner is in being or exists, if it does not, it may not happen in that manner. Therefore, the reading of the provision under consideration makes it clear that manner of declaration is to be followed "as may be prescribed" i.e. "if any" prescribed."

38. I am of the considered view that there is no difference in the legal position in a case where power conferred on the State Government for framing rules has been exercised but such rules remain silent on certain aspects although it had power to make rules with regard to those aspects and in the situation where no rules have been framed in exercise of the power conferred on it, insofar as executive power of the State is concerned. The power that vests in the State Government in Section 30(2) to carry out the provisions contained in Section 16(2) does not take away its executive power to make provision for the subjects covered in Section 16(2) for which no rules have been framed by it. The exercise of such power by the State Government, obviously, must not be inconsistent with the constitutional provisions or statutory provision in Section 16(2) or the State Rules framed by it. In the present case, the exercise of power by the State Government by issuance of the order dated April 5, 2002 does not suffer from any such vice.

39. Two more aspects need to be considered by me, firstly, the effect of Section 31(2) of the 1986 Act which provides that every rule made under the 1986 Act shall be laid before the State Legislature and secondly, whether in view of Section 31(2), the executive power of the State is to be exercised in generality and not for a situation specific.

40. Craies on Statute Law, Seventh Edition, has dealt with the subject, 'Laying before Parliament' in Chapter 13 under the title 'Delegated Legislation'. The author has observed that the

requirement for 'laying' first appeared in the 1830s. According to the author, there are three kinds of laying, (i) laying without further procedure: (ii) laying subject to negative resolution: and (iii) laying subject to affirmative resolution. The above three kinds of 'laying' have been then explained. This Court approved the observations made by Craies on Statute Law in respect of the subject 'laying before Parliament' in *Hukam Chand Etc. v. Union of India and others*[19].

41. As to whether the laying of rules and regulations before the Parliament is mandatory or directory or whether laying is a condition precedent to their operation or be neglected without prejudice to the effect of the rules, it is now well settled that each case must depend on its own circumstances or the wording of the statute under which the rules are made. This Court had an occasion to deal with the policy and object underlying the provisions relating to laying the delegated legislation made by the subordinate law making authorities or orders passed by subordinate executive instrumentalities before both Houses of Parliament with reference to Section 3(6) of the Essential Commodities Act, 1955, in the case of *M/s. Atlas Cycle Industries Ltd.*[11]. Section 3(6) under consideration read, 'every order made under this Section by the Central Government or by any officer or authority of the Central Government shall be laid before both Houses of Parliament as soon as may be, after it is made'. In *M/s. Atlas Cycle Industries Ltd.*[11], a three-Judge Bench of this Court referred to the observations made in the Craies on Statute Law and also the decisions of this Court in *Jan Mohammad Noor Mohammad Begban v. State of Gujarat & and Another*[20] and *Narendra Kumar and Others v. The Union of India and Others*[21] and held as under :

"32. From the foregoing discussion, it inevitably follows that the Legislature never intended that non-compliance with the

19. (1972) 2 SCC 601.

20. (1966) 1 SCR 505.

21. (1960) 2 SCR 375.

requirement of laying as envisaged by sub-section (6) of Section 3 of the Act should render the order void. Consequently non-laying of the aforesaid notification fixing the maximum selling prices of various categories of iron and steel including the commodity in question before both Houses of Parliament cannot result in nullification of the notification……."

42. In light of the above legal position, if Section 31(2) of the 1986 Act is seen, it leaves no manner of doubt that the said provision is directory.

43. I am unable to accept the submission of Mr. A. Mariarputham that having regard to the provision contained in Section 31(2), the executive power of the State Government to fill in the gaps in the rules can only be exercised in generality.

44. It follows from the above discussion that the State Government has power to issue executive order or administrative instructions with regard to subject/s provided in Section 16(2) of the 1986 Act where the State Rules are silent on any of such subject. There is nothing in Section 30(2) or Section 31 of the 1986 Act that abridges the power of the State Government to issue executive order or administrative instructions with regard to pensionable service of the President and Members of the State Commission, although State Rules have been framed but such Rules are silent on the aspect of the pensionable service. In other words, in the absence of any provision in the State Rules relating to the pensionable service of the President and Members of the State Commission, there is no bar for the State Government in issuing executive order or administrative instructions regarding pensionable service of the President, State Commission.

45. Insofar as the order dated April 5, 2002 issued by the Government of Madhya Pradesh according sanction for counting the service of the respondent on the post of President, State Commission for pension is concerned, the same being

not inconsistent with the statutory provision contained in Section 16(2) and the State Rules, the view of the High Court that the respondent was entitled to pension from the State Government as per the terms and conditions of appointment cannot be faulted. The High Court rightly observed that the respondent was entitled to pension from the State Government insofar as service rendered by him as the President, State Commission was concerned to the extent provided in the order dated April 5, 2002. Obviously such service shall not be clubbed with the service of the respondent as a High Court Judge and shall not be charged to Consolidated Fund of India.

46. Civil appeal, accordingly, has no merit and is dismissed with no order as to costs.

H.L. GOKHALE J. 1. I have had the advantage to go through the erudite judgment prepared by my Brother Lodha J., though for the reasons respectfully indicated below, I am not in a position to agree therewith.

2. The short question in this appeal is as to whether the first respondent who functioned as the President of the Consumer Disputes Redressal Commission, in Madhya Pradesh ("State Commission" for short) for a period of about 4 years and 11 months, after his retirement as a High Court Judge, was entitled to receive pension for this subsequent period in the absence of any specific provision therefor in the rules framed under the Consumer Protection Act, 1986 ("The Act" for short). The ancillary question is as to whether the second respondent i.e. State of Madhya Pradesh could grant pension for this period by issuing an executive order.

3. The broad facts and the statutory provisions relevant to this case have been referred to in my Brother's judgment and therefore I am not repeating them, though I may refer to some of the essential facts and relevant provisions.

Short facts leading to the present appeal

4. The first respondent herein, retired as a Judge from the Madhya Pradesh High Court on 13.8.1998 after putting in a service of more than ten years. He was appointed as the President of the State Commission after a short gap on 21.9.1998 vide Government notification dated 18.9.1998. Thereafter, he worked for a period of four years, ten months and twenty two days as the President, and demitted that office on 12.8.2003.

5. The salary or honorarium and other allowances payable to, and the other terms and conditions of service of the members of the State Commission (which include the President) are governed under the above Act. The terms and conditions of appointment of the first respondent were determined under the Government's letter/order dated 26.5/3.6.1999, which included the following terms:-

(i) The period of appointment shall be in accordance with Section 16(3) of Consumer Protection Act, 1986.

(ii) During the period of appointment he shall get pay equal to the pay payable to Judge of High Court after deducting the pension. The relief on pension shall not be payable to him in terms of Finance Department Office Memorandum No. E-4-Char-79-Ni-5-84 dated 20.10.1984.

(iii) The allowances and other perquisites at par with Judge of the High Court shall be made available to him.

Thus, it was clear that during this period he was to receive a pay equal to his pay as a High Court Judge after deducting

the amount of pension for the services rendered as a High court Judge. The relief on pension was also not payable to him. The allowances and other perquisites were to be made available to him at par with a Judge of a High Court. Thus, it was an appointment for a tenure with specific terms which did not include pension.

6. Later, on 5.4.2002, the Government of Madhya Pradesh issued an order according sanction for counting the period of his service as the President of the State Commission for the purpose of payability and determination of pension. The order included a proviso as follows:

> "*provided that the two pensions combined together shall not exceed the maximum of the pension prescribed for Judges of the Hon'ble High Court.*"

7. After the tenure of the first respondent was over, he submitted his pension papers to the office of the appellant on 29.8.2003 in Form 6 (Form for assessing pension and gratuity). Clauses 18 and 19 thereof read as follows:-

18	Proposed pension	:	Rs. 13,000/-p.m. + DA or Rs. 1,56,000/- p.a. + DA
19	Proposed death-cum-retirement gratuity	:	Rs. 1,38,333=00 (as per calculation sheet)

The calculation sheet enclosed therewith was as follows:-

CALCULATION SHEET

Calculation sheet of amount of Pension and Death-cum-retirement Gratuity Payable to Hon'ble Justice Shri S.K. Dubey, President M.P. State Consumer Disputes Redressal Commission, Bhopal as per present Scale.

Date of Birth	14.8.1936
Date of appointment and joining as Judge of High Court	2.3.1988
Date of appointment as permanent Judge	4.8.1989
Date of retirement as High Court Judge	14.8.1998 F.N.
Date of appointment as President, M.P. State Consumer Disputes Redressal Commission, Bhopal	21.9.1998 F.N.

Total Service

		Year	Month	Day
As High Court Judge	2.3.1988 to 14.8.1998 F.N.	10	5	12
Service as President of M.P. State Consumer Disputes Redressal Commission	21.9.1988 to 13.8.2003	4	10	22
Total		15	4	04

Amount of Pension under Part-I of the High Court Judge (Conditions of Service) Act 1954 and as per Government of India Ministry of Law and Justice Department of Justice Dt. 18.12.1987 and 11.4.1988

$$\text{Rs. } 11{,}150 \times 15 = \frac{167250}{12} = \text{Rs. } 13937.50\text{p}$$

Maximum is Rs. 13,000/- P.M. OR Rs. 1,56,000/- P.A.

Amount of Death-cum-Retirement Gratuity including 55% D.A. as per instructions.

Pay Rs. 26,000+

55% of D.A 14,300	40,300 X 20 X 15 / 30 X 1	= 4,03,000
Total Rs. 30,3000/-		
Maximum limit of DCRG	Rs. 3,50,000=00	
Less already paid	Rs. 2,11,667=00	
Balance to be paid	Rs. 1,38,333=00	

family pension:- w.e.f. 14.8.2003 of Rs. 78,000 per month (or per annum?) to Smt. Manju Dubey, wife of Hon'ble Justice Shri S.I. Dubey till her death or remarriage whichever is earlier.

8. The appellant raised certain queries with respect thereto by his letter dated 10.12.2003. It was stated in this letter that according to the pension calculation sheet submitted on behalf of the first respondent, the pension of first respondent had been revised by adding his service as the President to the service rendered by him as a High Court Judge, and the same was not in accordance with law. It was pointed out that there was no provision in the Consumer Protection Act, 1986 about the admissibility of pension. Besides, a clarification was sought on the following three points:-

(i) The rate at which the pension is to be calculated for each year of service.

(ii) Relief on pension is admissible or not, if admissible then as per rules applicable to the State Government, Central Government/Judges of High Court.

(iii) In the order for counting the said services, there is no mention about admissibility of gratuity and commutation of pension.

It was also pointed out that it was not proper to revise the pension of the first respondent as sanctioned by the President of India without amendment in the High Court Judges (Conditions of Service) Act, 1954. The pension papers were therefore returned.

9. This led to further correspondence between the appellant and the first respondent. Appellant recorded in his letter dated 23.9.2004, that the case of the first respondent was referred to the Central Ministry of Law and Justice which had replied by their letter dated 9.9.2002, alongwith a copy of the judgment of this Court in SLP No. 15450/2003 i.e. *Justice P. Venugopal Vs. Union of India* [reported in 2003(7) SCC 726] which held that for the purpose of pensionary benefits, the period undergone as a High Court Judge cannot be clubbed with an additional period to refix the pension. The same position is reiterated by the appellant in his subsequent letter dated 4.11.2004 addressed to respondent No. 1. These three letters/ orders were challenged by the first respondent in a writ petition to the Madhya Pradesh High Court (W.P. No.13302/2004) which has allowed that petition by the impugned judgment and order dated 8.2.2005. The High Court has noted that this additional liability is being undertaken by the State Government, and it is not be drawn from the Consolidated Fund of India, and that it is not to exceed the maximum pension payable to a High Court Judge and therefore would be valid.

The submissions by the rival parties

10. The learned counsel for the first respondent Mr. Amrendra Sharan raised an objection to the maintainability of the appeal at the instance of the appellant. It was contended that since his decision was challenged, the appellant is not expected to agitate it further. In this connection, we must note that the appellant was joined as the first respondent in the Writ Petition in the High Court. He is in charge of the accounts in the State and represents the Comptroller and Auditor General of India, who is a Constitutional Functionary. The payment of

pension and its supervision is a part of his responsibility. His letters/orders were challenged in the writ petition, and if it was his view that the decision of the High Court was erroneous, we do not see any reason as to why he should not be held eligible to challenge the decision. He is an administrative authority and his decision was approved by the Ministry of Law and Justice. Such petitions have been filed by the Accountant Generals in the past also. [For reference in the case of *Accountant General of Orissa Vs. R. Ramamurthy* reported in 2006 (12) SCC 557.] Hence we do not find any substance in this objection.

11. The principal submission on behalf of the appellant is based on Section 16(2) of the Act, which reads as follows:-

"**16. Composition of the State Commission…..**

(1) ……

(2) The salary or honorarium and other allowances payable to, and other terms and conditions of service of, the members of the State Commission shall be such as may be prescribed by the State Government."

The definition of a 'member' under Section 2(jj) of the act includes the President of the State Commission, and the term 'prescribed' has been defined in Section 2 (n) as follows:-

"2(n). "prescribed" means prescribed by rules made by the State Government, or as the case may be, by the Central Government under this Act."

Section 30 which lays down the power of the Central Government or that of the State Government to make the rules, specifically provides under Sub-section (2) that amongst others, the State Government may by a notification make rules for carrying out the provisions of Sub-section (2) of Section 16 of the Act. This being so, whatever is prescribed in the rules are the various terms and conditions of service, for the members of the State Commission. This does not mean that the State

Government cannot frame additional rules either granting pension or other benefits. However, wherever it is done without framing rules, it will be difficult to say that it is authorized by the statute.

12. As far as the rules in this behalf viz. The Madhya Pradesh Consumer Protection Rules, 1987 are concerned, there is no difficultly in noting that the rules do not provide for pension either to the President or to the members. Rules 6 (1) to (3) thereof are the relevant rules in this behalf. They read as follows:-

"**6. Salary and other allowances and terms and conditions of the President and Members of the State Commission.**

"1. The President of the State Commission shall receive salary of the High Court if appointed on whole time basis or a consolidated honorarium of Rs.200 per day for the sitting if appointed on part time basis. Other members, if sitting on whole time basis, shall receive a consolidated honorarium of Rs.150 per day for the sitting.

2. The President and the Members of the State Commission shall be eligible for such travelling allowance and daily allowance on official tour as are admissible to grade I Officer of the State Government.

3. The salary, honorarium and other allowances shall be defrayed out of the Consolidated Fund of the State Government.

……"

13. The submission of Mr. Mariarputham, learned Senior Counsel for the appellant has been that the appellant is required to read and implement these provisions as they are. The

section clearly provides that the terms and conditions of service of the member (including President of the Commission) will be as prescribed by the State Government. 'Prescribed' means as laid down in the rules. Section 31 of the Act requires that these rules are to be laid before the legislature. Since the rules do not provide for pension, one cannot incorporate any such concept in the service conditions of the first respondent. Mr. Mariarputham, relied upon the judgment of this Court in the case of *State of Uttar Pradesh Vs. Singhara Singh* reported in AIR 1964 SC 358, and particularly first part of paragraph 8 thereof which reads as follows:-

> "*8. The rule adopted in Taylor V. Taylor* (1876) 1 Ch. D 426 *is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted……"*

14. As against the submission on behalf of the appellant, it has been submitted by Mr. Amrendra Sharan, learned Senior Counsel appearing for the first respondent, that in the present case the rules are silent about the provision for pension. It cannot however mean that the State Government cannot on its own grant pension by issuing an executive order under Article 162 of the Constitution of India. He relied upon the judgment of this Court in *Sant Ram Sharma Vs. State of Rajasthan* reported in AIR 1967 SC 1910 in this behalf. A strong reliance was also placed on the judgment of this Court in the case of *Orissa State (Prevention and Control of Pollution) Board Vs. Orient Paper Mills* reported in 2003 (10) SCC 421, particularly paragraph 12 thereof, to explain the phrase 'as may be prescribed'. It was therefore submitted that where the rule is silent, it cannot mean a restriction on the exercise of the

executive powers of the State, which it has exercised in the present case.

Consideration of the rival submissions

15. Article 162 of the Constitution, lays down the extent of the executive power of the State in following terms:-

> "***162. Extent of executive power of State***
>
> Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:
>
> Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof."

This Article does lay down in its principal part that the executive power of the State shall extend to the matters with respect to which the Legislature of a State has the power to make laws. It is however important to note that the proviso to this Article lays down that in such matters the executive power of the State shall be subject to and limited by the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof. In the instant case, the State Govt. has been expressly given the power under Section 30 (2) to make rules for carrying out the provisions of Section 16 (2) of the act. The State has therefore to exercise its executive power subject to and as limited by this law meaning thereby in conformity therewith.

16. When the statute provides that the 'terms and conditions shall be such as may be prescribed, and 'prescribed' means prescribed by the rules, it is implied that

these rules shall be of general application. If pension is to be covered under the concept of terms and condition of service under Section 16 (2), there has to be a general rule concerning the same. Pension denotes a periodical payment to be made available to the employee after his retirement, after long years of service which are governed by the relevant rules [Ref. *Pepsu Road Transport Corporation, Patiala Vs. Mangal Singh* reported in 2011 (11) SCC 702]. In the instant case, there are general rules laying down the terms and conditions framed under the concerned statute but they do not make any provision for pension. As far as the grant of pension is concerned, in his first letter dated 10.12.2003, the appellant raised the issue with respect to the rate at which the pension is to be calculated. Mr. Mariarputham, submitted that if the service in the consumer commission is not to be clubbed, and even if the State Government is to bear the responsibility, it will also have to be provided as to how many years of service in the commission will qualify for pension. It is not enough merely to provide that the two pensions combined together shall not exceed the maximum of the pension prescribed for Judges of the Hon'ble High Court. These issues can be dealt with if rules are made and not otherwise.

17. Nothing prevents the State Government from making rules in this behalf specifically for this purpose. A provision for pension has thus been made when the legislature so wanted it, as can be seen in the case of Central Administrative Tribunal. Thus, Rule 8 of the Central Administrative Tribunal (Salaries and Allowances and Conditions of Service of Chairman, Vice Chairman and Members) Rules, 1985 reads as follows:-

"***8. Pension-*** *(1) Every person appointed to the Tribunal as the Chairman, a Vice Chairman or a Member shall be entitled to pension provided that no such pension shall be payable-*

(i) if he has put in less than two years of service; or

(ii) if he has been removed from an office in the Tribunal under sub-section (2) of Section 9 of the Act.

(2) Pension under sub-rule (1) shall be calculated at the rate of rupees seven hundred per annum for each completed year of service 1[**] and irrespective of the number of years of service in the Tribunal, the maximum amount of pension shall not exceed rupees three thousand five hundred per annum:

Provided that the aggregate amount of pension payable under this rule together with the amount of any pension including commuted portion of pension, (if any) drawn or entitled to be drawn while holding office in the Tribunal shall not exceed the maximum amount of pension prescribed for a Judge of the High Court.

1. Omitted by GSR 417 (E), dt. 31.3.1989

18. (i) In Justice *P. Venugopal* (supra), a bench of three Judges of this Court has laid down that a High Court Judge is entitled to pensionary benefits only in terms of the High Court Judges (Conditions of Service) Act, 1954 and not otherwise. A clubbing of additional services, if any, for the purpose of computation of pension is not contemplated. As seen from the calculations tendered by the first respondent it is very clear that he was clubbing his service as a High Court Judge and as the President of the State Commission, to claim the pension, though not exceeding the maximum of the pension prescribed for Judges of the High Court. It is also relevant to note that it is not stated in the Calculation Sheet as to which portion of the proposed pension was to be paid by the State Government and which would be payable for the services as a High Court Judge. Thus, on these facts the pension claimed was clearly inadmissible.

(ii) It is true that in para 26 of its judgment in Justice *P.*

Venugopal (supra) this Court has laid down that the question as to whether a Judge rendering services subsequently would be entitled to pension from the State will depend upon the statute or the terms and conditions of appointment. As noted above, in our understanding the provisions of the statute and the rules in the present case are clear, and therefore the appellant could not be faulted for raising the queries with respect to the claim of the first respondent for the pension as the President of the State Commission, in the absence of specific provision in the rules.

19. The reliance by the respondent No. 1 on the judgment of this Court in *Orissa State (Prevention and Control of Pollution) Board* (supra) is also erroneous. That was a case, where there was a power under Section 19 of the Air (Prevention and Control of Pollution) Act, 1981, to declare any area as air pollution control area. This was to be done after consultation with the said Board by issuing a notification in the official gazette. This in fact, was done. What was lacking were the rules to be made under Section 54 of the Act to carry out the purposes of the Act, and amongst others it was provided under sub-section (2) thereof that the rules may provide for the manner in which an area or areas may be declared as air pollution control area. It was canvassed on behalf of the respondent that in the absence of rules 'prescribing this manner', the notifications issued under Section 19 would be bad. This court negated this argument. The observations of this court concerning the term 'prescribed' will have to be looked in that context. It is in this context that what is observed in paragraph 13 of the judgment is more important. It reads as follows:-

"**13.** Thus, in case manner is not prescribed under the rules, there is no obligation or requirement to follow any, except whatever the provision itself provides viz. Section 19 in the instant case which is also complete in itself even without any manner being prescribed as indicated shortly

before to read the provision omitting this part "in such manner as may be prescribed". Merely by absence of rules, the State would not be divested of its powers to notify in the Official Gazette any area declaring it to be an air pollution control area. In case, however, the rules have been framed prescribing the manner, undoubtedly, the declaration must be in accordance with such rules."

Thus, in the Orissa case the substantive declaration concerning the pollution control area had been done by following the procedure of issuing a notification in exercise of the power under Section 19 of the Act, and therefore the decision was complete and valid in itself. The rules prescribing the manner were not framed at all, and therefore non-adherence thereto would not vitiate the notification. In the instant case, the rules have been framed. They lay down the substantive provisions concerning the terms and conditions of the service, and they do not include pension. The scenario in the two cases is quite distinct.

20. *Sant Ram Sharma* (supra) was a case concerning promotions to selection grade posts in the Indian Police Service on the basis of merit. The statutory rules for that purpose were not framed, and it was contended that the executive government cannot be held to have power to make appointments and lay down conditions of service without making rules in that behalf. There was however, long administrative practice bordering on to a rule of effecting promotions based on merit, and not merely on seniority, and the appellant had also been considered for selection. It was in this context that this Court held that it would not be proper to say that till statutory rules governing promotions to selection grade posts are framed, Govt. cannot issue administrative instructions regarding the principles to be followed. The court repelled the contention by observing at the end of paragraph 9 as follows:-

"As a matter of long administrative practice promotion to selection grade posts in the Indian Police

Service has been based on merit and seniority has been taken into consideration only when merit of the candidates is otherwise equal and we are unable to accept the argument of Mr. N.C. Chatterjee that this procedure violates, in any way, the guarantee under Arts. 14 and 16 of the Constitution."

Hence, this judgment cannot be read as a judgment permitting an additional grant when the rules do not provide for the same.

21. The decisions of this court in *Lalit Mohan Deb Vs. Union of India* reported in 1973 (3) SCC 862 and those in *Union of India and another Vs. Central Electrical and Mechanical Engineering Service (CE&MES) Group 'A' (Direct Recruits) Association, CPWD and others* reported in 2008 (1) SCC 354 are also to the same effect, namely that the executive instructions have to be in conformity with the rules and not inconsistent therewith. In the present case rules have been framed. It is not a case of absence of rules. It is a case where there is no concept of pension at all in the concerned rules. The question is whether such a provision can be brought in through an executive order for the benefit of an individual. In the instant case there are rules framed for the purpose of Section 16 (2) of the Act read with Section 30 (2) of the Act. The rules do not provide for any pension, and if they do not so provide, the concept and the obligation thereunder cannot be brought in through an executive order. It is also very relevant to note that the Oxford Dictionary defines the verb 'prescribe' amongst others, as follows:-

"to state authoritatively that something should be done in a particular way".

When Section 16 (2) lays down that the terms and conditions of service shall be such as may be prescribed, there is an element of authoritativeness, and a requirement to act in a particular way.

22. The provision of Section 31 of the Act is to be looked at from this point of view. It provides for the rules and regulations to be laid before each House of Parliament and State Legislature. The first respondent relied upon the judgment of this Court in the case of *M/s Atlas Cycle Industries Ltd. Vs. State of Haryana* reported in 1979 (2) SCC 196 to submit that laying down was not mandatory but was a directory provision. In the present case, it is difficult to say that this provision is merely directory. But in any case, what Section 31 indicates is that the Union Parliament or the State Legislature is to be kept informed about the rules. This is because it concerns the public finance and the functioning of the authorities under the Act. It is a welfare enactment and it cannot be said that these provisions are such which can be ignored. This is only to emphasize that one has to function within the four corners of law, and the executive power cannot be used to act outside thereof.

23. We cannot ignore that the provisions of statute and the rules are to be read as they are. As stated by Justice G.P. Singh in Principles of Statutory Interpretation (13th Edition, Chapter 2 Page 64),

"the intention of the Legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said."

[See also *Crawford Vs. Spooner 4 Moo Ind. App. 179* and *Nalinakhya Vs. Shyam Sunder* AIR 1953 SC 148 Para 9 quoting with approval *Crawford Vs. Spooner.*] We may as well refer to the observations of this court in para 10 of *State of Kerala Vs. K. Prasad* reported in 2007 (7) SCC 140 to the following effect:-

"…….. It needs little emphasis that the Rules are meant to be and have to be complied with and enforced scrupulously. Waiver or even relaxation of any rule, unless

such power exists under the rules, is bound to provide scope for discrimination, arbitrariness and favouritism, which is totally opposed to the rule of law and our constitutional values. *It goes without saying that even an executive order is required to be made strictly in consonance with the rules.* Therefore, when an executive order is called in question, while exercising the power of judicial review the Court is required to see whether the Government has departed from such rules and if so, the action, of the Government is liable to be struck down." (emphasis supplied)

24. The first respondent was undoubtedly entitled to receive pension for his tenure of service as a High Court Judge. The question is with respect to payability of pension for the service as the President of the State Commission. It is a matter concerning public finance, and such a grant cannot be made at the instance of the State Government when the rules do not prescribe the same. In the instant case the order according sanction to pension does not prescribe any period for eligibility nor any rate at which the pension is to be paid. This is apart from the fact that as seen from the Calculation Sheet tendered by the first respondent, the subsequent period of his service as the President of the State Commission was sought to be clubbed with the period of his service as a High Court Judge, which is impermissible. Such an order for the benefit of an individual cannot be considered to be a valid one. Any such exception being made by exercising executive power would be violative of Article 14 of the Constitution of India.

25. In the circumstances the appeal deserves to be allowed and the impugned judgment and order passed by the High Court is required to be set-aside. Accordingly, this Civil Appeal is allowed, the judgment and order of the High Court dated 8.2.2005 in Writ Petition No.13302/2004 is hereby set-aside, the said writ petition filed by the first respondent is dismissed though without any order as to costs.

26. Mr. Amrendra Sharan, learned counsel for the first respondent submitted that in the event this Court is not inclined to hold in favour of the respondent No.1, the payment made so far should not be recovered. He relied upon the judgment of this Court in the case of *Yogeshwar Prasad Vs. National Institute of Education Planning and Admn.* reported in 2010 (14) SCC 323 wherein this court held in the facts of that case the grant of higher pay scales should not be recovered unless it was a case of misrepresentation or fraud. This judgment in turn referred to an earlier judgment in *Sahib Ram Vs. State of Haryana* reported in 1995 Supp. (1) SCC 18. In that matter the appellant was held to be not entitled to a salary in the revised scale. However, since the higher pay scale was given to him due to wrong construction of the relevant order by the authority concerned and not on account of any misrepresentation by the employee, the amount paid till the date of order was directed not to be recovered. When this appeal was admitted, stay as prayed by the appellant was declined, but it was made clear that the payment made by the appellant pursuant to the judgment of the High Court will be subject to the decision of appeal. Mr. Mariarputham, learned counsel for the appellant submitted that the appeal is canvassed basically in view of the principle involved. In view thereof, although the appeal is allowed, the additional pension paid to the first respondent as the President of the State Commission till the end of February 2012, will not be recovered from him. However, from March, 2012 onwards the first respondent shall be entitled to receive pension only for the service rendered by him as a High Court Judge.

COMMON ORDER

In view of divergence of opinion in terms of separate judgments pronounced by us in this appeal today, the Registry is directed to place the papers before Hon'ble the Chief Judtice for appeal being assigned to an appropriate Bench.

N.J. Matter referred to Larger Bench.

VISMAY DIGAMBAR THAKARE
v.
RAMCHANDRA SAMAJ SEWA SAMITI AND ORS.
(Civil Appeal No. 2708 of 2012)

MARCH 2, 2012

[T.S. THAKUR AND GYAN SUDHA MISRA, JJ.]

Service Law – Back wages – Claim for – Parties came to an amicable settlement – Appeal accordingly disposed of by Supreme Court – Employee-appellant directed to be paid by respondent No.1-Samiti and respondent no.2-Institution jointly and severally a sum of Rupees one lakh towards back wages in full and final settlement of the claim of the appellant on that account.

The High Court, by the impugned order, set aside the judgment of the School Tribunal to the extent the same awarded back wages to the appellant. When the matter came up before this Court, the parties came to an amicable settlement on the question of back wages claimed by the appellant.

It was submitted on behalf of the respondent-school and the Samiti that they were willing to pay to the appellant a sum of Rupees one lakh in full and final settlement of the claim made by him towards back wages. The appellant expressed his willingness to accept the said amount in satisfaction of his claim.

Allowing the appeal in part, the Court

HELD: The parties having agreed to a solution, there is no reason why the same cannot be made a basis for disposal of this appeal in modification of the order passed by the High Court. The appellant shall be paid by

respondent No.1-Samiti and No.2-Institution jointly and severally a sum of Rupees one lakh towards back wages in full and final settlement of the claim of the appellant on that account. The payment shall be made to the appellant within a period of three months failing which the amount shall start earning interest @ 10% p.a. from the date of this judgment till actual payment. [Paras 6, 7] [774-C-E]

U.P. State Brassware Corpn. Ltd. & Anr. v. Uday Narain Pandey **(2006) 1 SCC 479 - 2005 (5) Suppl. SCR 609;** *Reetu Marbles v. Brabhakant Shkla* **(2010) 2 SCC 70 - 2009 (16) SCR 34;** *Metropolitan Transport Corporation v. V. Venkatesan* **(2009) 9 SCC 601 - 2009 (12) SCR 583 and** *Kendriya Vidyalaya Sangathan & Anr. v. S.C. Sharma*, **(2005) 2 SCC 363 - 2005 (1) SCR 374 – cited.**

Case Law Reference:

2005 (5) Suppl. SCR 609	**cited**	**Para 3**
2009 (16) SCR 34	**cited**	**Para 3**
2009 (12) SCR 583	**cited**	**Para 3**
2005 (1) SCR 374	**cited**	**Para 4**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2708 of 2012.

From the Judgment & Order dated 07.05.2010 of the High Court of Judicature at Mombay, Nagpur in M.C.A. (Review) No. 1479 of 2009 in Letters Patent Appeal No. 386 of 2008.

Manish Pitale, Wasi Haider, Chander Shekhar Ashri for the Appellant.

Satyajit A. Desai, Anagha S. Desai, Vipul Ganda, Somanatha Padhan, Rahul M. Bhangde for the Respondents.

The Judgments of the Court was delivered by

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

2. This appeal arises out of a judgment and order dated 7th May, 2010 passed by the High Court of Judicature at Bombay, Nagpur Bench, whereby M.C.A. (Review) No.1479 of 2009 in Letters Patent Appeal No.386 of 2008 has been allowed and the judgment of the School Tribunal to the extent the same awarded back wages to the appellant has been set aside.

3. When the matter came up before us for hearing on 27th February, 2012, learned counsel for the parties made their submissions extensively but sought liberty to mention the matter again if the parties were able to negotiate an amicable settlement on the question of back wages claimed by the appellant? Only to recapitulate the line of arguments advanced before us we may mention that learned counsel for the appellant had placed reliance upon the decisions of this Court in *U.P. State Brassware Corpn. Ltd. & Anr. v. Uday Narain Pandey* (2006) 1 SCC 479, *Reetu Marbles v. Brabhakant Shkla* (2010) 2 SCC 70, and *Metropolitan Transport Corporation v. V. Venkatesan* (2009) 9 SCC 601, to contend that back wages could be awarded to the appellant even in the absence of a specific assertion by the appellant to the effect that he was not gainfully employed during the period he remained out of service. It was argued by learned counsel for the appellant on the strength of the above decisions that back wages could range between 25% to 60%.

4. On behalf the respondent-Institution, reliance was placed upon the decision of this Court *Kendriya Vidyalaya Sangathan & Anr. v. S.C. Sharma,* (2005) 2 SCC 363, in an attempt to demonstrate that unless there was a specific assertion that the appellant was not gainfully employed during the period he remained out of service, no back wages could be awarded in his favour.

5. It is not necessary for us to pronounce upon the rival

contentions urged by learned counsel for the parties. We say so because the matter was mentioned before us on 28th February, 2012 by the learned counsel for the parties. It was submitted on behalf of the respondent-school and the Simiti that they were willing to pay to the appellant a sum of Rupees one lakh in full and final settlement of the claim made by him towards back wages. Mr. Manish Pitale, learned counsel for the appellant submitted on instructions that the appellant was ready and willing to accept the said amount in satisfaction of his claim.

6. The parties having agreed to a solution, we see no reason why the same cannot be made a basis for disposal of this appeal in modification of the order passed by the High Court.

7. We accordingly, allow this appeal but only in part and to the extent that the appellant shall be paid by respondents No.1-Samiti and No.2-Institution jointly and severally a sum of Rupees one lakh towards back wages in full and final settlement of the claim of the appellant on that account. The payment shall be made to the appellant within a period of three months from today failing which the amount shall start earning interest @ 10% p.a. from the date of this judgment till actual payment. The parties to bear their own costs.

B.B.B. Appeal partly allowed.

RAVI YASHWANT BHOIR
v.
DISTRICT COLLECTOR, RAIGAD AND ORS.
(Civil Appeal No. 2085 of 2012)

MARCH 2, 2012

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

Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 – s.55B – Complaint by the Ex-President and the then sitting Municipal Councillor regarding the misconduct of the President-appellant – Allegations that appellant did not call for a meeting for a period of three months as required u/s.81(1) and also obtained undue financial gain by giving contract to a particular contractor at higher rate – Show cause notice served on the appellant after conducting preliminary inquiry – Competent authority declaring the appellant disqualified for the remaining tenure and further disqualifying him for a period of six years even as member of the council – Propriety of – Held: The competent authority did not make any reference to the pleadings taken by the appellant either in his reply to show cause or during the course of hearing – The order simply revealed that the competent authority noticed certain things – Not calling the meeting of the General Body of the House would at most be a technical misconduct committed inadvertently in ignorance of statutory requirements – It was nobody's case that the appellant had done it intentionally/ purposely in order to avoid some unpleasant resolution/ demand of the council – So far as the other charges were concerned, it was a consensus collective decision of the Council to accept the tender at higher rate and the appellant could not have been held guilty of the said charges – High Court failed to appreciate that it was a case of political rivalry – Complainant being a political rival, could not have been

entertained as a party to the lis – Thus, it was a clear case of legal malice and therefore, the impugned orders are liable to be quashed – The duly elected member/chairman of the council could not have been removed in such a casual and cavalier manner without giving strict adherence to the safeguards provided under the statute.

Constitution of India, 1950: Executive order – Municipal Council – Removal of elected office bearer – Held: An elected official cannot be permitted to be removed unceremoniously without following the procedure prescribed by law, in violation of the provisions of Article 21 of the Constitution, by the State by adopting a casual approach and resorting to manipulations to achieve ulterior purpose – Removal of a duly elected Member on the basis of proved misconduct is a quasi-judicial proceeding in nature – Therefore, the principles of natural justice are required to be given full play and strict compliance should be ensured, even in the absence of any provision providing for the same – In service jurisprudence, for removal, termination or reduction in rank, a full fledged inquiry is required otherwise it will be violative of the provisions of Article 311 of the Constitution – The case of elected office bearer is to be understood in an entirely different context as compared to the government employees, for the reason, that for the removal of the elected officials, a more stringent procedure and standard of proof is required.

Administrative law: Administrative order – Recording of reasons, necessity – Held: Even in administrative matters, the reasons should be recorded as it is incumbent upon the authorities to pass a speaking and reasoned order – Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind of the authority before the court – Another rationale is that the affected party can know why the decision has gone against him – Spelling out reasons for the order made is one of the salutary requirements of natural justice.

Jurisprudence: Legal right – Held: A legal right is an averment of entitlement arising out of law – A person who suffers from legal injury can only challenge the act or omission – The complainant has to establish that he has been deprived of or denied of a legal right and he has sustained injury to any legally protected interest – In case he has no legal peg for a justiciable claim to hang on, he cannot be heard as a party in a lis – A fanciful or sentimental grievance may not be sufficient to confer a locus standi to sue upon the individual – There must be injuria or a legal grievance which can be appreciated and not a stat pro ratione valuntas reasons i.e. a claim devoid of reasons – Torts.

Strictures: Strictures against State Authorities – State Authorities were asked to produce original record by Supreme Court within a period of two weeks – Neither the record produced before Supreme Court nor any application filed to extend the time to produce the same – In such a fact-situation, adverse inference is liable to be drawn against the State.

Words and phrases: Expressions 'misconduct', 'disgraceful conduct', 'malice in law' – Connotation of.

The appellant was elected as member of Uran Municipal Council and, subsequently, elected as a President of the Municipal Council. He was served with a show cause notice by the State of Maharashtra calling upon him to explain why action under Section 55B of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 be not taken against him. The chargesheet contained six charges. The competent authority i.e. Chief Minister declared the appellant disqualified for his remaining tenure and further declared him disqualified for a period of six years even as member of the Council. The appellant filed a writ petition which was dismissed.

In the instant appeal, it was contended for the

appellant that only three charges i.e. charge nos.3, 5 and 6 were held proved against the appellant; that one charge was that the appellant did not call for a meeting for a period of three months as required under Section 81(1) of the 1965 Act, for which the appellant had furnished explanation which was worth acceptance; that the officer concerned of the municipal council did not inform the appellant, nor the members asked to hold such meeting as required under Section 81(1) of the Act 1965, so it was merely an inadvertent act and could not be intentional, therefore, the question of committing any misconduct could not arise.

Allowing the appeal, the Court

HELD: 1.1. Mere error of judgment resulting in doing of negligent act does not amount to misconduct. However, in exceptional circumstances, not working diligently may be a misconduct. An action which is detrimental to the prestige of the institution may also amount to misconduct. Acting beyond authority may be a misconduct. When the office bearer is expected to act with absolute integrity and honesty in handling the work, any misappropriation, even temporary, of the funds etc. constitutes a serious misconduct, inviting severe punishment. [Para 9] [803-H; 804-A-B]

State of Punjab & Ors. v. Ram Singh Ex. Constable **AIR 1992 SC 2188: 1992 (3) SCR 634;** *Disciplinary Authority-cum-RegionalManager & Ors.v. Nikunja Bihari Patnaik* **(1996) 9 SCC 69: 1996 (1) Suppl. SCR 314;** *Government of Tamil Nadu v. K.N. Ramamurthy* **AIR 1997 SC 3571: 1997 (7) SCC 101;** *Inspector Prem Chand v. Govt. of NCT of Delhi & Ors.* **(2007) 4 SCC 566: 2007 (4) SCR 968;** *State Bank of India & Ors. v. S.N. Goyal* **AIR2008 SC 2594: 2008 (7) SCR 631;** *Government of A.P. v. P. Posetty* **(2000) 2 SCC 220;** *M.M. Malhotra v. Union of India & Ors.* **AIR 2006 SC 80: 2005 (3) Suppl. SCR 1026;** *Baldev Singh Gandhi v. State of*

Punjab & Ors. **AIR 2002 SC 1124: 2002 (1) SCR 102 – relied on.**

Black's Law Dictionary, Sixth Edition P. Ramanatha Aiyar's Law Lexicon, **Reprint Edition 1987 – referred to.**

1.2. Conclusions about the absence or lack of personal qualities in the incumbent do not amount to misconduct holding the person concerned liable for punishment. It is also a settled legal proposition that misconduct must necessarily be measured in terms of the nature of the misconduct and the court must examine as to whether misconduct has been detrimental to the public interest. The expression 'misconduct' has to be understood as a transgression of some established and definite rule of action, a forbidden act, unlawful behaviour, wilful in character. It may be synonymous as misdemeanour in propriety and mismanagement. In a particular case, negligence or carelessness may also be a misconduct for example, when a watchman leaves his duty and goes to watch cinema, though there may be no theft or loss to the institution but leaving the place of duty itself amounts to misconduct. It may be more serious in case of disciplinary forces. Further, the expression 'misconduct' has to be construed and understood in reference to the subject matter and context wherein the term occurs taking into consideration the scope and object of the statute which is being construed. Misconduct is to be measured in terms of the nature of misconduct and it should be viewed with the consequences of misconduct as to whether it has been detrimental to the public interest. [Paras 12-14] [805-A-G]

Union of India & Ors. v. J. Ahmed **AIR 1979 SC 1022: 1979 (3) SCR 504;** *General Manager, Appellate Authority, Bank of India & Anr. v. Mohd. Nizamuddin* **AIR 2006 SC 3290: 2006 (7) SCC 410 – relied on.**

2. <u>DISGRACEFUL CONDUCT</u> :

The expression 'disgraceful conduct' is not defined in the statute. Therefore, the same has to be understood in given dictionary meaning. The term 'disgrace' signifies loss of honor, respect, or reputation, shame or bring disfavour or discredit. Disgraceful means giving offence to moral sensibilities and injurious to reputation or conduct or character deserving or bringing disgrace or shame. Disgraceful conduct is also to be examined from the context in which the term has been employed under the statute. Disgraceful conduct need not necessarily be connected with the official of the office bearer. Therefore, it may be outside the ambit of discharge of his official duty. [para 15] [805-H; 806-A-B]

<u>REMOVAL OF AN ELECTED OFFICE BEARER :</u>

3.1. The municipalities have been conferred Constitutional status by amending the Constitution by 74th Amendment Act, 1992 w.e.f. 1.6.1993. The municipalities have also been conferred various powers under Article 243B of the Constitution. Amendment in the Constitution by adding Parts IX and IX-A confers upon the local self Government a complete autonomy on the basic democratic unit unshackled from official control. Thus, exercise of any power having effect of destroying the Constitutional Institution besides being outrageous is dangerous to the democratic set-up of this country. Therefore, an elected official cannot be permitted to be removed unceremoniously without following the procedure prescribed by law, in violation of the provisions of Article 21 of the Constitution, by the State by adopting a casual approach and resorting to manipulations to achieve ulterior purpose. The Court being the custodian of law cannot tolerate any attempt to thwart the Institution. The democratic set-up of the country has always been recognized as a basic feature of the

Constitution, like other features e.g. Supremacy of the Constitution, Rule of law, Principle of separation of powers, Power of judicial review under Articles 32, 226 and 227 of the Constitution etc. It is not permissible to destroy any of the basic features of the Constitution even by any form of amendment, and therefore, it is beyond imagination that it can be eroded by the executive on its whims without any reason. The Constitution accords full faith and credit to the act done by the executive in exercise of its statutory powers, but they have a primary responsibility to serve the nation and enlighten the citizens to further strengthen a democratic State. Public administration is responsible for the effective implication of the rule of law and constitutional commands which effectuate fairly the objective standard set for adjudicating good administrative decisions. However, wherever the executive fails, the Courts come forward to strike down an order passed by them passionately and to remove arbitrariness and unreasonableness, for the reason, that the State by its illegal action becomes liable for forfeiting the full faith and credit trusted with it. [Paras 16-18] [806-C-H; 807-A-E]

His Holiness Keshwananda Bharti Sripadagalvaru & Ors. v. State of Kerala & Anr. **AIR 1973 SC 1461: 1973 (0) Suppl. SCR 1;** *Minerva Mills Ltd. & Ors. v. Union of India & Ors.* **AIR 1980 SC 1789: 1981 (1)SCR 206;** *Union of India v. Association for Democratic Reforms & Anr.* **AIR 2002 SC 2112: 2002 (3) SCR 696;** *Special Reference No.1 of 2002 (Gujarat Assembly Election Matter)* **AIR 2003 SC 87: 2002 (3) Suppl. SCR 366;** *Kuldip Nayar v. Union of India & Ors.* **AIR 2006 SC 3127: 2006 (5) Suppl. SCR 1;** *Scheduled Castes and Scheduled Tribes officers Welfare Council v. State of U.P. & Ors.,* **AIR 1997 SC 1451: 1996 (6) Suppl. SCR 544;** *State of Punjab & Ors. v. G.S. Gill & Anr.* **AIR 1997 SC 2324: 1997 (3) SCR 412 – relied on.**

3.2. Basic means the basis of a thing on which it stands, and on the failure of which it falls. In democracy all citizens have equal political rights. Democracy means actual, active and effective exercise of power by the people in this regard. It means political participation of the people in running the administration of the Government. It conveys the State of affair in which each citizen is assured of the right of equal participation in the polity. There can also be no quarrel with the settled legal proposition that removal of a duly elected Member on the basis of proved misconduct is a quasi-judicial proceeding in nature. Therefore, the principles of natural justice are required to be given full play and strict compliance should be ensured, even in the absence of any provision providing for the same. Principles of natural justice require a fair opportunity of defence to such an elected office bearer. [Para 19, 23] [807-F-G; 809-C-E]

R.C. Poudyal v. Union of India & Ors. **AIR 1993 SC 1804: 1993 (1) SCR 891;** *Peoples Union for Civil Liberties (PUCL) & Anr. v. Union of India & Anr.* **AIR 2003 SC 2363: 2003(2) SCR 1136;** *State of Punjab v. Baldev Singh etc. etc.* **AIR 1999 SC 2378: 1999 (3) SCR 977;** *Mohinder Kumar v. State, Panaji, Goa* **(1998) 8 SCC 655;** *Ali Mustafa Abdul Rehman Moosa v. State of Kerala* **AIR 1995 SC 244;** *G. Sadanandan v. State of Kerala & Anr.* **AIR 1966 SC 1925;** *Indian National Congress (I) v. Institute of Social Welfare & Ors.* **AIR 2002 SC 2158: 2002 (3) SCR 1040;** *Bachhitar Singh v. State of Punjab & Anr.* **AIR 1963 SC 395: 1962 Suppl. SCR 713;** *Union of India v. H.C. Goel* **AIR 1964 SC 364: 1964 SCR 718;** *Tarlochan Dev Sharma v. State of Punjab & Ors.* **AIR 2001 SC 2524: 2001 (3) SCR 1146 – relied on.**

3.3. Undoubtedly, any elected official in local self-government has to be put on a higher pedestal as against a government servant. If a temporary government

employee cannot be removed on the ground of misconduct without holding a full fledged inquiry, it is difficult to imagine how an elected office bearer can be removed without holding a full fledged inquiry. In service jurisprudence, minor punishment is permissible to be imposed while holding the inquiry as per the procedure prescribed for it but for removal, termination or reduction in rank, a full fledged inquiry is required otherwise it will be violative of the provisions of Article 311 of the Constitution of India. The case is to be understood in an entirely different context as compared to the government employees, for the reason, that for the removal of the elected officials, a more stringent procedure and standard of proof is required. [Para 24] [809-F-H; 810-A]

3.4. In a democratic institution, like ours, the incumbent is entitled to hold the office for the term for which he has been elected unless his election is set aside by a prescribed procedure known to law or he is removed by the procedure established under law. The proceedings for removal must satisfy the requirement of natural justice and the decision must show that the authority has applied its mind to the allegations made and the explanation furnished by the elected office bearer sought to be removed. The elected official is accountable to its electorate because he is being elected by a large number of voters. His removal has serious repercussions as he is removed from the post and declared disqualified to contest the elections for a further stipulated period, but it also takes away the right of the people of his constituency to be represented by him. Undoubtedly, the right to hold such a post is statutory and no person can claim any absolute or vested right to the post, but he cannot be removed without strictly adhering to the provisions provided by the legislature for his removal. [Paras 26-27] [810-E-H; 811-A-B]

Jyoti Basu & Ors. v. Debi Ghosal & Ors. **AIR 1982 SC 983: 1982 (3) SCR 318;** *Mohanlal Tripathi v. District Magistrate, Rai Barelly & Ors.* **AIR 1993 SC 2042: 1992 (3) SCR 338;** *Ram Beti etc. v. District Panchayat Rajadhikari & Ors.* **AIR1998 SC 1222: 1997 (6) Suppl. SCR 582 – relied on.**

RECORDING OF REASONS:

4.1. It is a settled proposition of law that even in administrative matters, the reasons should be recorded as it is incumbent upon the authorities to pass a speaking and reasoned order. The emphasis on recording reason is that if the decision reveals the 'inscrutable face of the sphinx', it can be its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind of the authority before the court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made. In other words, a speaking out, the inscrutable face of the sphinx is ordinarily incongruous with a judicial or quasi-judicial performance. [Paras 29, 36] [811-G; 814-H; 815-A-B]

Kumari Shrilekha Vidyarthi etc. etc. v. State of U.P. & Ors. **AIR 1991 SC 537: 1990 (1) Suppl. SCR 625;** *L.I.C. of India & Anr. v. Consumer Education and Research Centre & Ors.* **AIR 1995 SC 1811: 1995 (1) Suppl. SCR 349;** *Union of India v. M.L. Capoor & Ors.* **AIR 1974 SC 87: 1974 (1) SCR 797;** *Mahesh Chandra v. Regional Manager, U.P. Financial Corporation & Ors.* **AIR 1993 SC 935: 1992 (1) SCR 616;** *State of West Bengal v. Atul Krishna Shaw & Anr.* **AIR 1990 SC 2205: 1990 (1) Suppl. SCR 91;** *S.N. Mukherjee v. Union of India* **AIR 1990 SC 1984: 1990 (1) Suppl. SCR 44;** *Krishna Swami v. Union of India & Ors.* **AIR 1993 SC 1407:**

1992 (1) Suppl. SCR 53; *Sant Lal Gupta & Ors. v. Modern Co-operative Group Housing Society Ltd. & Ors.* **(2010) 13 SCC 336: 2010 (13) SCR 621;** *Institute of Chartered Accountants of India v. L.K Ratna & Ors.* **AIR 1987 SC 71: 1986 (3) SCR 1048 – relied on.**

Malice in law:

5. The State is under an obligation to act fairly without ill will or malice- in fact or in law. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. "Legal malice" or "malice in law" means something done without lawful excuse. It is a deliberate act in disregard to the rights of others. It is an act which is taken with an oblique or indirect object. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. Mala fide exercise of power does not imply any moral turpitude. It means exercise of statutory power for "purposes foreign to those for which it is in law intended." It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, where intent is manifested by its injurious acts. Passing an order for unauthorized purpose constitutes malice in law. [Para 37] [815-C-G]

Addl. Distt. Magistrate, Jabalpur v. Shivakant Shukla **AIR 1976 SC 1207: 1976 (0) Suppl. SCR 172;** *Union of India thr. Govt. of Pondicherry & Anr. v. V. Ramakrishnan & Ors.* **(2005) 8 SCC 394: 2005 (4) Suppl. SCR 291;** *Kalabharati Advertising v. Hemant Vimalnath Narichania & Ors.* **AIR 2010 SC 3745: 2010 (10) SCR 971 – relied on.**

6. Section 55 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 provides for removal of the President of the Council by No Confidence Motion. Sections 55A and 55B provide a

mode of removal of duly elected President on proved misconduct or negligence etc. In the instant case, on a complaint filed by the Ex-President and the then sitting Municipal Councillor, Uran Municipal Council (Respondent No.5) regarding the misconduct of the appellant, preliminary inquiry was conducted through Collector. The Collector made an inquiry through Deputy Collector and submitted the inquiry report and as no action was taken by the Statutory Authority against the appellant, the complainant filed a writ petition before the High Court which was disposed of directing respondent no. 2 (Minister of State, Urban Development, the then Chief Minister) to take a decision on the complaint. The charge sheet/show cause notice containing 6 charges was served upon the appellant. In response to the said chargesheet, the appellant furnished explanation denying all the charges framed against him and furnished a detailed explanation. In this respect, hearing was held wherein the appellant as well as the complainant appeared alongwith their advocates and made their submissions before the competent authority. The impugned order was passed holding the appellant guilty of three charges imposing the punishment. It is evident from the said order that the competent authority did not make any reference to the pleadings taken by the appellant either in his reply to show cause or during the course of hearing. The order simply revealed that the competent authority noticed certain things. The explanation furnished by the appellant for not holding the meeting and acceptance of tender by the council itself and not by the appellant, was not considered at all. No reasoning was given by the Statutory Authority for reaching the conclusions. The High Court also erred in not dealing with any of the issues raised by the appellant while furnishing his explanation rather relied upon the findings recorded by the competent authority. There was nothing in the judgment of the High Court wherein the

grievance of the appellant was considered nor any reasoning was given to uphold the findings recorded by the Statutory Authority imposing such a severe punishment. The complainant at the most, could have led the evidence as a witness. He could not claim the status of an adversial litigant. The complainant cannot be the party to the lis. A legal right is an averment of entitlement arising out of law. In fact, it is a benefit conferred upon a person by the rule of law. Thus, a person who suffers from legal injury can only challenge the act or omission. There may be some harm or loss that may not be wrongful in the eyes of law because it may not result in injury to a legal right or legally protected interest of the complainant but juridically harm of this description is called *damnum sine injuria*. The complainant has to establish that he has been deprived of or denied of a legal right and he has sustained injury to any legally protected interest. In case he has no legal peg for a justiciable claim to hang on, he cannot be heard as a party in a lis. A fanciful or sentimental grievance may not be sufficient to confer a locus standi to sue upon the individual. There must be injuria or a legal grievance which can be appreciated and not a *stat pro ratione valuntas reasons* i.e. a claim devoid of reasons. Under the garb of being necessary party, a person cannot be permitted to make a case as that of general public interest. A person having a remote interest cannot be permitted to become a party in the lis, as the person wants to become a party in a case, has to establish that he has a proprietary right which has been or is threatened to be violated, for the reason that a legal injury creates a remedial right in the injured person. A person cannot be heard as a party unless he answers the description of aggrieved party. The High Court failed to appreciate that it was a case of political rivalry. The case of the appellant was not considered in correct perspective at all. In such a fact-

situation, the complaint filed by the respondent No. 5 could at the most be pressed into service as a material exhibit in order to collect the evidence to find out the truth. As all the charges proved against the appellant were dealt with exclusively on the basis of documentary evidence, there was nothing on record by which the complainant could show that the General Body meeting was not called, as statutorily required, by the appellant intentionally. [Paras 38, 41-45] [815-G-H; 818-D-H; 819-A-D; 820-A-H; 821-A-G]

Adi Pherozshah Gandhi v. H.M. Seervai, Advocate General of Maharashtra **AIR 1971 SC 385: 1971 (2) SCR 863;** *Jasbhai Motibhai Desai v. Roshan Kumar, Haji Bashir Ahmed & Ors.* **AIR 1976 SC 578: 1976 (3) SCR 58;** *Maharaj Singh v. State of Uttar Pradesh & Ors.* **AIR 1976 SC 2602: 1977 (1) SCR 1072;** *Ghulam Qadir v. Special Tribunal & Ors.* **(2002) 1 SCC 33: 2001 (3) Suppl. SCR 504;** *Kabushiki Kaisha Toshiba v. Tosiba Appliances Company & Ors.* **(2008) 10 SCC 766: 2008 (9) SCR 670 – relied on.**

7. Not calling the meeting of the General Body of the House may be merely a technical misconduct committed inadvertently in ignorance of statutory requirements. It was nobody's case that the appellant had done it intentionally/purposely in order to avoid some unpleasant resolution/demand of the council. No finding of fact was recorded either by the competent authority or by the High Court that some urgent/important work could not be carried out for want of General Body meeting of the council. Merely not to conduct oneself according to the procedure prescribed or omission to conduct a meeting without any corresponding loss to the corporate body, would not be an automatic misconduct by inference, unless some positive intentional misconduct is shown. It was an admitted fact that the meeting was not called. However, in the absence of any imputation of motive, not

calling the meeting by the appellant could not in itself, be enough to prove the charge. Section 81 of the Act 1965 requires that for the disposal of the general business, the President should call the meeting of the Council within a period of two months from the date on which the last preceding ordinary meeting was held. The statutory provisions further provided that in case the President fails to call the ordinary meeting within the said stipulated period, the Chief Officer may report such failure to the Collector and the Collector can call the ordinary meeting of the Council following the procedure prescribed therein. The President can also call the meeting on the request of the members not less than one-fourth of the total number of councils. Therefore, the cogent reading of all the provisions makes it clear that in case the President fails to call the meeting, there are other modes of calling the meeting and in such an eventuality where reasonable explanation has been furnished by the appellant to the show cause notice on this count, the competent authority could not have passed such a harsh order. [Para 46] [821-G-H; 822-A-F]

8. So far as the other charges regarding laying down the pipelines at a much higher rate were concerned, it was a positive case of the appellant that as earlier contractor had abandoned the work in between and there was a scarcity of water in the city, the Chief Officer, the Junior Engineer considered the technical aspect and then recommendations were forwarded under the signatures of the appellant, the Chief Officer and Junior Engineer to the council, which ultimately passed the resolution accepting the said tenders. In such a fact-situation, it was a collective consensus decision of the house after due deliberations. Admittedly, it was not even the ratification of contract awarded by the appellant himself. Thus, even by any stretch of imagination it cannot be held to be an individual decision of the appellant and the competent

authority failed to appreciate that the tenders were accepted by the Council itself and not by the appellant alone. Therefore, he could not be held responsible for acceptance of tenders. In the counter affidavit filed by respondent No.5, complainant, he has not stated anywhere that the tenders were not accepted by the council, rather allegations were made that the tenders were accepted at a higher rate so that the contractor could get the financial gain. [Para 47] [822-G-H; 823-A-D]

9. The first charge proved against the appellant for not calling the meeting of Council, did not warrant the order of removal and the explanation furnished by appellant could have been accepted. Other charges could not be proved against the appellant, in view of the fact, that the tenders at a higher rate were accepted by the Council itself and the appellant could not be held exclusively responsible for it. Respondent no. 5, being a political rival, could not have been entertained as a party to the lis. The charge of not calling the meeting of the Council was admitted by the appellant himself, thus, no further evidence was required, for the reason, that the admission is the best evidence. The competent authority could have considered his explanation alone and proceeded to take a final decision. So far as the other charges were concerned, it was a consensus collective decision of the Council to accept the tender at higher rate and the appellant could not have been held guilty of the said charges. Thus, the instant case was a crystal clear cut case of legal malice and therefore, the impugned orders are liable to be quashed. The duly elected member/chairman of the council could not have been removed in such a casual and cavalier manner without giving strict adherence to the safeguards provided under the statute which had to be scrupulously followed. [Para 48] [823-F-H; 824-A-C]

10. The appellant had raised a question of fact before the High Court as well as before this Court submitting that at the time of hearing before the competent authority, respondent No.5 had raised new grounds and the appellant raised serious objections as he had no opportunity to meet the same. Thus, in order to give the appellant an opportunity to rebut the same the competent authority had adjourned the case and directed the Secretary to fix a date so that the appellant may meet those new objections/grounds. However, the order impugned removing the appellant from the post and declaring him further disqualified for a period of six years was passed. It is not evident from the order impugned as what could be those new grounds which had not been disclosed to the appellant. Thus, to ascertain as to whether in order to give an opportunity to the appellant to meet the alleged new grounds, the competent authority had adjourned the case, this Court while reserving the judgment on 13.2.2012 asked the Standing Counsel for the State to produce the original record before this Court within a period of two weeks. For the reasons best known to the State Authorities, neither the record was produced before this Court nor any application was filed to extend the time to produce the same. In fact, this Court was deprived of seeing the original record and to examine the grievance of the appellant. In such a fact-situation, the court has no option except to draw the adverse inference against the State. This Court while entertaining the petition had granted interim protection to the appellant which was extended till further orders and, thus, the orders impugned remained inoperative. Thus, it will be deemed as no order had ever been passed against the appellant. A copy of the order be sent directly to the Chief Secretary, State of Maharashtra, Bombay, who may conduct an enquiry and send his personal affidavit as under what circumstances the State Authorities could decide not to ensure

compliance of the order of this Court dated 13.2.2012, within a period of four week from the date of receipt of this order, to the Registrar General of this Court who may place it alongwith the file before the Bench. [Paras 49, 50] [824-D-H; 825-A-B, D-F]

Case Law Reference:

1992 (3) SCR 634	relied on	Para 8
1996 (1) Suppl. SCR 314	relied on	Para 9
1997 (7) SCC 101	relied on	Para 9
2007 (4) SCR 968	relied on	Para 9
2008 (7) SCR 631	relied on	Para 9
(2000) 2 SCC 220	relied on	Para 10
2005 (3) Suppl. SCR 1026	relied on	Para 11
2002 (1) SCR 1021	relied on	Para 11
1979 (3) SCR 504	relied on	Para 12
2006 (7) SCC 410	relied on	Para 13
1973 (0) Suppl. SCR 1	relied on	Para 17
1981 (1) SCR 206	relied on	Para 17
2002 (3) SCR 696	relied on	Para 17
2002 (3) Suppl. SCR 366	relied on	Para 17
2006 (5) Suppl. SCR 1	relied on	Para 17
1996 (6) Suppl. SCR 544	relied on	Para 18
1993 (1) SCR 891	relied on	Para 18
2003 (2) SCR 1136	relied on	Para 19
1999 (3) SCR 977	relied on	Para 21

(1998) 8 SCC 655	**relied on**	**Para 21**
1994 (4) Suppl. SCR 52	**relied on**	**Para 21**
AIR 1966 SC 1925	**relied on**	**Para 22**
2002 (3) SCR 1040	**relied on**	**Para 23**
1962 Suppl. SCR 713	**relied on**	**Para 23**
1964 SCR 718	**relied on**	**Para 23**
2001 (3) SCR 1146	**relied on**	**Para 25**
1982 (3) SCR 318	**relied on**	**Para 27**
1992 (3) SCR 338	**relied on**	**Para 27**
1997 (6) Suppl. SCR 582	**relied on**	**Para 27**
1990 (1) Suppl. SCR 625	**relied on**	**Para 29**
1995 (1) Suppl. SCR 349	**relied on**	**Para 30**
1974 (1) SCR 797	**relied on**	**Para 30**
1992 (1) SCR 616	**relied on**	**Para 30**
1990 (1) Suppl. SCR 91	**relied on**	**Para 31**
1990 (1) Suppl. SCR 44	**relied on**	**Para 32**
1992 (1) Suppl. SCR 53	**relied on**	**Para 33**
2010 (13) SCR 621	**relied on**	**Para 34**
1986 (3) SCR 1048	**relied on**	**Para 35**
1976 (0) Suppl. SCR 172	**relied on**	**Para 37**
2005 (4) Suppl. SCR 291	**relied on**	**Para 37**
2010 (10) SCR 971	**relied on**	**Para 37**
1971 (2) SCR 863	**relied on**	**Para 44**
1976 (3) SCR 58	**relied on**	**Para 44**
1977 (1) SCR 1072	**relied on**	**Para 44**
2001 (3) Suppl. SCR 504	**relied on**	**Para 44**
2008 (9) SCR 670	**relied on**	**Para 44**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2085 of 2012.

From the Judgment & Order dated 18.06.2009 of the High Court of Judicature at Bombay in Writ Petition No. 4665 of 2009.

Vinay Navare, Keshav Ranjan, Satyajeet Kumar, Abha R. Sharma for the Appellant.

Sudhanshu S. Choudhari, Mike Prakash Desai, Sanjay V. Kharde, Asha Gopalan Nair for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the impugned judgment and order dated 18.6.2009 passed by the High Court of Bombay in Writ Petition No. 4665 of 2009 by which the High Court has affirmed and upheld the judgment of the Hon'ble Chief Minister of Maharashtra declaring that the conduct of the appellant was unbecoming of the President of Uran Municipal Council and declared him to be disqualified for remaining tenure of municipal councilorship under Section 55B of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (hereinafter called as the `Act 1965) and further declared him disqualified for a period of six years from the date of the order i.e. 21.3.2009.

2. Facts and circumstances giving rise to this appeal are:

A. That the appellant was elected as member of Uran Municipal Council and, subsequently, elected as a President of the Municipal Council. The appellant was served with a show

cause notice dated 3.12.2008 by the State of Maharashtra calling upon him to explain why action under Section 55B of the Act 1965 be not taken against him. The chargesheet contained the following six charges:

Charge No.1

Uran Charitable Medical Trust has built up unauthorized construction on Survey Nos. 8 + 9 + 10 + 11 situated at Mouje Mhatawali to the extent of 1140 square meters for their hospital and you are the Trustee of the said Trust. Municipal Council had issued notice dated 17.10.2006 for demolishing the said unauthorized construction on its own. Shri Dosu Ardesar Bhiwandiwala had filed Regular Civil Suit No.95/07 against the said notice in the court of Civil Judge, Junior Division, Uran and the same was decided on 19.12.2007 in which plaintiff's application was rejected.

Junior Engineer of Uran Municipal Council lodged a complaint with Uran police Station under Sections 53 and 54 of the Maharashtra Regional and Town Planning Act, 1966 against the said unauthorized construction on 24.7.2007. Shri Jayant Gosal and three others filed Public Interest Litigation No. 57 of 2008 concerning the said unauthorized construction of the said Trust in the Bombay High Court and the same is presently subjudice. You are the Trustee of the said Trust and as President of the Municipal Council, you are duty bound to oppose the unauthorized construction. However, you did not take any action to oppose the same and it appears that you have supported the unauthorized construction. You have, therefore, violated Sections 44, 45, 52 and 53 of the Maharashtra Regional and Town Planning Act, 1966.

Charge No.2

The Municipal Council had called the General Body

Meeting on 22.3.2007 by way of Resolution No. 2 Survey Nos. 8 + 9 + 10 + 11 at Mouje Mhatawali area admeasuring about 4000 square meters was proposed for reservation of garden. However, instead of that, the resolution was passed for reserving the same for hospital, nursing home and medical college. At that time, you were presiding over the meeting. By this illegal Act, you have violated Sections 44(1)(e) and 42(1), (2) and (3) of Maharashtra Municipal Councils, Panchayat Samiti and Industrial Township Act, 1965.

Charge No.3

After you were elected as the President on 20.12.2006, a General Body Meeting was held on 9.1.2007. Although it is required under Section 80(1) of the Maharashtra Municipal Councils, Panchayat Samiti and Industrial Township Act, 1965 to hold the General Body Meeting once in two months, no such meeting was held for a period of three months between 28.2.2007 and 28.5.2007. By the said act, you have violated Section 81 (1) of the Maharashtra Municipal Councils, Panchayat Samiti and Industrial Township Act, 1965.

Charge No.4

In the meeting held on 9.1.2007, the suggestion to the Agenda No.4 made by Members Shri Chintaman Gharat and Shri Shekhar Mhatre that a rented car be provided for the use of the President was rejected by you. Similarly, the Members Shri Chintaman Gharat and Shri Shekhar Mhatrehad made suggestion to the Agenda No.ll of the same meeting that new Nalla be constructed near Ughadi at Bhavara Phanaswadi. The said suggestion was rejected after being read over. Similarly, Members Shri Chintaman Gharat and Shri Shekhar Mhatre had made suggestion to the Agenda No.20 in the same meeting that new Nalla be constructed in front of the house of Shri

Kailash Patail at Bhavara Phanaswadi. The said suggestion was rejected. Similarly, suggestion was made by Shri Chintaman Gharat and Shri Shekhar Mhatre to Agenda No.23 that the Standing Committee be authorized to open the tender/approvals and give sanctions for diverse works of the Municipal Council. The said suggestion was rejected. Similarly, suggestion was made by Shri Chintaman Gharat and Shri Shekhar Mhatre to Agenda No. 27 of the same meeting regarding allotment of contract for spraying insecticides in Ward Nos. 1 to 17 of the Municipal Council. It appears from the minutes of the meeting dated 9.1.2007 that even said suggestion was rejected. You have, therefore, violated rules 30, 32(1) and (2) of the Maharashtra Municipal Councils (Conduct of Business) Rules, 1966 by frequently rejecting the suggestions of the Members of the Municipal Council.

Charge No.5

Tenders were invited on 5.10.2006 for installing CI Pipeline of 300 mm. diameter for outlet and inlet of GSR Tank at Sarvodayawadi within Uran Municipal Council by the construction department of Maharashtra Jeevan Pradhikaran, Panvel by its Outward No.MJPBV /MC/MS/ Uran /311/3/06 dated 7.12.2006 at the Town Hall of the Uran Municipal Council. Pursuant to the same three tenders were invited, details whereof are as follows :

	Name & Address of the Contractor	Tender Amount
1.	M/s Shailemsh Construction Ulhasnagar	9,11,351.50
2.	M/s Padmavati Enterprise, Ambernath	8,92,375.00
3.	M/s Kiran B. Jadhav, Ulhasnagar	8.47,462.98

Out of the aforesaid three tenders, the lowest tender of M/s Kiran B. Jadhav, Ulhasnagar was accepted as per Clause 171 of the Maharashtra Accounts Code, 1971. However, the estimate was prepared as per the DSR of 2005-2006. As a result when the tenders were invited, there was a difference of more than 10% in the tender amount. Therefore, by citing Item No.44 of the Standing Order No.36 of the Commissioner and Director, Directorate of Municipal Administration, the Municipal Council called for the current market rates from the concerned commercial dealers. M/ s Nazmi Electrical & Hardware Limited, Kalyan and M/s Sanjay Steel Tube Corporation Limited on 5.1.2007 to compare the difference in the rates of the tenderers/ contractors and the market rates and decided that the rates of the tenderers were less than the market rates on the basis of the comparison and sanctioned the tenders and the bills of the tenderers were paid thereby you have violated paragraphs Nos. 44 to 47 of Standing Order No.36 regarding inviting tenders and approvals dated 29.12.2005 bearing No. NPS/Inviting Tenders/2005/Case No.151/05and Rule No.171 of the Maharashtra Accounts Code, 1971.

Charge No.6

Tenders were invited on 5.10.2006 for installing CI Pipeline of 300 mm. diameter for outlet and inlet of GSR Tank at Sarvodayawadi within Uran Municipal Council by the construction department of Maharashtra Jeevan Pradhikaran, Panvel by its Outward No.MJPBV/MC/MS/ Uran /311/3/06 dated 7.12.2006 at the Town Hall of the Uran Municipal Council. Pursuant to the same three tenders were invited, details whereof are as follows:

	Name & Address of the Contractor	Tender Amount
1.	M/s Shailesh Construction Ulhasnagar	4,21,165.00
2.	M/s Padmavati Enterprise, Ambernath	4,18,889.28
3.	M/s Kiran B. Jadhav, Ulhasnagar	3,78,507.78

Out of the aforesaid three tenders, the lowest tender of M/s Kiran B. Jadhav, Ulhasnagar was accepted as per Clause 171 of the Maharashtra Accounts Code, 1971. However, the estimate was prepared as per the DSR of 2005-2006. As a result when the tenders were invited, there was a difference of more than 10% in the tender amount. Therefore, by citing Item No.44 of the Standing Order No.36 of the Commissioner and Director, Directorate of Municipal Administration, the Municipal Council called for the current market rates from the concerned commercial dealers. M/s Nazmi Electrical & Hardware Limited, Kalyan and M/s Sanjay Steel Tube Corporation Limited on 5.1.2007 to compare the difference in the rates of the tenderers / contractors and the market rates and decided that the rates of the tenderers were less than the market rates on the basis of the comparison and sanctioned the tenders and the bills of the tenderers were paid thereby you have violated paragraphs Nos. 44 to 47 of Standing Order No.36 regarding inviting tenders and approvals dated 29.12.2005 bearing No. NPS/Inviting Tenders/2005/Case No.151/05 and Rule No.171 of the Maharashtra Accounts Code, 1971.

B. The appellant submitted his explanation dated 18.12.2008 in writing. After considering the same, the appellant was issued a notice for hearing on 23.1.2009. The appellant remained present alongwith his advocate before the competent

authority i.e. Hon'ble Chief Minister holding the portfolio of Department. However, vide impugned order dated 21.3.2009, the appellant was declared disqualified for his remaining tenure and further declaring him disqualified for a period of six years even as member of the Council.

C. Being aggrieved, the appellant filed the writ petition challenging the order dated 21.3.2009. The writ petition stood dismissed vide impugned judgment and order dated 18.6.2009.

Hence, this appeal.

3. Shri Vinay Navare, learned counsel appearing for the appellant, has submitted that only three charges i.e. charge nos.3, 5 and 6 have been held proved against the appellant. One charge is that the appellant did not call for a meeting for a period of three months i.e. from 28.2.2007 to 28.5.2007 as required under Section 81(1) of the Act 1965, for which the appellant had furnished explanation which was worth acceptance. The officer concerned of the municipal council did not inform the appellant, nor the members asked to hold such meeting as required under Section 81(1) of the Act 1965, so it was merely an inadvertent act and could not be intentional. Therefore, the question of committing any misconduct could not arise.

4. Other charges which stood proved are regarding the acceptance of fresh tenders at high rates for incomplete work of laying down 300 mm. CI pipeline for water supply. The tender for lower estimated cost was not accepted rather there was a difference of more than 10 per cent in tender amount. The explanation was furnished by the appellant that there was a resolution by the council itself accepting the said tenders and, therefore, the appellant exclusively could not be held responsible for acceptance of tenders on the high rate of CI pipes. Even the rate of C.I. pipe purchased by Maharashtra Jivan Pradhikaran were also considered and after considering

all these factors, the lowest bid was accepted by the Uran Municipal Council. The Chief Officer, the Junior Engineer has also considered the technical aspect, and, then the recommendation was forwarded under the signature of President, Chief Officer and Jr. Engineer and thereafter, the Municipal Council passed resolution and accepted the said tender. Therefore, it cannot be said that by doing this the appellant has breached any of the statutory provisions.

5. It is further submitted that at the time of hearing on 21.3.2009, the complainant wanted to rely upon some new grounds, and, therefore, the appellant raised the objection. The Hon'ble Chief Minister directed the Secretary to fix up a date of hearing, however, no date of hearing was fixed and impugned order dated 21.3.2009 had been passed without affording any opportunity of hearing to the appellant. Therefore, the said order was passed in utter disregard of the principles of natural justice and cannot be sustained in the eyes of law.

The Competent/Statutory authority has not recorded reasons for conclusions arrived, by which, at least the three charges stood proved against the appellant. The expression 'misconduct' has not been understood in correct perspective. Even if the three charges stood proved, the punishment imposed is totally disproportionate, more so, was not warranted in the facts and circumstances of the case. The High Court erred in not appreciating the facts in correct perspective, therefore, the impugned judgment and order is liable to be set aside.

6. Shri Mike Prakash Desai and Shri Sudhansu Choudhary, learned counsel appearing on behalf of the respondents, have vehemently opposed the appeal contending that charges proved against the appellant constituted grave misconduct on his part and was liable to be removed and has rightly been declared disqualified for further period of six years. The appellant had been given full opportunity to defend himself. The period of disqualification has lapsed, thus this Court is

dealing with an academic issue. The impugned order does not warrant any interference in the facts and circumstances of the case. The appeal lacks merit and, accordingly, is liable to be dismissed.

7. We have considered the rival submissions made by the learned counsel of the parties and perused the record. Before considering the case on merits, it is pertinent to deal with certain legal issues.

MISCONDUCT:

8. Misconduct has been defined in Black's Law Dictionary, Sixth Edition as:

> "A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, wilful in character, improper or wrong behavior, its synonyms are misdemeanor, misdeed, misbehavior, delinquency,impropriety,mismanagement offense, but not negligence or carelessness."

Misconduct in office has been defined as:

> "Any unlawful behavior by a public officer in relation to the duties of his office, wilful in character. Term embraces acts which the office holder had no right to perform, acts performed improperly, and failure to act in the face of an affirmative duty to act."

P. Ramanatha Aiyar's Law Lexicon, Reprint Edition 1987 at page 821 defines 'misconduct' thus:

> "The term misconduct implies a *wrongful intention,* and *not a mere error of judgment.* Misconduct is not necessarily the same thing as conduct involving moral turpitude. *The word misconduct is a relative term, and has to be construed with reference to the subject matter and the context wherein the term occurs,* having regard to the

scope of the Act or statute which is being construed. Misconduct literally means wrong conduct or improper conduct. In usual parlance, misconduct means a transgression of some established and definite rule of action, where no discretion is left, except what necessity may demand and carelessness, negligence and unskilfulness are transgressions of some established, but indefinite, rule of action, where some discretion is necessarily left to the actor. Misconduct is a violation of definite law; carelessness or abuse of discretion under an indefinite law. Misconduct is a forbidden act; carelessness, a forbidden quality of an act, and is necessarily indefinite. Misconduct in office may be defined as unlawful behaviour or neglect by a public officer, by which the rights of a party have been affected."

Thus it could be seen that the word 'misconduct' though not capable of precise definition, on reflection receives its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of the duty. It may involve moral turpitude, it must be improper or wrong behaviour; unlawful behaviour, wilful in character; forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve….".

(See also: *State of Punjab & Ors. v. Ram Singh Ex. Constable,* AIR 1992 SC 2188).

9. Mere error of judgment resulting in doing of negligent act does not amount to misconduct. However, in exceptional circumstances, not working diligently may be a misconduct. An

action which is detrimental to the prestige of the institution may also amount to misconduct. Acting beyond authority may be a misconduct. When the office bearer is expected to act with absolute integrity and honesty in handling the work, any misappropriation, even temporary, of the funds etc. constitutes a serious misconduct, inviting severe punishment. (Vide: *Disciplinary Authority-cum-Regional Manager & Ors. v. Nikunja Bihari Patnaik,* (1996) 9 SCC 69; *Government of Tamil Nadu v. K.N. Ramamurthy,* AIR 1997 SC 3571; *Inspector Prem Chand v. Govt. of NCT of Delhi & Ors.,* (2007) 4 SCC 566; and *State Bank of India & Ors. v. S.N. Goyal,* AIR 2008 SC 2594).

10. In *Government of A.P. v. P. Posetty,* (2000) 2 SCC 220, this Court held that since acting in derogation to the prestige of the institution/body and placing his present position in any kind of embarrassment may amount to misconduct, for the reason, that such conduct may ultimately lead that the delinquent had behaved in a manner which is unbecoming of an incumbent of the post.

11. In *M.M. Malhotra v. Union of India & Ors.,* AIR 2006 SC 80, this Court explained as under:

".....It has, therefore, to be noted that the word 'misconduct' is not capable of precise definition. But at the same time though incapable of precise definition, the word 'misconduct' on reflection receives its connotation from the context, the delinquency in performance and its effect on the discipline and the nature of the duty. The act complained of must bear a forbidden quality or character and its ambit has to be construed with reference to the subject-matter and the context wherein the terms occurs, having regard to the scope of the statute and the public purpose it seeks to serve."

A similar view has been reiterated in *Baldev Singh Gandhi v. State of Punjab & Ors.,* AIR 2002 SC 1124.

12. Conclusions about the absence or lack of personal qualities in the incumbent do not amount to misconduct holding the person concerned liable for punishment.

(See: *Union of India & Ors. v. J. Ahmed,* AIR 1979 SC 1022).

13. It is also a settled legal proposition that misconduct must necessarily be measured in terms of the nature of the misconduct and the court must examine as to whether misconduct has been detrimental to the public interest. (Vide: *General Manager, Appellate Authority, Bank of India & Anr. v. Mohd. Nizamuddin* AIR 2006 SC 3290).

14. The expression 'misconduct' has to be understood as a transgression of some established and definite rule of action, a forbidden act, unlawful behaviour, wilful in character. It may be synonymous as mis-demeanour in propriety and mismanagement. In a particular case, negligence or carelessness may also be a misconduct for example, when a watchman leaves his duty and goes to watch cinema, though there may be no theft or loss to the institution but leaving the place of duty itself amounts to misconduct. It may be more serious in case of disciplinary forces. Further, the expression 'misconduct' has to be construed and understood in reference to the subject matter and context wherein the term occurs taking into consideration the scope and object of the statute which is being construed. Misconduct is to be measured in the terms of the nature of misconduct and it should be viewed with the consequences of misconduct as to whether it has been detrimental to the public interest.

DISGRACEFUL CONDUCT :

15. The expression 'disgraceful conduct' is not defined in the statute. Therefore, the same has to be understood in given dictionary meaning. The term 'disgrace' signifies loss of honor, respect, or reputation, shame or bring disfavour or discredit.

Disgraceful means giving offence to moral sensibilities and injurious to reputation or conduct or character deserving or bringing disgrace or shame. Disgraceful conduct is also to be examined from the context in which the term has been employed under the statute. Disgraceful conduct need not necessarily be connected with the official of the office bearer. Therefore, it may be outside the ambit of discharge of his official duty.

REMOVAL OF AN ELECTED OFFICE BEARER :

16. The municipalities have been conferred Constitutional status by amending the Constitution vide 74th Amendment Act, 1992 w.e.f. 1.6.1993. The municipalities have also been conferred various powers under Article 243B of the Constitution.

17. Amendment in the Constitution by adding Parts IX and IX-A confers upon the local self Government a complete autonomy on the basic democratic unit unshackled from official control. Thus, exercise of any power having effect of destroying the Constitutional Institution besides being outrageous is dangerous to the democratic set-up of this country. Therefore, an elected official cannot be permitted to be removed unceremoniously without following the procedure prescribed by law, in violation of the provisions of Article 21 of the Constitution, by the State by adopting a casual approach and resorting to manipulations to achieve ulterior purpose. The Court being the custodian of law cannot tolerate any attempt to thwart the Institution.

The democratic set-up of the country has always been recognized as a basic feature of the Constitution, like other features e.g. Supremacy of the Constitution, Rule of law, Principle of separation of powers, Power of judicial review under Articles 32, 226 and 227 of the Constitution etc. (Vide: *His Holiness Keshwananda Bharti Sripadagalvaru & Ors. v. State of Kerala & Anr.,* AIR 1973 SC 1461; *Minerva Mills Ltd. & Ors. v. Union of India & Ors.,* AIR 1980 SC 1789; *Union of India v. Association for Democratic Reforms & Anr.,* AIR 2002

SC 2112; *Special Reference No. 1 of 2002* (Gujarat Assembly Election Matter), AIR 2003 SC 87; and *Kuldip Nayar v. Union of India & Ors.,* AIR 2006 SC 3127).

18. It is not permissible to destroy any of the basic features of the Constitution even by any form of amendment, and therefore, it is beyond imagination that it can be eroded by the executive on its whims without any reason. The Constitution accords full faith and credit to the act done by the executive in exercise of its statutory powers, but they have a primary responsibility to serve the nation and enlighten the citizens to further strengthen a democratic State. Public administration is responsible for the effective implication of the rule of law and constitutional commands which effectuate fairly the objective standard set for adjudicating good administrative decisions. However, wherever the executive fails, the Courts come forward to strike down an order passed by them passionately and to remove arbitrariness and unreasonableness, for the reason, that the State by its illegal action becomes liable for forfeiting the full faith and credit trusted with it. (Vide: *Scheduled Castes and Scheduled Tribes officers Welfare Council v. State of U.P. & Ors.,* AIR 1997 SC 1451; and *State of Punjab & Ors. v. G.S. Gill & Anr.,* AIR 1997 SC 2324).

19. Basic means the basis of a thing on which it stands, and on the failure of which it falls. In democracy all citizens have equal political rights. Democracy means actual, active and effective exercise of power by the people in this regard. It means political participation of the people in running the administration of the Government. It conveys the State of affair in which each citizen is assured of the right of equal participation in the polity. (See: *R.C. Poudyal v. Union of India & Ors.,* AIR 1993 SC 1804).

20. In *Peoples Union for Civil Liberties (PUCL) & Anr. v. Union of India & Anr.,* AIR 2003 SC 2363, this Court held as under:-

> "The trite saying that "democracy is for the people, of the people and by the people" has to be remembered for ever. In a democratic republic, it is the will of the people that is paramount and becomes the basis of the authority of the Government. The will is expressed in periodic elections based on universal adult suffrage held by means of secret ballot. It is through the ballot that the voter expresses his choice or preference for a candidate "Voting is formal expression of will or opinion by the person entitled to exercise the right on the subject or issue", as observed by the Court in Lily Thomas v. Speaker, Lok Sabha, (1993) 4 SCC 234 quoting from Black's Law Dictionary. The citizens of the country are enabled to take part in the Government through their chosen representatives. In a parliamentary democracy like ours, the Government of the day is responsible to the people through their elected representatives. The elected representative acts or is supposed to act as a live link between the people and the Government. The people's representatives fill the role of law-makers and custodians of the Government. People look to them for ventilation and redressal of their grievances."

21. In *State of Punjab v. Baldev Singh etc. etc.,* AIR 1999 SC 2378, this Court considered the issue of removal of an elected office bearer and held that where the statutory provision has a very serious repercussions, it implicitly makes it imperative and obligatory on the part of the authority to have strict adherence to the statutory provisions. All the safeguards and protections provided under the statute have to be kept in mind while exercising such a power. The Court considering its earlier judgments in *Mohinder Kumar v. State, Panaji, Goa* (1998) 8 SCC 655; and *Ali Mustafa Abdul Rehman Moosa v. State of Kerala,* AIR 1995 SC 244, held as under:-

> "It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the

safeguards provided in a statute are scrupulously followed."

22. The Constitution Bench of this Court in *G. Sadanandan v. State of Kerala & Anr.,* AIR 1966 SC 1925, held that if all the safeguards provided under the Statute are not observed, an order having serious consequences is passed without proper application of mind, having a casual approach to the matter, the same can be characterised as having been passed mala fide, and thus, is liable to be quashed.

23. There can also be no quarrel with the settled legal proposition that removal of a duly elected Member on the basis of proved misconduct is a quasi-judicial proceeding in nature. (Vide: Indian National Congress (I) v. Institute of Social Welfare & Ors., AIR 2002 SC 2158). This view stands further fortified by the Constitution Bench judgments of this Court in *Bachhitar Singh v. State of Punjab & Anr.,* AIR 1963 SC 395 and *Union of India v. H.C. Goel,* AIR 1964 SC 364. Therefore, the principles of natural justice are required to be given full play and strict compliance should be ensured, even in the absence of any provision providing for the same. Principles of natural justice require a fair opportunity of defence to such an elected office bearer.

24. Undoubtedly, any elected official in local self-government has to be put on a higher pedestal as against a government servant. If a temporary government employee cannot be removed on the ground of misconduct without holding a full fledged inquiry, it is difficult to imagine how an elected office bearer can be removed without holding a full fledged inquiry. In service jurisprudence, minor punishment is permissible to be imposed while holding the inquiry as per the procedure prescribed for it but for removal, termination or reduction in rank, a full fledged inquiry is required otherwise it will be violative of the provisions of Article 311 of the Constitution of India. The case is to be understood in an entirely different context as compared to the government employees,

for the reason, that for the removal of the elected officials, a more stringent procedure and standard of proof is required.

25. This Court examined the provisions of the Punjab Municipal Act, 1911, providing for the procedure of removal of the President of the Municipal Council on similar grounds in *Tarlochan Dev Sharma v. State of Punjab & Ors.,* AIR 2001 SC 2524 and observed that removal of an elected office bearer is a serious matter. The elected office bearer must not be removed unless a clear-cut case is made out, for the reason that holding and enjoying an office, discharging related duties is a valuable statutory right of not only the elected member but also of his constituency or electoral college. His removal may curtail the term of the office bearer and also cast stigma upon him. Therefore, the procedure prescribed under a statute for removal must be strictly adhered to and unless a clear case is made out, there can be no justification for his removal. While taking the decision, the authority should not be guided by any other extraneous consideration or should not come under any political pressure.

26. In a democratic institution, like ours, the incumbent is entitled to hold the office for the term for which he has been elected unless his election is set aside by a prescribed procedure known to law or he is removed by the procedure established under law. The proceedings for removal must satisfy the requirement of natural justice and the decision must show that the authority has applied its mind to the allegations made and the explanation furnished by the elected office bearer sought to be removed.

27. The elected official is accountable to its electorate because he is being elected by a large number of voters. His removal has serious repercussions as he is removed from the post and declared disqualified to contest the elections for a further stipulated period, but it also takes away the right of the people of his constituency to be represented by him. Undoubtedly, the right to hold such a post is statutory and no

person can claim any absolute or vested right to the post, but he cannot be removed without strictly adhering to the provisions provided by the legislature for his removal (Vide: *Jyoti Basu & Ors. v. Debi Ghosal & Ors.,* AIR 1982 SC 983; *Mohan Lal Tripathi v. District Magistrate, Rai Barelly & Ors.,* AIR 1993 SC 2042; and *Ram Beti etc. etc. v. District Panchayat Rajadhikari & Ors.,* AIR 1998 SC 1222).

28. In view of the above, the law on the issue stands crystallized to the effect that an elected member can be removed in exceptional circumstances giving strict adherence to the statutory provisions and holding the enquiry, meeting the requirement of principles of natural justice and giving an incumbent an opportunity to defend himself, for the reason that removal of an elected person casts stigma upon him and takes away his valuable statutory right. Not only the elected office bearer but his constituency/electoral college is also deprived of representation by the person of his choice. A duly elected person is entitled to hold office for the term for which he has been elected and he can be removed only on a proved misconduct or any other procedure established under law like 'No Confidence Motion' etc. The elected official is accountable to its electorate as he has been elected by a large number of voters and it would have serious repercussions when he is removed from the office and further declared disqualified to contest the election for a further stipulated period.

RECORDING OF REASONS:

29. It is a settled proposition of law that even in administrative matters, the reasons should be recorded as it is incumbent upon the authorities to pass a speaking and reasoned order. In *Kumari Shrilekha Vidyarthi etc. etc. v. State of U.P. & Ors.,* AIR 1991 SC 537, this Court has observed as under:-

> "Every such action may be informed by reason and if follows that an act un-informed by reason is arbitrary, the rule of law contemplates governance by law and not by humour, whim or caprice of the men to whom the governance is entrusted for the time being. It is the trite law that "be you ever so high, the laws are above you." This is what a man in power must remember always."

30. In *L.I.C. of India & Anr. v. Consumer Education and Research Centre & Ors.,* AIR 1995 SC 1811, this Court observed that the State or its instrumentality must not take any irrelevant or irrational factor into consideration or appear arbitrary in its decision. "Duty to act fairly" is part of fair procedure envisaged under Articles 14 and 21. Every activity of the public authority or those under public duty must be received and guided by the public interest. A similar view has been reiterated by this Court in *Union of India v. M.L. Capoor & Ors.,* AIR 1974 SC 87; and *Mahesh Chandra v. Regional Manager, U.P. Financial Corporation & Ors.,* AIR 1993 SC 935.

31. In *State of West Bengal v. Atul Krishna Shaw & Anr.,* AIR 1990 SC 2205, this Court observed that "giving of reasons is an essential element of administration of justice. A right to reason is, therefore, an indispensable part of sound system of judicial review."

32. In *S.N. Mukherjee v. Union of India,* AIR 1990 SC 1984, it has been held that the object underlying the rules of natural justice is to prevent miscarriage of justice and secure fair play in action. The expanding horizon of the principles of natural justice provides for requirement to record reasons as it is now regarded as one of the principles of natural justice, and it was held in the above case that except in cases where the requirement to record reasons is expressly or by necessary implication dispensed with, the authority must record reasons for its decision.

33. In *Krishna Swami v. Union of India & Ors.,* AIR 1993 SC 1407, this Court observed that the rule of law requires that

any action or decision of a statutory or public authority must be founded on the reason stated in the order or borne-out from the record. The Court further observed:

> "Reasons are the links between the material, the foundation for their erection and the actual conclusions. They would also demonstrate how the mind of the maker was activated and actuated and their rational nexus and synthesis with the facts considered and the conclusions reached. Lest it would be arbitrary, unfair and unjust, violating Article 14 or unfair procedure offending Article 21."

34. This Court while deciding the issue in *Sant Lal Gupta & Ors. v. Modern Co-operative Group Housing Society Ltd. & Ors.,* (2010) 13 SCC 336, placing reliance on its various earlier judgments held as under:

> "28. It is a settled legal proposition that not only administrative but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice - delivery system, to make it known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of the principles of natural justice. "The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before Courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the Court concerned had really applied its mind." The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected."

35. In *Institute of Chartered Accountants of India v. L.K. Ratna & Ors.,* AIR 1987 SC 71, this Court held that on charge of misconduct the authority holding the inquiry must record reasons for reaching its conclusion and record clear findings. The Court further held:

> "In fairness and justice, the member is entitled to know why he has been found guilty. The case can be so serious that it can attract the harsh penalties provided by the Act. Moreover, the member has been given a right of appeal to the High Court under S. 22 A of the Act. The exercise his right of appeal effectively he must know the basis on which the Council has found him guilty. We have already pointed out that a finding by the Council is the first determinative finding on the guilt of the member. It is a finding by a Tribunal of first instance. The conclusion of the Disciplinary Committee does not enjoy the status of a "finding". Moreover, the reasons contained in the report by the Disciplinary Committee for its conclusion may or may not constitute the basis of the finding rendered by the Council. The Council must, therefore, state the reasons for its finding".

36. The emphasis on recording reason is that if the decision reveals the 'inscrutable face of the sphinx', it can be its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an

indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind of the authority before the court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made. In other words, a speaking out, the inscrutable face of the sphinx is ordinarily incongruous with a judicial or quasi-judicial performance.

MALICE IN LAW:

37. This Court has consistently held that the State is under an obligation to act fairly without ill will or malice- in fact or in law. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. "Legal malice" or "malice in law" means something done without lawful excuse. It is a deliberate act in disregard to the rights of others. It is an act which is taken with an oblique or indirect object. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. Mala fide exercise of power does not imply any moral turpitude. It means exercise of statutory power for "purposes foreign to those for which it is in law intended." It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, where intent is manifested by its injurious acts. Passing an order for unauthorized purpose constitutes malice in law. (See: *Addl. Distt. Magistrate, Jabalpur v. Shivakant Shukla,* AIR 1976 SC 1207; *Union of India thr. Govt. of Pondicherry & Anr. v. V. Ramakrishnan & Ors.,* (2005) 8 SCC 394; and *Kalabharati Advertising v. Hemant Vimalnath Narichania & Ors.,* AIR 2010 SC 3745).

38. Section 55 of the Act 1965 provides for removal of the President of the Council by No Confidence Motion. Sections 55A and 55B provide a mode of removal of duly elected President on proved misconduct or negligence etc., which read as under:

Section 55A.- Removal of President and Vice-President by Government:-

Without prejudice to the provisions of Section 55-1A and 55, a President or a Vice-President may be removed from office by the State Government for misconduct in the discharge of his duties, or for neglect of or incapacity to perform, his duties or for being guilty of any disgraceful conduct, and the President or Vice-President so removed shall not be eligible for re-election or re-appointment as President or Vice-President as the case may be, during the remainder of the term of office of the Councillors:

Provided that, no such President or Vice-President shall be removed from office, unless he has been given a reasonable opportunity to furnish an explanation.

55B.- Disqualification for continuing as Councillor or becoming Councillor on removal as President or Vice-President :

Notwithstanding anything contained in Section 55A, if a Councillor or a person is found to be guilty of misconduct in the discharge of his official duties or being guilty of any disgraceful conduct while holding or while he was holding the office of the President or Vice-President, as the case may be, the State Government may,-

(a) disqualify such Councillor to continue as a Councillor for the remainder of his term of office as a Councillor and also for being elected as a Councillor, till the period of six years has elapsed from the order of such disqualification;

(b) Disqualify such person for being elected as a Councillor till the period of six years has elapsed from the order of such disqualification.

39. It is also pertinent to refer to the provisions of Section 81 of the Act 1965 which reads as under:

"Section 81- Provisions in regard to meetings of Council:

The following provisions shall be observed with respect to the meetings of a Council:

(1) For the disposal of general business, which shall be restricted to matters relating to the powers, duties and functions of the Council as specified in this Act or any other law for the time being in force, and any welcome address to a distinguished visitor, proposal for giving Manpatra to a distinguished person or resolution of condolence (where all or any of these are duly proposed), an ordinary meeting shall be held once in two months. The first such meeting, shall be held within two months, from the date on which the meeting of the Council under Section 51 is held, and each succeeding ordinary meeting shall be held within two months from the date on which the last preceding ordinary meeting is held. The President may also call additional ordinary meetings as he deems necessary. It shall be the duty of the President to fix the dates for all ordinary meetings and, to call such meetings in time.

(1A) If the President fails to call an ordinary meeting within the period specified in clause (1), the Chief Officer shall forthwith report such failure to the Collector. The Collector shall, within seven days from receipt of the Chief Officer's report or may, suo motu, call the ordinary meeting. The agenda for such meeting shall be drawn up by the Collector, in consultation with the Chief Officer:

(2) The President may, whenever he thinks fit, and shall upon the written request of not less than one-fourth of the total number of Councillors and on a date not later than fifteen days after the receipt of such request by the President, call a special meeting. The business to be transacted at any such meeting shall also be restricted to matters specified in clause (1).

(3) If the President fails to call a meeting within the period specified in clause (2), the Councillors who had made a request for the special meeting being called, may request the Collector to call a special meeting. On receipt of such request, the Collector, or any officer whom he may designate in this behalf, shall call the special meeting on a date within fifteen days from the date of receipt of such request by the Collector. Such meeting shall be presided over by the Collector or the Officer designated, but he shall have no right to vote."

40. The instant case requires to be examined in the light of aforesaid settled legal propositions and the statutory provisions.

41. The case has initially originated because of the complaint filed by Shri Chintaman Raghunath Gharat, Ex-President and the then sitting Municipal Councillor, Uran Municipal Council (Respondent No.5) dated 3.5.2007 regarding the misconduct of the appellant. The preliminary inquiry was conducted through Collector, Raigad. The Collector, Raigad made an inquiry through Deputy Collector and submitted the inquiry report dated 25.8.2008 and as no action was taken by the Statutory Authority against the appellant, Shri Gharat filed a Writ Petition No. 2309 of 2008 before the High Court which was disposed of vide order dated 3.4.2008 directing the respondent no. 2 (Hon'ble Minister of State, Urban Development, the then Hon'ble Chief Minister) to take a decision on the application/complaint submitted by Shri Gharat within a period of 8 weeks. As the decision could not be taken within that stipulated time, Shri Gharat filed Contempt Petition No. 379 of 2008 which was disposed of by the High Court directing the statutory authority to take up the decision expeditiously.

It was, in fact, in view of the High Court's order, the chargesheet/showcause notice dated 3.12.2008 containing 6 charges was served upon the appellant. In response to the said

chargesheet dated 3.12.2008, the appellant furnished explanation dated 18.12.2008 denying all the charges framed against him and furnished a detailed explanation. In this respect, hearing was held on 23.1.2009 wherein the appellant as well as the complainant appeared alongwith their advocates and made their submissions before the Hon'ble Minister. The impugned order was passed on 21.3.2009 holding the appellant guilty of three charges imposing the punishment as referred to hereinabove.

The impugned order dated 21.3.2009 runs from pages 28 to 52 of the appeal paper-book. The facts and the charges run from pages 28 to 36. Explanation furnished by the appellant runs from pages 36 to 47. The order of the Hon'ble Minister runs only to 5 pages. It is evident from the said order that the Hon'ble Minister did not make any reference to the pleadings taken by the appellant either in his reply to show cause or during the course of hearing. The order simply reveals that the Hon'ble Minister noticed certain things. Two paragraphs at page 48 are not relevant at all for our consideration. The admission of the appellant that meeting was not held for a period of 3 months between 28.2.2007 to 28.5.2007 has been relied upon. In other paragraphs reference has been made to Standing Order 36 issued by the Director and Commissioner, Directorate of Municipal Administration, providing for the procedure for inviting tenders and then straightaway without giving any reason, finding is recorded as under:

> "Out of the 3 tenders received for installation of 300 mm diameter pipeline for outlet and inlet of GSR tank at Sarvodayawadi and Town Hall of Uran Municipal Council, lowest tender is accepted as per clause 171 of the Maharashtra Municipal Council Accounts Code, 1971. However, the tenders were invited as per the DSR rates for the year 2005-2006. The lowest tender received at that time and was more than 10% of the rates of the estimate (approximately 31% and 37%). Despite this, the said tender was accepted."

Then, a very cryptic order of punishment has been passed.

42. The explanation furnished by the appellant for not holding the meeting and acceptance of tender by the council itself and not by the appellant, has not been considered at all. No reasoning has been given by the Statutory Authority for reaching the conclusions. We fail to understand as on what basis such a cryptic order imposing such a severe punishment can be sustained in the eyes of law.

43. The High Court has also erred in not dealing with any of the issues raised by the appellant while furnishing his explanation rather relied upon the findings recorded by the Hon'ble Minister. There is nothing in the judgment of the High Court wherein the grievance of the appellant has been considered or any reasoning has been given to uphold the findings recorded by the Statutory Authority imposing such a severe punishment.

44. Shri Chintaman Raghunath Gharat, Ex-President was the complainant, thus, at the most, he could lead the evidence as a witness. He could not claim the status of an adversial litigant. The complainant cannot be the party to the lis. A legal right is an averment of entitlement arising out of law. In fact, it is a benefit conferred upon a person by the rule of law. Thus, a person who suffers from legal injury can only challenge the act or omission. There may be some harm or loss that may not be wrongful in the eyes of law because it may not result in injury to a legal right or legally protected interest of the complainant but juridically harm of this description is called damnum sine injuria. The complainant has to establish that he has been deprived of or denied of a legal right and he has sustained injury to any legally protected interest. In case he has no legal peg for a justiciable claim to hang on, he cannot be heard as a party in a lis. A fanciful or sentimental grievance may not be sufficient to confer a locus standi to sue upon the individual. There must

be injuria or a legal grievance which can be appreciated and not a stat pro ratione valuntas reasons i.e. a claim devoid of reasons. Under the garb of being necessary party, a person cannot be permitted to make a case as that of general public interest. A person having a remote interest cannot be permitted to become a party in the lis, as the person wants to become a party in a case, has to establish that he has a proprietary right which has been or is threatened to be violated, for the reason that a legal injury creates a remedial right in the injured person. A person cannot be heard as a party unless he answers the description of aggrieved party. (Vide: *Adi Pherozshah Gandhi v. H.M. Seervai, Advocate General of Maharashtra,* AIR 1971 SC 385; *Jasbhai Motibhai Desai v. Roshan Kumar, Haji Bashir Ahmed & Ors.,* AIR 1976 SC 578; *Maharaj Singh v. State of Uttar Pradesh & Ors.,* AIR 1976 SC 2602; *Ghulam Qadir v. Special Tribunal & Ors.,* (2002) 1 SCC 33; and *Kabushiki Kaisha Toshiba v. Tosiba Appliances Company & Ors.,* (2008) 10 SCC 766). The High Court failed to appreciate that it was a case of political rivalry. The case of the appellant has not been considered in correct perspective at all.

45. In such a fact-situation, the complaint filed by the respondent No. 5 could at the most be pressed into service as a material exhibit in order to collect the evidence to find out the truth.

In the instant case, as all the charges proved against the appellant have been dealt with exclusively on the basis of documentary evidence, there is nothing on record by which the complainant could show that the General Body meeting was not called, as statutorily required, by the appellant intentionally.

46. Not calling the meeting of the General Body of the House may be merely a technical misconduct committed inadvertently in ignorance of statutory requirements. It is nobody's case that the appellant had done it intentionally/purposely in order to avoid some unpleasant resolution/demand

of the council. No finding of fact has been recorded either by the competent authority or by the High Court that some urgent/important work could not be carried out for want of General Body meeting of the council. Merely not to conduct oneself according to the procedure prescribed or omission to conduct a meeting without any corresponding loss to the corporate body, would not be an automatic misconduct by inference, unless some positive intentional misconduct is shown. It was an admitted fact that the meeting had not been called. However, in the absence of any imputation of motive, not calling the meeting by the appellant could not in itself, be enough to prove the charge.

Section 81 of the Act 1965 requires that for the disposal of the general business, the President should call the meeting of the Council within a period of two months from the date on which the last preceding ordinary meeting was held. The statutory provisions further provided that in case the President fails to call the ordinary meeting within the said stipulated period, the Chief Officer may report such failure to the Collector and the Collector can call the ordinary meeting of the Council following the procedure prescribed therein. The President can also call the meeting on the request of the members not less than one-fourth of the total number of councils. Therefore, the cogent reading of all the provisions makes it clear that in case the President fails to call the meeting, there are other modes of calling the meeting and in such an eventuality where reasonable explanation has been furnished by the appellant to the show cause notice on this count, the competent authority could not have passed such a harsh order.

47. So far as the other charges regarding laying down the pipelines at a much higher rate are concerned, it has been a positive case of the appellant that as earlier contractor had abandoned the work in between and there was a scarcity of water in the city, the Chief Officer, the Junior Engineer considered the technical aspect and then recommendations were forwarded under the signatures of the appellant, the Chief

Officer and Junior Engineer to the council, which ultimately passed the resolution accepting the said tenders. In such a fact-situation, it was a collective consensus decision of the house after due deliberations. Admittedly, it was not even the ratification of contract awarded by the appellant himself. Thus, even by any stretch of imagination it cannot be held to be an individual decision of the appellant and the competent authority failed to appreciate that the tenders were accepted by the Council itself and not by the appellant alone. Therefore, he could not be held responsible for acceptance of tenders.

We have gone through the counter affidavit filed by respondent No.5, complainant before this court and he has not stated anywhere that the tenders were not accepted by the council, rather allegations have been made that the tenders had been accepted at a higher rate so that the contractor could get the financial gain. Similarly, technical issue has been raised for not calling the meeting, committing serious irregularities sufficiently warranting dis-qualification of the appellant on his omission to call the meeting, but it is not his case that he did it intentionally. The counter affidavit filed by the State does not reveal anything in relation to the issues involved herein and it appears that the deponent/officer has merely completed the formalities without any purpose.

48. To conclude, we are of the considered opinion and that too after appreciation of the entire evidence on record that the first charge proved against the appellant for not calling the meeting of Council, did not warrant the order of removal and the explanation furnished by appellant could have been accepted. Other charges could not be proved against the appellant, in view of the fact, that the tenders at a higher rate were accepted by the Council itself and the appellant could not be held exclusively responsible for it. The Respondent no. 5, being a political rival, could not have been entertained as a party to the lis. The charge of not calling the meeting of the Council had been admitted by the appellant himself, thus, no further evidence was required, for the reason, that the

admission is the best evidence. The competent authority could have considered his explanation alone and proceeded to take a final decision. So far as the other charges are concerned, as has been observed hereinabove, it had been a consensus collective decision of the Council to accept the tender at higher rate and the appellant could not have been held guilty of the said charges. Thus, the instant case has been a crystal clear cut case of legal malice and therefore, the impugned orders are liable to be quashed. The duly elected member/chairman of the council could not have been removed in such a casual and cavalier manner without giving strict adherence to the safeguards provided under the statute which had to be scrupulously followed.

49. The appellant has raised a question of fact before the High Court as well as before this Court submitting that at the time of hearing before the Hon'ble Chief Minister, respondent No.5 has raised new grounds and the appellant raised serious objections as he had no opportunity to meet the same. Thus, in order to give the appellant an opportunity to rebut the same the competent authority had adjourned the case and directed the Secretary to fix a date so that the appellant may meet those new objections/grounds. However, the order impugned removing the appellant from the post and declaring him further disqualified for a period of six years had been passed. It is not evident from the order impugned as what could be those new grounds which had not been disclosed to the appellant. Thus, to ascertain as to whether in order to give an opportunity to the appellant to meet the alleged new grounds, the competent authority had adjourned the case, this Court while reserving the judgment vide order dated 13.2.2012 asked the learned Standing Counsel for the State Shri Mike Prakash Desai to produce the original record before this Court within a period of two weeks. For the reasons best known to the State Authorities neither the record has been produced before us, nor any application has been filed to extend the time to produce the same.

In fact, this Court has been deprived of seeing the original record and to examine the grievance of the appellant. We express our grave concern and shock the way the State Authorities has treated the highest court of the land. In such a fact-situation, the court has no option except to draw the adverse inference against the State.

50. In view of the above, the appeal succeeds and is allowed. The judgment and order of the High Court dated 18.6.2009 as well as the order passed by the Hon'ble Chief Minister dated 21.3.2009 are hereby set aside.

This Court while entertaining the petition had granted interim protection to the appellant vide order dated 17.7.2009, which was extended till further orders vide order dated 13.8.2009 and, thus, the orders impugned remained inoperative. Thus, it will be deemed as no order had ever been passed against the appellant.

In the facts and circumstances of the case, there will be no order as to costs.

A copy of the order be sent directly to the Chief Secretary, State of Maharashtra, Bombay, who may conduct an enquiry and send his personal affidavit as under what circumstances the State Authorities could decide not to ensure compliance of the order of this Court dated 13.2.2012, within a period of four week from the date of receipt of this order, to the Registrar General of this Court who may place it alongwith the file before the Bench.

D.G. Appeal allowed.

ASHOK SADARANGANI & ANR.
v.
UNION OF INDIA & ORS.
(Writ Petition (Crl.) No. 26 of 2011)

MARCH 14, 2012

[ALTAMAS KABIR AND J. CHELAMESWAR, JJ.]

CONSTITUTION OF INDIA, 1950: Article 142 – Extra-ordinary powers of the Supreme Court to quash the criminal proceedings – Dispute between banks and petitioners over non-payment of dues – Compromise – Continuance/ Quashing of criminal proceeding after compromise – Permissibility – Held: Ordinarily, continuance of a criminal proceeding after a compromise has been arrived at between the complainant and the accused, would amount to abuse of the process of court and an exercise in futility – In such situation, inherent powers of the courts can be invoked – However, exercise of inherent powers would depend entirely on the facts and circumstances of each case – In the instant case, special case was registered alleging that the petitioners had secured credit facilities from Bank by submitting forged property documents as collaterals and utilized such facilities in a dishonest and fraudulent manner – The actual owner of the property had also filed a criminal complaint against the petitioners – The emphasis was, thus, more on the criminal intent of the petitioners than on the civil aspect involving the dues of the Bank in respect of which a compromise was worked out, therefore, writ petitioners were not entitled to quashing of criminal proceedings.

The writ petitioner no.1 opened a Current Account in the name of his proprietary concern with the Bank of Maharashtra and various credit facilities were sanctioned to it. The Bank sought additional collateral security of Rs.56 lacs from petitioner no.1, who, submitted a Lease

Deed in respect of an immovable property leased by 'HS' and his family members, through their Constituted Attorney, 'KM'. The petitioners were Directors of the said company.

Subsequently, six irrevocable Import Letters of Credit for a total sum of Rs.188.01 lacs were opened by the Bank of Maharashtra on behalf of proprietary concern of petitioner no.1 for import of houseware items. The documents relating to the said Letters of Credit, including Bills of Lading, Invoice and Bills of Exchange, were accepted and collected by petitioner no.1 on behalf of the firm from the Bank and he undertook to make payment on the due date. However, the petitioners defaulted in payment of their liability of about 188 lacs towards the Bank. Criminal case was registered at the behest of the Bank of Maharashtra. On the complaint of the Union Bank of India another case was registered by the Central Bureau of Investigation against the petitioners alleging that they had secured the credit facilities by submitting forged property documents as collaterals and utilized such facilities in a dishonest and fraudulent manner by opening Letters of Credit in respect of foreign supplies of goods, without actually bringing any goods but inducing the Bank to negotiate the Letters of Credit in favour of foreign suppliers and also by misusing the Cash Credit facility. Charge-sheet was filed in the said Special Case. At about the same time, a criminal case was registered against 'KM' and others under Section 120-B, r/w 465, 467, 468 and 471, IPC. The said case was registered primarily on the accusation that 'KM' in connivance with petitioner No.1, had sought to sell or dispose of the property belonging to 'HS' and that the Powers of Attorney which had been used by 'KM' in the transactions, were not genuine. In 2000, a civil suit was filed by 'HS' against 'KM' for cancellation of the Powers of Attorney.

While the criminal case against the petitioners was pending, the Union Bank of India wrote to petitioner no.1 offering a One-Time Settlement of the disputes relating to the transactions in question. Subsequently, a compromise proposal relating to the transaction between the petitioners and the Bank was also mooted by the Asset Recovery Branch of the Bank of Maharashtra and a communication was addressed to petitioner no.1, which, however, made it clear that such compromise should not be construed as settlement of criminal complaints/investigations/ proceedings pending in the court against the borrowers/guarantors. Pursuant to such offer of One-Time Settlement, dues of both the Banks were cleared by the petitioners and they, therefore, entered into a compromise with the petitioners indicating that they had no further claim against the petitioners.

The issue for consideration in the instant writ petition was whether an offence which is not compoundable under the provisions of the Criminal Procedure Code, 1973 can be quashed in the facts and circumstances of the case. A separate application was made in the writ petition for stay of further proceedings.

Dismissing the writ petition, the Court

HELD: 1. Continuance of a criminal proceeding after a compromise has been arrived at between the complainant and the accused, would amount to abuse of the process of court and an exercise in futility, since the trial could be prolonged and ultimately, may conclude in a decision which may be of any consequence to any of the other parties. The exercise of inherent powers would depend entirely on the facts and circumstances of each case. In other words, not that there is any restriction on the power or authority vested in the Supreme Court in exercising powers under Article 142 of the Constitution, but that in exercising such powers the Court has to be

circumspect, and has to exercise such power sparingly in the facts of each case. Once the circumstances in a given case were held to be such as to attract the provisions of Article 142 or Articles 32 and 226 of the Constitution, it would be open to the Supreme Court to exercise its extraordinary powers under Article 142 of the Constitution to quash the proceedings, the continuance whereof would only amount to abuse of the process of Court. In the instant case, the allegation was that as part of a larger conspiracy, property acquired on lease from a person who had no title to the leased properties, was offered as collateral security for loans obtained. Apart from that the actual owner of the property has filed a criminal complaint against 'KM' and the petitioners who had held himself out as the Attorney of the owner and his family members. Thus, the emphasis was more on the criminal intent of the petitioners than on the civil aspect involving the dues of the Bank in respect of which a compromise was worked out. Therefore, the reliefs prayed for in the writ petition cannot be granted. [Paras 17, 18, 20] [838-E-H; 839-A, F-G; 840-C-G]

Nikhil Merchant v. Central Bureau of Investigation & Anr. **(2008) 9 SCC 677: 2008 (12) SCR 236;** *B.S. Joshi v. State of Haryana* **(2003) 4 SCC 675: 2003 (2) SCR 1104;** *Manoj Sharma v. State & Ors.* **(2008) 16 SCC 1: 2008 (14) SCR 539 – Distinguished.**

Central Bureau of Investigation, SPE, SIU(X), New Delhi v. Duncans Agro Industries Ltd., Calcutta **(1996) 5 SCC 591: 1996 (3) Suppl. SCR 360;** *Shiji @ Pappu & Ors. v. Radhika & Anr.* **(2011) 10 SCC 705;** *Rumi Dhar (Smt.) v. State of West Bengal & Anr.* **(2009) 6 SCC 364: 2009 (5) SCR 553;** *Sushil Suri v. Central Bureau of Investigation & Anr.* **(2011) 5 SCC 708;** *Central Bureau of Investigation v. Ravi Shankar Prasad & Ors.* **(2009) 6 SCC 351 – referred to.**

Case Law Reference:

2008 (12) SCR 236	**Distinguished**	**Paras 10, 11, 12,13,15,17,**
1996 (3) Suppl. SCR 360	**referred to**	**Paras 10,13, 15**
2003 (2) SCR 1104	**Distinguished**	**Paras 11,12, 13,17,**
2008 (14) SCR 539	**Distinguished**	**Paras 11,12, 16,17**
(2011) 10 SCC 705	**referred to**	**Para 11**
2009 (5) SCR 553	**referred to**	**Paras 15,18**
(2011) 5 SCC 708	**referred to**	**Para 15,**
(2009) 6 SCC 351	**referred to**	**Para 18**

CRIMINAL ORIGINAL JURISDICTION : Writ Petition (Crl.) No. 26 of 2011.

Under Article 32 of the Constitution of India.

Mohan Jain, ASG, Mukul Rohtagi, Indu Malhotra, Saurabh Kirpal, Sanjay Agarwal, Sujay N. Kantawal, K.L. Janjani, P.K. Dey, D.K. Thakur, Alok Kumar, Arvind Kumar Sharma, Shubham Aggarwal, Shankar Chillarge, Asha Gopalan Nair, Rachana Joshi Issar, Nidhi Tewari, Ambeeran Rasool, Alok Prakash, O.P. Gaggar for the appearing parties.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. The issue which has been raised in this writ petition is whether an offence which is not compoundable under the provisions of the Criminal Procedure Code, 1973, hereinafter referred to as the "Cr.P.C.", can be quashed in the facts and circumstances of the case.

2. The writ petitioner No.1, Ashok Sadarangani, opened a Current Account No.314 in the name of his proprietary concern, M/s. Internat Impex, Mumbai, with the Bank of Maharashtra, Overseas Branch, Mumbai. The said account was subsequently converted by the Bank into Cash Credit Account No.3 and Cash Credit facility of Rs.125 lacs, Import Letter of Credit facility of Rs.100 lacs, Bank Guarantee facility of Rs.20 lacs and Forward Contracts upto a limit of Rs.300 lacs, were sanctioned and such decision was conveyed to the Petitioner No.1 by the Bank by its letter dated 7th July, 1999. On 16th October, 1999, the Bank sought additional collateral security of Rs.56 lacs from the Petitioner No.1, who, on 29th December, 1999, submitted a Lease Deed dated 29th December, 1999, in respect of an immovable property leased to M/s. Nitesh Amusements Pvt. Ltd. by Shri Homi D. Sanjana and his family members, through their Constituted Attorney, Shri Kersi V. Mehta. The Petitioners herein were Directors of the aforesaid company.

3. In December, 2000, six irrevocable Import Letters of Credit for a total sum of Rs.188.01 lacs were opened by the Bank of Maharashtra on behalf of M/s. Internat Impex, Mumbai, for import of "houseware items & rechargeable lanterns" and "velvet four-way and upholstery materials". The documents relating to the said Letters of Credit, including Bills of Lading, Invoice and Bills of Exchange, were accepted and collected by the Petitioner No.1 on behalf of the firm from the Bank and he undertook to make payment on the due date. However, the Petitioners defaulted in payment of their liability of about 188 lacs towards the Bank. On 10th April, 2003, R.C.No.3/E/2003/CBI/EOW/MUM in Case No.3/CPW/2004, was registered at the behest of the Bank of Maharashtra. On 30th June, 2003, on the complaint of the Union Bank of India, Special Case No.3 of 2004, in CBI Case R.C.No.8/E.2003/MUM, was registered by the Central Bureau of Investigation, hereinafter referred to as "CBI", against the Petitioners alleging that they had secured the credit facilities by submitting forged property documents as

collaterals and utilized such facilities in a dishonest and fraudulent manner by opening Letters of Credit in respect of foreign supplies of goods, without actually bringing any goods but inducing the Bank to negotiate the Letters of Credit in favour of foreign suppliers and also by misusing the Cash Credit facility.

4. Charge-sheet was filed in the said Special Case No.3 of 2004 on 14th January, 2004. At about the same time, a criminal case, being No.236 of 2001, was registered against Shri Kersi Mehta and others under Section 120-B, r/w 465, 467, 468 and 471 of the Indian Penal Code, hereinafter referred to as the "IPC". The said case was registered primarily on the accusation that Shri Kersi Mehta, in connivance with the Petitioner No.1, had sought to sell or dispose of the property belonging to Shri Homi D. Sanjana, situated at Kandivli and Aksha and that the Powers of Attorney dated 11.1.1996 and 24.1.1999, which had been used by Shri Kersi Mehta in the transactions, were not genuine.

5. In 2000 a Civil Suit, being S.C. Suit No.4849 of 2000, was filed by Shri Homi D. Sanjana, in the City Civil Court at Bombay, against Shri Kersi Mehta and various Government authorities, in which the relief sought for was for a direction upon Shri Kersi Mehta to deliver up to the Court the said two Powers of Attorney for cancellation of the same.

6. It is a matter of record that, although, the Petitioner No.1 has surrendered and is on bail and facing trial, the Petitioner No.2 is yet to be arrested in connection with the case.

7. While the criminal case against the Petitioners was proceeding, the Union Bank of India wrote to the Petitioner No.1 on 27th September, 2010, offering a One-Time Settlement of the disputes relating to the transactions in question. Subsequently, on 27th September, 2010, a compromise proposal relating to the transaction between the Petitioners and the Bank was also mooted by the Asset Recovery Branch at

Mumbai of the Bank of Maharashtra and a communication was addressed to the Petitioner No.1, which, however, made it clear that such compromise should not be construed as settlement of criminal complaints/investigations/ proceedings pending in the court against the borrowers/guarantors. As has been submitted during the course of hearing of the writ petition, pursuant to such offer of One-Time Settlement, dues of both the Banks have been cleared by the Petitioners and they have, therefore, entered into a compromise with the Petitioners indicating that they had no further claim against the Petitioners.

8. It is in this background that a separate application was made in the writ petition, being Criminal Misc. Petition No.1110 of 2012, for stay of further proceedings in R.C.No.3/E/2003/CBI/ EOW/ MUM filed by the CBI and pending before the Additional Metropolitan Magistrate, 19th Court, Esplanade, Mumbai, and also Special Case No.3 of 2004 in CBI Case RC No.8/E/2003/ MUM filed by the CBI before the Special Judge at Mumbai, together with Criminal Case No.236 of 2001, registered with Kherwadi Police Station, Bandra (East), Mumbai. The same has also been taken up for consideration along with the writ petition for final disposal.

9. Appearing in support of the writ petition, Shri Mukul Rohatgi, learned Senior Advocate, submitted that the issue, which has fallen for consideration in the writ petition, has been considered in great detail in several decisions of this Court. Learned counsel submitted that in some cases this Court had exercised its powers under Article 142 of the Constitution of India to quash proceedings which were not compoundable, but the common thread which runs through almost all the judgments is that the power to interfere with even non-compoundable cases was not doubted, but the same was required to be used very sparingly and only in special circumstances.

10. Shri Rohatgi submitted that the facts of this case are almost identical to the facts of the case in *Nikhil Merchant Vs. Central Bureau of Investigation & Anr.* [(2008) 9 SCC 677],

which was decided on 20th August, 2008. Shri Rohatgi submitted that as far back as in 1996, a similar issue had come for consideration before this Court in *Central Bureau of Investigation, SPE, SIU(X), New Delhi Vs. Duncans Agro Industries Ltd., Calcutta* [(1996) 5 SCC 591], in which the provisions of Section 320 Cr.P.C. were considered in regard to offences which constituted both civil and criminal wrong, including the offence of cheating. In the said case, this Court while considering the aforesaid issue held that compromise in a civil suit for all intents and purposes amounted to compounding of the offence of cheating. Furthermore, in the said case, the investigations had not been completed even till 1991, even though there was no impediment to complete the same. Having further regard to the fact that the claim of the Bank had been satisfied and the suit instituted by the Banks had been compromised on receiving their dues, this Court was of the view that the complaint and the criminal action initiated thereupon, should not be pursued any further.

11. Shri Rohatgi then referred to the decision of this Court in *Nikhil Merchant's* case (supra), to which one of us (Kabir, J.) was a party. In the said case, what was urged was that though an offence may not be compoundable, it did not take away the powers of this Court to quash such proceedings in exercise of its inherent jurisdiction under Article 142 of the Constitution, and even Section 320 Cr.P.C. could not fetter such powers, as had been earlier held in *B.S. Joshi Vs. State of Haryana* [(2003) 4 SCC 675]. It had also been contended on behalf of the Union of India that the power under Article 142 of the Constitution was to be exercised sparingly and only in rare cases and not otherwise. The fact that such a power vested in the Supreme Court under Article 142 of the Constitution or the High Court under Section 482 Cr.P.C. was never in doubt, only the manner of its application was in issue and it was held that such power was to be used sparingly in order to prevent any obstruction to the spring of justice. Taking an over all view of the facts in the said case and keeping in mind the decision in *B.S. Joshi's*

case and the compromise arrived at between the company and the Bank and the consent terms, this Court took the view that technicality should not be allowed to stand in the way of quashing of the criminal proceedings, since the continuance of the same after the compromise had been arrived at between the parties, would be a futile exercise. Reference was also made to another decision of this Court in *Manoj Sharma Vs. State & Ors.* [(2008) 16 SCC 1], where following the decisions rendered in *B.S. Joshi's* case and in *Nikhil Merchant's* case (supra) and after referring to various other decisions, this Court ultimately came to the conclusion that continuance of the criminal proceedings before the trial court would be an exercise in futility and, accordingly, quashed the same.

12. To buttress his aforesaid submissions, Mr. Rohatgi then referred to and relied upon the decision in *Shiji @ Pappu & Ors. Vs. Radhika & Anr.* [(2011) 10 SCC 705], where also the question of quashing of proceedings relating to non-compoundable offences after a compromise had been arrived at between the rival parties, was under consideration. After examining the powers of the High Court under Section 482 Cr.P.C., the learned Judges came to the conclusion that in the facts and circumstances of the case, the continuance of proceedings would be nothing but an empty formality and that Section 482 Cr.P.C. in such circumstances could be justifiably invoked by the High Court to prevent the abuse of the process of law. The learned judges, who decided the said case, took into consideration the decisions rendered by this Court in B.S. Joshi's case, Nikhil Merchant's case and also *Manoj Sharma's* case (supra) in arriving at the aforesaid decision.

13. Mr. Rohatgi submitted that application of the law as laid down in the *Duncans Agro Industries's* case, and, thereafter, in B.S. Joshi's case, followed in *Nikhil Merchant's* case, as also in *Manoj Sharma's* case (supra), gave sufficient indication that the powers under Article 142 of the Constitution, as far as the Supreme Court is concerned, and Section 482 Cr.P.C., as far as the High Courts are concerned, could not be

fettered by reason of the fact that an offence might not be compoundable but in its own facts was capable of being quashed.

14. On the other hand, learned Additional Solicitor General, Shri Mohan Jain, urged that even if the Banks and the Petitioners had settled their disputes and had also entered into a compromise settlement, that did not absolve the Petitioners of the offence, which they had already committed under the criminal laws, which was explicitly indicated in the settlement itself. Shri Jain submitted that the gravity of the offence would be revealed from the various transactions which were effected by the writ petitioners in order to camouflage their intention of offering as security a property in respect of which they had no title. As innocent as it may seem to be, it is more than a coincidence that the Petitioners offered as security a leasehold property which had been acquired from one Shri Kersi Mehta, who had used a Power of Attorney alleged to have been executed by Shri Homi D. Sanjana and his family members and in respect whereof a criminal case had been filed by Shri Homi against the said Kersi Mehta and the writ petitioners. Shri Jain contended that the entire transaction was based on a fraud perpetrated on Shri Homi D. Sanjana and his family members and, in fact, no title to the property in question had ever passed to the Petitioners.

15. Shri Jain submitted that in *Rumi Dhar (Smt.) Vs. State of West Bengal & Anr.* [(2009) 6 SCC 364], a Bench of two Judges while considering the maintainability of criminal action where the liability was both civil and criminal, had occasion to consider the effect of a judgment in civil proceedings in respect of a loan obtained by fraud. As an off-shoot of the aforesaid question, another question raised was regarding the continuance of the criminal proceedings after settlement and repayment of a loan, wherein it was held that where settlement is arrived at by and between the creditor bank and debtor, the offence committed as such, does not come to an end. The judgment of a tribunal in civil proceedings and, that too, when

it is rendered on the basis of the settlement entered into between the parties, would not be of much relevance in a criminal proceeding in view of the provisions of Section 43 of the Indian Evidence Act, 1872, which provides that judgments in civil proceedings will be admissible in evidence only for limited purposes. However, in deciding the said matter, the Bench took note of the decision in *Nikhil Merchant's* case (supra), as also the judgment rendered in *Duncans Agro Industries* case (supra). While considering the said judgments, the learned Judges ultimately observed that the jurisdiction of the Court under Article 142 of the Constitution of India is not in dispute, but that exercise of such power would depend on the facts and circumstances of each case. After referring to the decision in *Nikhil Merchant's* case (supra), this Court also held that the High Court, in exercise of its jurisdiction under Section 482 Cr.P.C. and the Supreme Court in terms of Article 142 of the Constitution, would ordinarily direct the quashing of a charge involving a crime against society, particularly, when both quashing of a case, continuance whereof after the settlement is arrived at between the parties, would be a futile exercise. Reference was then made to another decision of this Court in *Sushil Suri Vs. Central Bureau of Investigation & Anr.* [(2011) 5 SCC 708], in which the Bench was called upon to deliberate upon the very same issue, as has been raised in the present writ petition. In the said case, after discussing earlier decisions, including those rendered in *B.S. Joshi's* case (supra) and in *Nikhil Merchant's* case (supra), the Court, while placing reliance on the decision in *Rumi Dhar's* case (supra), observed that while the jurisdiction of the Court under Article 142 of the Constitution was not in dispute, the exercise of such power would, however, depend on the facts and circumstances of each case.

16. The learned Additional Solicitor General contended that having regard to the divergent views expressed by different Benches of this Court, when the same issue surfaced in *Gian Singh Vs. State of Punjab & Anr.,* SLP (Crl.) No. 8989 of 2010,

wherein the decisions in *B.S. Joshi's* case, *Nikhil Merchant's* case and *Manoj Sharma's* case (supra) came to be considered, the Bench comprised of two Judges, was of the view that the said decisions required reconsideration and directed that the matter be placed before a larger Bench to consider the correctness of the said three decisions. Shri Jain urged that as the same issue which was involved in the present case was also the subject matter of the reference to a larger Bench, this Court should abstain from pronouncing judgment on the issue which was the subject matter in the said reference. Shri Jain urged that in the circumstances mentioned hereinabove, no relief could be given to the Petitioners on the writ petition and the same was liable to be dismissed.

17. Having carefully considered the facts and circumstances of the case, as also the law relating to the continuance of criminal cases where the complainant and the accused had settled their differences and had arrived at an amicable arrangement, we see no reason to differ with the views that had been taken in *Nikhil Merchant's* case or *Manoj Sharma's* case (supra) or the several decisions that have come thereafter. It is, however, no coincidence that the golden thread which runs through all the decisions cited, indicates that continuance of a criminal proceeding after a compromise has been arrived at between the complainant and the accused, would amount to abuse of the process of court and an exercise in futility, since the trial could be prolonged and ultimately, may conclude in a decision which may be of any consequence to any of the other parties. Even in Sushil Suri's case on which the learned Additional Solicitor General had relied, the learned Judges who decided the said case, took note of the decisions in various other cases, where it had been reiterated that the exercise of inherent powers would depend entirely on the facts and circumstances of each case. In other words, not that there is any restriction on the power or authority vested in the Supreme Court in exercising powers under Article 142 of the Constitution, but that in exercising such powers the Court has

to be circumspect, and has to exercise such power sparingly in the facts of each case. Furthermore, the issue, which has been referred to a larger Bench in *Gian Singh's* case (supra) in relation to the decisions of this Court in B.S. Joshi's case, *Nikhil Merchant's* case, as also *Manoj Sharma's* case, deal with a situation which is different from that of the present case. While in the cases referred to hereinabove, the main question was whether offences which were not compoundable, under Section 320 Cr.P.C. could be quashed under Section 482 Cr.P.C., in Gian Singh's case the Court was of the view that a non-compoundable offence could not be compounded and that the Courts should not try to take over the function of the Parliament or executive. In fact, in none of the cases referred to in Gian Singh's case, did this Court permit compounding of non-compoundable offences. On the other hand, upon taking various factors into consideration, including the futility of continuing with the criminal proceedings, this Court ultimately quashed the same.

18. In addition to the above, even with regard to the decision of this Court in *Central Bureau of Investigation Vs. Ravi Shankar Prasad & Ors.* [(2009) 6 SCC 351], this Court observed that the High Court can exercise power under Section 482 Cr.P.C. to do real and substantial justice and to prevent abuse of the process of Court when exceptional circumstances warranted the exercise of such power. Once the circumstances in a given case were held to be such as to attract the provisions of Article 142 or Articles 32 and 226 of the Constitution, it would be open to the Supreme Court to exercise its extraordinary powers under Article 142 of the Constitution to quash the proceedings, the continuance whereof would only amount to abuse of the process of Court. In the instant case the dispute between the petitioners and the Banks having been compromised, we have to examine whether the continuance of the criminal proceeding could turn out to be an exercise in futility without anything positive being ultimately achieved.

19. As was indicated in *Harbhajan Singh's* case (supra),

the pendency of a reference to a larger Bench, does not mean that all other proceedings involving the same issue would remain stayed till a decision was rendered in the reference. The reference made in *Gian Singh's* case (supra) need not, therefore, detain us. Till such time as the decisions cited at the Bar are not modified or altered in any way, they continue to hold the field.

20. In the present case, the fact situation is different from that in *Nikhil Merchant's* case (supra). While in Nikhil Merchant's case the accused had misrepresented the financial status of the company in question in order to avail of credit facilities to an extent to which the company was not entitled, in the instant case, the allegation is that as part of a larger conspiracy, property acquired on lease from a person who had no title to the leased properties, was offered as collateral security for loans obtained. Apart from the above, the actual owner of the property has filed a criminal complaint against Shri Kersi V. Mehta who had held himself out as the Attorney of the owner and his family members. The ratio of the decisions in *B.S. Joshi's* case and in *Nikhil Merchant's* case or for that matter, even in Manoj Sharma's case, does not help the case of the writ petitioners. In Nikhil Merchant's case, this Court had in the facts of the case observed that the dispute involved had overtures of a civil dispute with criminal facets. This is not so in the instant case, where the emphasis is more on the criminal intent of the Petitioners than on the civil aspect involving the dues of the Bank in respect of which a compromise was worked out.

21. In the different fact situation of this case and those in *B.S. Joshi's* case or in *Nikhil Merchant's* case (supra), we are not inclined to grant the reliefs prayed for in the writ petition and the same is accordingly dismissed.

22. There will, however, be no order as to costs.

D.G. Writ Petition dismissed.

MARIA MARGARIDA SEQUERIA FERNANDES AND OTHERS

v.

ERASMO JACK DE SEQUERIA(DEAD) THROUGH L.RS.

(Civil Appeal No. 2968 of 2012)

MARCH 21, 2012

[DALVEER BHANDARI, H.L. DATTU AND DEEPAK VERMA, JJ.]

Injunction:

Suit for injunction – Maintainability of – Suit for injunction filed by respondent-brother on ground that he was dispossessed from the suit house by appellant-sister without following the due process of law – Courts below decreed the suit – On appeal, held: The suit house was given by appellant-sister to respondent-brother who was to act as a caretaker of the house – Admittedly, respondent did not claim any title to the suit property – Appellant had a valid title to the property which was clearly proved from the pleadings and documents on record – The caretaker holds the property of the principal only on behalf of the principal – The respondent's suit for injunction against the true owner i.e. appellant was, therefore, not maintainable, particularly when it was established beyond doubt that the respondent was only a caretaker and he ought to have given possession of the premises to the true owner of the suit property on demand – The judgments of courts below set aside – Respondents directed to handover possession of the suit house to appellant – In the peculiar facts and circumstances of the case, LRs of respondent granted three months time to vacate the suit premises and to pay Rs.1,00,000/- p.m. towards use and occupation of the premises for a period of three months and to pay a cost of Rs.50,000/- to the appellant.

Grant or refusal of injunction – Governing principles – Discussed.

ADMINISTRATION OF JUSTICE: Truth as guiding star in judicial process – Held: Truth alone has to be the foundation of justice – Court must discharge its statutory functions-whether discretionary or obligatory-according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done – In the administration of justice, judges and lawyers play equal roles – Like judges, lawyers also must ensure that truth triumphs in the administration of justice – Courts must give greater emphasis on the veracity of pleadings and documents in order to ascertain the truth.

PLEADINGS: Requirement of – Held: In pleadings, only the necessary and relevant material must be included and unnecessary and irrelevant material must be excluded – In civil cases, pleadings are extremely important for ascertaining the title and possession of the property in question – Once the title is prima facie established, it is for the person who is resisting the title holder's claim to possession to plead with sufficient particularity on the basis of his claim to remain in possession and place before the Court all such documents as are expected to be there in the ordinary course of human affairs – Only if the pleadings are sufficient, would an issue be struck and the matter sent to trial, where the onus will be on him to prove the averred facts and documents.

Administration of justice:

Due process of Law – Meaning of – Discussed.

False claims and false defences – Held: False claims and defences are really serious problems with real estate litigation, predominantly because of ever escalating prices of the real estate – In order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive

or motive for uncalled for litigation – This problem can be solved or at least be minimized if exemplary cost is imposed for instituting frivolous litigation – Imposition of heavy costs would also control unnecessary adjournments by the parties – In appropriate cases, the Courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

MESNE PROFITS: Grant of, when possession/title in respect of property is claimed on the basis of false and fabricated documents – Determinative factors – Discussed.

POSSESSION: Right over property – Claim for – Held: No one acquires title to the property if he or she was allowed to stay in the premises gratuitously – Even by long possession of years or decades such person would not acquire any right or interest in the said property – Caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession – The caretaker or servant has to give possession forthwith on demand – Courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant – The protection of the Court can only be granted or extended to the person who has valid, subsisting rent agreement, lease agreement or license agreement in his favour – The caretaker or agent holds property of the principal only on behalf of the principal – He acquires no right or interest whatsoever for himself in such property irrespective of his long stay or possession.

The appellant and the respondent were sister and brother. The case of the appellant was that the suit property situated in Goa belonged to her as it was purchased by her in court auction from her aunt. The husband of the appellant was in Navy and was posted in different cities from time to time and, therefore, the appellant stayed out of Goa. On the request of the

respondent, she granted permission to the respondent to stay in the suit property as caretaker. In 1991 the appellant decided to stay in the suit property. The respondent returned the keys of the suit property and shifted out of the suit property on 1.4.1991 and the appellant occupied the suit property. The respondent filed suit for injunction. The case of the respondent was that he was permitted to live in the suit premises because of the family arrangement and, therefore, the respondent remained in possession of the suit property for several years and hence he could not be dispossessed without due process of law. The trial court decreed the suit. The High Court upheld the same. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD:

1. <u>Truth as guiding star in judicial process</u>

The truth should be the guiding star in the entire judicial process. Truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth. Judges at all levels have to seriously engage themselves in the journey of discovering the truth. That is their mandate, obligation and bounden duty. Justice system will acquire credibility only when people will be convinced that justice is based on the foundation of the truth. It is a well accepted and settled principle that a Court must discharge its statutory functions-whether discretionary or obligatory-according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done. A judge in the Indian System has to be regarded as failing to exercise its jurisdiction and thereby discharging its judicial duty, if in the guise of remaining neutral, he opts to remain passive to the proceedings

before him. He has to always keep in mind that "every trial is a voyage of discovery in which truth is the quest". In order to bring on record the relevant fact, he has to play an active role; no doubt within the bounds of the statutorily defined procedural law. World over, modern procedural Codes are increasingly relying on full disclosure by the parties. Managerial powers of the Judge are being deployed to ensure that the scope of the factual controversy is minimized. In civil cases, adherence to Section 30 CPC would also help in ascertaining the truth. It seems that this provision which ought to be frequently used is rarely pressed in service by our judicial officers and judges. [Paras 31-34, 39, 41-42] [865-E-G; 866-B-C; 867-A-B; 867-D-E]

1.2. "Satyameva Jayate" (Literally: "Truth Stands Invincible") is a mantra from the ancient scripture Mundaka Upanishad. Upon independence of India, it was adopted as the national motto of India. It is inscribed in Devanagari script at the base of the national emblem. Malimath Committee on Judicial Reforms heavily relied on the fact that in discovering truth, the judges of all Courts need to play an active role. In the administration of justice, judges and lawyers play equal roles. Like judges, lawyers also must ensure that truth triumphs in the administration of justice. Truth is the foundation of justice. It must be the endeavour of all the judicial officers and judges to ascertain truth in every matter and no stone should be left unturned in achieving this object. Courts must give greater emphasis on the veracity of pleadings and documents in order to ascertain the truth. [Paras 43-44, 51-52] [868-B-C-D; 871-F-H]

Mohanlal Shamji Soni v. Union of India **1991 Supp (1) SCC 271: 1991 (1) SCR 712;** *Ritesh Tewari and Another v. State of U.P. and Others* **(2010) 10 SCC 677: 2010 (11) SCR 589;** *Chandra Shashi v. Anil Kumar Verma* **(1995) 1 SCC 421: 1994 (5) Suppl. SCR 465 – relied on.**

Jones v. National Coal Board **1957 2 QB 55;** *James v. Giles et al. v. State of Maryland* **386 U.S. 66, 87, S.Ct. 793;** *United States v. J.Lee Havens* **446 U.S. 620, 100 St.Ct.1912 – referred to.**

2. Pleadings

2.1. Pleadings are the foundation of litigation. In pleadings, only the necessary and relevant material must be included and unnecessary and irrelevant material must be excluded. Pleadings are given utmost importance in similar systems of adjudication, such as, the United Kingdom and the United States of America. In the United Kingdom, after the Woolf Report, Civil Procedure Rules, 1998 were enacted. After enactment of the Civil Procedure Rules 1998, much greater emphasis is given on pleadings in the United Kingdom. Similarly, in the United States of America, much greater emphasis is given on pleadings. [Paras 53, 54, 57] [872-A-C; 873-C]

2.2. In civil cases, pleadings are extremely important for ascertaining the title and possession of the property in question. Possession is an incidence of ownership and can be transferred by the owner of an immovable property to another such as in a mortgage or lease. A licensee holds possession on behalf of the owner. Possession is important when there are no title documents and other relevant records before the Court, but, once the documents and records of title come before the Court, it is the title which has to be looked at first and due weightage be given to it. Possession cannot be considered in vacuum. There is a presumption that possession of a person, other than the owner, if at all it is to be called possession, is permissive on behalf of the title-holder. Further, possession of the past is one thing, and the right to remain or continue in future is another thing. It is the latter which is usually more in controversy

than the former, and it is the latter which has seen much abuse and misuse before the Courts. A suit can be filed by the title holder for recovery of possession or it can be one for ejectment of an ex-lessee or for mandatory injunction requiring a person to remove himself or it can be a suit under Section 6 of the Specific Relief Act to recover possession. [paras 61-65] [874-B-F]

2.3. A title suit for possession has two parts – first, adjudication of title, and second, adjudication of possession. If the title dispute is removed and the title is established in one or the other, then, in effect, it becomes a suit for ejectment where the defendant must plead and prove why he must not be ejected. In an action for recovery of possession of immovable property, or for protecting possession thereof, upon the legal title to the property being established, the possession or occupation of the property by a person other than the holder of the legal title will be presumed to have been under and in subordination to the legal title, and it will be for the person resisting a claim for recovery of possession or claiming a right to continue in possession, to establish that he has such a right. To put it differently, wherever pleadings and documents establish title to a particular property and possession is in question, it will be for the person in possession to give sufficiently detailed pleadings, particulars and documents to support his claim in order to continue in possession. In order to do justice, it is necessary to direct the parties to give all details of pleadings with particulars. Once the title is prima facie established, it is for the person who is resisting the title holder's claim to possession to plead with sufficient particularity on the basis of his claim to remain in possession and place before the Court all such documents as in the ordinary course of human affairs are expected to be there. Only if the pleadings are sufficient, would an issue be struck and the matter sent to trial,

where the onus will be on him to prove the averred facts and documents. [Paras 66-68] [874-G-H; 875-A-E]

2.4. The person averring a right to continue in possession shall, as far as possible, give a detailed particularized specific pleading along with documents to support his claim and details of subsequent conduct which establish his possession. It would be imperative that one who claims possession must give all such details as enumerated hereunder. They are only illustrative and not exhaustive. (a) who is or are the owner or owners of the property; (b) title of the property; (c) who is in possession of the title documents; (d) identity of the claimant or claimants to possession; (e) the date of entry into possession; (f) how he came into possession - whether he purchased the property or inherited or got the same in gift or by any other method; (g) in case he purchased the property, what is the consideration; if he has taken it on rent, how much is the rent, license fee or lease amount; (h) If taken on rent, license fee or lease - then insist on rent deed, license deed or lease deed; (i) who are the persons in possession/occupation or otherwise living with him, in what capacity; as family members, friends or servants etc.; (j) subsequent conduct, i.e., any event which might have extinguished his entitlement to possession or caused shift therein; and (k) basis of his claim that not to deliver possession but continue in possession. [Paras 69-70] [875-F-H; 876-A-E]

2.5. Apart from these pleadings, the Court must insist on documentary proof in support of the pleadings. All those documents would be relevant which come into existence after the transfer of title or possession or the encumbrance as is claimed. While dealing with the civil suits, at the threshold, the Court must carefully and critically examine pleadings and documents. The Court will examine the pleadings for specificity as also the

supporting material for sufficiency and then pass appropriate orders. Discovery and production of documents and answers to interrogatories, together with an approach of considering what in ordinary course of human affairs is more likely to have been the probability, will prevent many a false claims or defences from sailing beyond the stage for issues. If the pleadings do not give sufficient details, they will not raise an issue, and the Court can reject the claim or pass a decree on admission. On vague pleadings, no issue arises. Only when he so establishes, does the question of framing an issue arise. Framing of issues is an extremely important stage in a civil trial. Judges are expected to carefully examine the pleadings and documents before framing of issues in a given case. [Paras 71-75] [876-F-H; 877-A-C]

2.6. In pleadings, whenever a person claims right to continue in possession of another property, it becomes necessary for him to plead with specificity about who was the owner, on what date did he enter into possession, in what capacity and in what manner did he conduct his relationship with the owner over the years till the date of suit. He must also give details on what basis he is claiming a right to continue in possession. Until the pleadings raise a sufficient case, they will not constitute sufficient claim of defence. The Court must ensure that pleadings of a case must contain sufficient particulars. Insistence on details reduces the ability to put forward a non-existent or false claim or defence. In dealing with a civil case, pleadings, title documents and relevant records play a vital role and that would ordinarily decide the fate of the case. [Paras 76, 78-79] [877-D-G]

Bell Atlantic Corporation et al. v. William Twombly **550 U.S. 544, 127 S.Ct. 1955;** *John. D.* Ashcroft, *Former Attorney General, et al. v. Javaid Iqbal et al.* **556 U.S. 662, 129 S.Ct.1937 – referred to.**

Dr. Arun Mohan in his classic treatise on "Justice, Courts and Delays" **– referred to.**

Suit for Mandatory Injunction

3. It is a settled principle of law that no one can take law in his own hands. Even a trespasser in settled possession cannot be dispossessed without recourse of law. It must be the endeavour of the Court that if a suit for mandatory injunction is filed, then it is its bounden duty and obligation to critically examine the pleadings and documents and pass an order of injunction while taking pragmatic realities including prevalent market rent of similar premises in similar localities in consideration. The Court's primary concern has to be to do substantial justice. Even if the Court in an extraordinary case decides to grant *ex-parte* ad interim injunction in favour of the plaintiff who does not have a clear title, then at least the plaintiff be directed to give an undertaking that in case the suit is ultimately dismissed, then he would be required to pay market rent of the property from the date when an ad interim injunction was obtained by him. It is the duty and the obligation of the Court to at least dispose off application of grant of injunction as expeditiously as possible. It is the demand of equity and justice. [Para 80] [877-H; 878-A-D]

Thomas Cook (India) Limited v. Hotel Imperial **2006 (88) DRJ 545 – approved.**

4. Due process of Law

Due process of law means nobody ought to be condemned unheard. The due process of law means a person in settled possession will not be dispossessed except by due process of law. Due process means an opportunity for the defendant to file pleadings including written statement and documents before the Court of law.

It does not mean the whole trial. Due process of law is satisfied the moment rights of the parties are adjudicated by a competent Court. [Para 81] [878-E-F]

5. False claims and false defences

False claims and defences are really serious problems with real estate litigation, predominantly because of ever escalating prices of the real estate. Litigation pertaining to valuable real estate properties is dragged on by unscrupulous litigants in the hope that the other party will tire out and ultimately would settle with them by paying a huge amount. This happens because of the enormous delay in adjudication of cases in our Courts. If pragmatic approach is adopted, then this problem can be minimized to a large extent. In order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that Court's otherwise scarce time is consumed or more appropriately, wasted in a large number of uncalled for cases. This problem can be solved or at least be minimized if exemplary cost is imposed for instituting frivolous litigation. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases, the Courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings. [Paras 84, 85] [880-B-H]

Ramrameshwari Devi and Others v. *Nirmala Devi and Others* **(2011) 8 SCC 249 – relied on.**

6. Grant or refusal of an injunction

6.1. Grant or refusal of an injunction in a civil suit is the most important stage in the civil trial. Due care, caution, diligence and attention must be bestowed by the judicial officers and judges while granting or refusing injunction. In most cases, the fate of the case is decided by grant or refusal of an injunction. Experience has shown that once an injunction is granted, getting it vacated would become a nightmare for the defendant. In order to grant or refuse injunction, the judicial officer or the judge must carefully examine the entire pleadings and documents with utmost care and seriousness. The safe and better course is to give short notice on injunction application and pass an appropriate order after hearing both the sides. In case of grave urgency, if it becomes imperative to grant an ex-parte ad interim injunction, it should be granted for a specified period, such as, for two weeks. In those cases, the plaintiff will have no inherent interest in delaying disposal of injunction application after obtaining an ex-parte ad interim injunction. The Court, in order to avoid abuse of the process of law may also record in the injunction order that if the suit is eventually dismissed, the plaintiff undertakes to pay restitution, actual or realistic costs. While passing the order, the Court must take into consideration the pragmatic realities and pass proper order for mesne profits. The Court must make serious endeavour to ensure that even-handed justice is given to both the parties. [Paras 86-87] [881-A-F]

6.2. Ordinarily, three main principles govern the grant or refusal of injunction. Prima facie case; balance of convenience; and irreparable injury, which guide the Court in this regard. In the broad category of prima facie case, it is imperative for the Court to carefully analyse the pleadings and the documents on record and only on that basis the Court must be governed by the prima facie case. In grant and refusal of injunction, pleadings and documents play vital role. [Paras 88, 89] [881-G-H; 882-A]

7. Mesne Profits

Experience has shown that all kinds of pleadings are introduced and even false and fabricated documents are filed in civil cases because there is an inherent profit in continuation of possession. In a large number of cases, honest litigants suffer and dishonest litigants get undue benefit by grant or refusal of an injunction because the Courts do not critically examine pleadings and documents on record. In case while granting or refusing injunction, the Court properly considers pleadings and documents and takes the pragmatic view and grants appropriate mesne profit, then the inherent interest to continue frivolous litigation by unscrupulous litigants would be reduced to a large extent. The Court while granting injunction should broadly take into consideration the prevailing market rentals in the locality for similar premises. Based on that, the Court should fix *adhoc* amount which the person continuing in possession must pay and on such payment, the plaintiff may withdraw after furnishing an undertaking and also making it clear that should the Court pass any order for reimbursement, it will be a charge upon the property. The Court can also direct payment of a particular amount and for a differential, direct furnishing of a security by the person who wishes to continue in possession. If such amount, as may be fixed by the Court, is not paid as security, the Court may remove the person and appoint a receiver of the property or strike out the claim or defence. This is a very important exercise for balancing equities. Courts must carry out this exercise with extreme care and caution while keeping pragmatic realities in mind and make a proper order of granting mesne profit. This is the requirement of equity and justice. In the instant case, if the Courts below would have carefully looked into the pleadings and documents and had applied principle of the grant of mesne profit, then injustice and illegality

would not have perpetuated for more than two decades. Admittedly, the respondent did not claim any title to the suit property. Undoubtedly, the appellant has a valid title to the property which was clearly proved from the pleadings and documents on record. The respondent was not able to establish the family arrangement by which the suit property was given to the respondent for his residence. The courts below failed to appreciate that the premises in question was given by the appellant to her brother respondent as a caretaker. The appellant was married to a Naval Officer who was transferred from time to time outside Goa. Therefore, on the request of her brother she gave possession of the premises to him as a caretaker. The caretaker holds the property of the principal only on behalf of the principal. The respondent's suit for injunction against the true owner – the appellant was not maintainable, particularly when it was established beyond doubt that the respondent was only a caretaker and he ought to have given possession of the premises to the true owner of the suit property on demand. Admittedly, the respondent did not claim any title over the suit property and he had not filed any proceedings disputing the title of the appellant. [Paras 90-96] [882-B-H; 883-A-G]

Puran Singh v. The State of Punjab **(1975) 4 SCC 518: 1975 (0) Suppl. SCR 299;** *Mahabir Prasad Jain* v. *Ganga Singh* **(1999) 8 SCC 274: 1999 (3) Suppl. SCR 415 – relied on.**

Sham Lal v. Rajinder Kumar & Others **1994 (30) DRJ 596 – approved.**

8. Principles of law which emerged in this case are crystallized as under:-

1. No one acquires title to the property if he or she was allowed to stay in the premises

gratuitously. Even by long possession of years or decades such person would not acquire any right or interest in the said property.

2. Caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession. The caretaker or servant has to give possession forthwith on demand.

3. The Courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant.

4. The protection of the Court can only be granted or extended to the person who has valid, subsisting rent agreement, lease agreement or license agreement in his favour.

5. The caretaker or agent holds property of the principal only on behalf of the principal. He acquires no right or interest whatsoever for himself in such property irrespective of his long stay or possession. [Para 101] [885-C-H; 886-A]

9. In this view of the matter, the impugned judgment of the High Court as also of the trial court are set aside and we accordingly do so. Consequently, directions is passed to hand over possession of the suit premises to the appellant. In the peculiar facts and circumstances of this case, the legal representatives of the respondent are granted three months time to vacate the suit premises. They are further directed that after the expiry of the three months period, the vacant and peaceful possession of the suit property be handed over to the appellant. The

usual undertaking to this effect be filed by the legal representatives of the respondent in this Court within two weeks. The legal representatives of the respondent are also directed to pay Rs.1,00,000/- (Rupees one Lakh) per month towards the use and occupation of the premises for a period of three months. The said amount for use and occupation be given to the appellant on or before the 10th of every month. In case the legal representatives of the respondent are not willing to pay the amount for use and occupation as directed by this Court, they must hand over the possession of the premises within two weeks from the date of this judgment. Thereafter, if the legal representatives of the respondent do not hand over peaceful possession of the suit property, in that event, the appellant would be at liberty to get the possession of the premises by taking police help. In the facts and circumstances of the case, the respondents are directed to pay a cost of Rs.50,000/- to the appellant within four weeks. (The moderate cost imposed in view of the fact that the original respondent has expired). [Paras 102-105] [886-B-H]

Rame Gowda (dead) by LRs. v. *M. Varadappa Naidu (dead) by LRs. and Another* **(2004) 1 SCC 769: 2003 (6) Suppl. SCR 850 – relied on.**

Southern Roadways Ltd., Madurai v. *S.M. Krishnan* **(1989) 4 SCC 603: 1989 (1) Suppl. SCR 410;** *Anima Mallick* v. *Ajoy Kumar Roy and Another* **(2000) 4 SCC 119;** *Sopan Sukhdeo Sable and Others* v. *Assistant Charity Commissioner and Others* **(2004) 3 SCC 137: 2004 (1) SCR 1004;** *Automobile Products India Limited* v. *Das John Peter and Others* **(2010) 12 SCC 593: 2010 (8) SCR 764 – referred to.**

Case Law Reference:

1999 (3) Suppl. SCR 415 relied on Paras 15, 98

2003 (6) Suppl. SCR 850	**relied on**	**Paras 18, 25**
1989 (1) Suppl. SCR 410	**referred to**	**Para 19**
(2000) 4 SCC 119	**referred to**	**Para 26**
2004 (1) SCR 1004	**referred to**	**Para 27**
2010 (8) SCR 764	**referred to**	**Para 29**
(2011) 8 SCC 249	**relied on**	**Paras 29, 85**
1991 (1) SCR 712	**relied on**	**Para 34**
2010 (11) SCR 589	**relied on**	**Para 36**
1994 (5) Suppl. SCR 465	**relied on**	**Para 45**
386 U.S. 66, 87, S.Ct. 793	**referred to**	**Para 47**
446 U.S. 620, 100 St.Ct.1912	**referred to**	**Para 48**
550 U.S. 544, 127 S.Ct. 1955	**referred to**	**Paras 57, 58**
556 U.S. 662, 129 S.Ct.1937	**referred to**	**Paras 57, 59**
2006 (88) DRJ 545	**approved**	**Para 82**
1975 (0) Suppl. SCR 299	**relied on**	**Para 97**
1994 (30) DRJ 596	**approved**	**Paras 99, 100**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2968 of 2012.

From the Judgment & Order dated 5.5.2009 of the High Court of Bombay at Goa in Civil Revision Application No. 3 of 2009.

D.N. Goburdhan, Prabal Bagchi, Aayush Chandra, Kartika Sharma for the Appellants.

S. Ganesh, Pratap Venugopal, Namrata Sooda (for K.J. John & Co.) for the Respondents.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J.1. Leave granted.

2. This appeal emanates from the judgment and order dated 5.5.2009 passed by the High Court of Bombay, Bench at Goa in Civil Revision Application No.3 of 2009.

3. Appellant No.1 and respondent No.1, Erasmo Jack de Sequeira (now dead) were sister and brother, hereinafter referred to as appellant and respondent respectively.

4. According to the appellant, she is the sole owner and is in exclusive possession of the suit property. Her title of the said suit property was clearly admitted, and never disputed by the respondent, Erasmo Jack de Sequeira. According to the appellant, the suit property was given to her brother as a caretaker. The respondent has kept appellant, his own sister, out of her suit property for about two decades by suppressing relevant material and pertinent information from the Court and abusing the process of law.

5. Both the appellant and the respondent hail from the State of Goa and belong to one of the leading and well known families of Goa. The father of the appellant and the respondent, Dr. Jack D. Sequeira was an affluent businessman and a well-known politician of Goa. Dr. Sequeira, during his lifetime, gave a number of properties worth crores of rupees to the respondent and also gave some properties to the appellant and her sisters. The respondent was given a soft drink factory at Goa, mining leases of iron ore, agricultural lands and residential plots including one situated at Dona Paula, which is located next to the Governor's House. Though the respondent was given properties worth several crores of rupees, he still eyed on a small property which the appellant purchased through Court auction after paying full sale consideration. The respondent-brother of the appellant was also a very influential and important Member of Parliament. He was also very active in the local politics in Goa.

6. The appellant urged that the suit property originally belonged to her grandmother. Under the Portuguese Law, her (grandmother's) children, i.e. two sons and a daughter (the appellant's father, uncle and aunt) got 1/3rd share each in the said suit property. The suit property of her grandmother was put to auction and this suit property in question was purchased in auction by the appellant. In the Inventory Proceedings No. 1075/935 in the year 1968, she became the exclusive owner of the suit property. Admittedly, the appellant has placed a certified copy of the order of the Civil Judge, Senior Division at Panaji dated 27th May, 1972 issued in favour of the appellant. According to the appellant, the possession and title of the suit property in favour of the appellant is established from the judgment of the Inquiry Officer of City Survey Tiswadi, Panjim, Goa. The said order was not only passed in the presence of the respondent, but also in the presence of his Attorney, Rodrigues who was also a senior executive officer of the respondent. The relevant portion of that judgment is as under:-

> "The claim put forth by Shrimati Maria Teresa de Sequeria from Panaji, in respect of Chalta No.14 of P.T. Sheet 65 was inquired into and it was found that the same belongs to the said Maria Teresa de Sequeria in view of Inventory Proceedings No.9-1968 [1075-935] – vide Certificate issued by the Court of Civil Judge Senior Division, Panaji dated 27.5.72 and as such her title and possession to the Chalta No.14 of P.T. Sheet No.65 is confirmed."

7. According to the appellant, she obtained the exclusive title of the plot and the house in question.

8. It may be pertinent to mention that the respondent had even participated in the said Court proceedings on behalf of his handicapped aunt, Edna May Sequeria as a guardian and received a cheque on her behalf. The appellant had deposited Rs.40,000/-, the owelty money in the said Court proceedings which became payable on account of the purchase of the said

house. The said suit property stood registered in Panaji Municipal Council in the name of the appellant. House tax was paid by the appellant to the Municipality on self-occupation basis. Further, it is submitted that the possession of the suit property always remained with the appellant.

9. The Panaji Municipal Council, Goa issued a certificate showing that possession of the suit premises was with the appellant and the house tax of the suit property was paid by her and she was the recorded owner of the same. According to the appellant, the respondent himself had acknowledged possession and title of the suit property in favour of the appellant.

10. The appellant submitted that she got married on 8.9.1974 to an Officer of the Indian Navy who was posted from time to time in different places in India. She also submitted that the respondent - her brother requested her that as his office is just adjacent to the suit property, therefore, it would be convenient for him to run his office and to keep an eye on the suit property of the appellant. Therefore, the suit property was given to the respondent only as a caretaker.

11. The respondent executed a leave and licence agreement in the name of his wife to shift with his family out of the suit property completely on 1.4.1991 to Campo Verde Apartments at Caranzalem in Goa. The leave and licence agreement executed by the respondent's wife for the new house wherein the respondent and his family shifted on 1.4.1991 and thereafter got the agreement renewed on 7.3.1992. The respondent also owned one flat in Goa and occupied on 17.4.1991.

12. According to the appellant, the respondent handed over the suit property to his sister Maria in the first week of May, 1991 and requested her that some items which were already lying in the suit property which the respondent did not immediately require in his new place may be kept in the suit property.

According to the appellant, her brother before shifting to the tenanted flat, handed over the keys of the house to the appellant. The appellant did not take any receipt from her brother or click a photograph to create evidence showing handing over of the custodian possession of the suit property. The respondent shifted to his new flat and the suit property was lying almost vacant because the appellant along with her husband was living outside Goa on his different official postings.

13. According to the appellant, the details of electricity, water and telephone bills clearly demonstrate that the house was locked and the small amounts payable in the said months, i.e., August, September, October and November in the year 1991, February 1992 also showed very nominal payments of Rs.30/-, Rs.33/-, Rs.68/- which conclusively proved that a house comprising of several rooms, drawing, dining, bathrooms, verandah, lawns etc. was lying vacant.

14. On 20.5.1992, the appellant returned with her family to Goa and occupied and enjoyed the said suit property. The appellant submitted that she has a valid title/ownership and was in possession of the suit property and she could not be dispossessed by a Court in a suit for injunction. The appellant submitted that under Section 6 of the Specific Relief Act, the appellant could not have been legally compelled to hand over the possession to the respondent. It may be pertinent to mention that the respondent had filed a suit for injunction before the Trial Court. The Trial Court granted injunction in favour of the respondent and the same was upheld by the High Court in the impugned judgment in Civil Revision Application.

15. According to the appellant, the impugned judgment of the High Court by which the judgment of the Trial Court was affirmed is totally contrary to the law laid down by this Court in *Mahabir Prasad Jain* v. *Ganga Singh* (1999) 8 SCC 274. It was also asserted by the appellant that this Court in the aforementioned case has laid down the parameters of Section 6 of the Special Relief Act, 1963. In the instant case, the Courts

below were oblivious of the principle under Section 6 of the Specific Relief Act. The appellant urged that the respondent's suit for injunction was not maintainable as he could not claim to be in lawful and legal possession of the premises at all. The appellant argued that the Courts below have missed the main issue as the respondent was merely in custody of the house on behalf of the appellant. According to her, a caretaker can never sue a valid title-holder of the property.

16. The appellant further urged that a caretaker's possession can never be a possession of individual's right and no such suit for injunction under Section 6 of the Specific Relief Act was maintainable. The appellant contended that the respondent returned the keys of the suit property sometime in May 1991. The appellant asserted that the respondent had manipulated the system and collected false and fabricated evidence in the form of Panchnama in collusion with the local police and was designed to throw out the appellant from her own house.

17. On 17.6.1992, the respondent filed a suit for permanent and mandatory injunction in the Court of Civil Judge, Senior Division at Panaji as a Special Civil Suit No.131/92/A. On 22.6.1992, an ex-parte order for depositing the keys was passed while the appellant and her family members were living in the suit premises. The Trial Court decreed the suit.

18. According to the appellant, the impugned judgment of the High Court is contrary to the ratio of the judgment of this Court in *Rame Gowda (dead) by LRs.* v. *M. Varadappa Naidu (dead) by LRs. and Another* (2004) 1 SCC 769 wherein a three-Judge Bench of this Court has observed that possession is no good against the rightful owner and that the assumption that he is in peaceful possession will not work and cannot operate against the true lawful owner.

19. Reliance has also been placed by the appellant on *Southern Roadways Ltd., Madurai v. S.M. Krishnan* (1989) 4

SCC 603 wherein this Court has held that it is the settled law that agent has no possession of his own and caretaker's possession is the possession of the principal. This Court has taken the view that possession of the agent is the possession of the principal and in view of the fiduciary relationship, the agent cannot be permitted to claim his own possession. Thus, according to the appellant, the respondent had no right, title and/or interest in the suit property and was not in lawful possession. Therefore, the suit for injunction under Section 6 of the Specific Relief Act is totally misconceived. The appellant contended that the High Court in the impugned judgment has gravely erred in affirming the judgment of the Trial Court.

20. According to the case of the respondent, he was permitted to live in the suit premises because of the family arrangement. The respondent remained in possession of the suit property for several years and hence he cannot be dispossessed without following due process of law.

21. It is also submitted by the respondent that he was in possession of the suit premises for 28 years and was forcibly dispossessed on 15.6.1992. The respondent also submitted that he never conceded that the title of the suit property was with the appellant. He also submitted that it is contrary to the records that the respondent was a caretaker.

22. The learned counsel for the parties reiterated the submissions made before the Courts below. The appellant submitted that she is a helpless and hapless sister of the respondent who has been kept out from her own house for more than two decades. The appellant is the owner of the suit property which is evident from the Certificate of the Probate Proceedings known as Inventory Proceeding No.1075/935. She further submitted that the respondent, her brother, was a party in the said Probate Proceedings where the appellant acquired the title of the suit property on 27.5.1972. The respondent collected the sale consideration amount on 17th March, 1972 vide Cheque No.33559 drawn on Bank of India

on behalf of his aunt in the auction proceedings.

23. The appellant submitted that the City Civil Court held that the appellant is the owner of the suit property and has the title and possession of the same which was never challenged by the respondent. The appellant also submitted that apart from the title of the suit property, house tax records and wealth tax records indicate that she was and continued to be the owner of the suit property. She further submitted that the utility bills of electricity, water and telephone were of minimal amount which show that the respondent had never resided in the suit premises. The appellant submitted that the finding of the Trial Court that the appellant had no funds to purchase the property was contrary to record. The High Court has also erroneously affirmed the findings of the Trial Court.

24. The appellant urged that the suit filed by the respondent is not based on title. The family arrangement, as alleged by the respondent, is neither pleaded nor proved. The appellant asserted that no suit under Section 6 of the Specific Relief Act lies against the true owner. The appellant submitted that a caretaker, agent, guardian etc. cannot file a suit under Section 6 of the Specific Relief Act.

25. According to law laid down by this Court in *Rame Gowda (dead) by LRs.* (supra), it is the settled legal position that a possessory suit is good against the whole world except the rightful owner. It is not maintainable against the true owner.

26. This Court in *Anima Mallick* v. *Ajoy Kumar Roy and Another* (2000) 4 SCC 119 held that where the sister gave possession as gratuitous to the brother, this Court restored possession to the sister as it was purely gratuitous basis and the sister could have reclaimed possession even without knowledge of the brother.

27. According to the appellant, this Court in *Sopan Sukhdeo Sable and Others* v. *Assistant Charity*

Commissioner and Others (2004) 3 SCC 137 has observed that no injunction can be granted against the true owner and Section 6 of the Specific Relief Act cannot be invoked to protect the wrongdoer who suppressed the material facts from the Courts.

28. The appellant submitted that Section 41 of the Specific Relief Act debars any relief to be given to such an erring person as the respondent who is guilty of suppression of material facts.

29. The appellant relied on *Automobile Products India Limited* v. *Das John Peter and Others* (2010) 12 SCC 593 and *Ramrameshwari Devi and Others* v. *Nirmala Devi and Others* (2011) 8 SCC 249 where the Court has laid down that dilatory tactics, misconceived injunction suits create only incentives for wrongdoers.

30. The appellant submitted that for more than two decades the appellant is without the possession of her own house despite the fact that she has valid title to the suit property.

Truth as guiding star in judicial process

31. In this unfortunate litigation, the Court's serious endeavour has to be to find out where in fact the truth lies. The truth should be the guiding star in the entire judicial process.

32. Truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth. Judges at all levels have to seriously engage themselves in the journey of discovering the truth. That is their mandate, obligation and bounden duty.

33. Justice system will acquire credibility only when people will be convinced that justice is based on the foundation of the truth.

34. In *Mohanlal Shamji Soni v. Union of India* 1991 Supp

(1) SCC 271, this Court observed that in such a situation a question that arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a Court must discharge its statutory functions-whether discretionary or obligatory-according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done.

35. What people expect is that the Court should discharge its obligation to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice.

36. In *Ritesh Tewari and Another v. State of U.P. and Others* (2010) 10 SCC 677 this Court reproduced often quoted quotation which reads as under:

> "Every trial is voyage of discovery in which truth is the quest"

37. This Court observed that the power is to be exercised with an object to subserve the cause of justice and public interest and for getting the evidence in aid of a just decision and to uphold the truth.

38. Lord Denning, in the case of *Jones* v. *National Coal Board* [1957] 2 QB 55 has observed that:

> "In the system of trial that we evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of the society at large, as happens, we believe, in some foreign countries."

39. Certainly, the above, is not true of the Indian Judicial system. A judge in the Indian System has to be regarded as failing to exercise its jurisdiction and thereby discharging its judicial duty, if in the guise of remaining neutral, he opts to remain passive to the proceedings before him. He has to always keep in mind that "every trial is a voyage of discovery in which truth is the quest". In order to bring on record the relevant fact, he has to play an active role; no doubt within the bounds of the statutorily defined procedural law.

40. Lord Denning further observed in the said case of ***Jones*** (supra) that "'It's all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth…"

41. World over, modern procedural Codes are increasingly relying on full disclosure by the parties. Managerial powers of the Judge are being deployed to ensure that the scope of the factual controversy is minimized.

42. In civil cases, adherence to Section 30 CPC would also help in ascertaining the truth. It seems that this provision which ought to be frequently used is rarely pressed in service by our judicial officers and judges. Section 30 CPC reads as under:-

> 30. *Power to order discovery and the like.* – Subject to such conditions and limitations as may be prescribed, the Court may, at any time either of its own motion or on the application of any party, -
>
> (a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;

> (b) issue summons to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;
>
> (c) order any fact to be proved by affidavit

43. *"Satyameva Jayate"* (Literally: "Truth Stands Invincible") is a mantra from the ancient scripture Mundaka Upanishad. Upon independence of India, it was adopted as the national motto of India. It is inscribed in Devanagari script at the base of the national emblem. The meaning of full mantra is as follows:

> "Truth alone triumphs; not falsehood. Through truth the divine path is spread out by which the sages whose desires have been completely fulfilled, reach where that supreme treasure of Truth resides."

44. Malimath Committee on Judicial Reforms heavily relied on the fact that in discovering truth, the judges of all Courts need to play an active role. The Committee observed thus:

> 2.2……. In the adversarial system truth is supposed to emerge from the respective versions of the facts presented by the prosecution and the defence before a neutral judge. The judge acts like an umpire to see whether the prosecution has been able to prove the case beyond reasonable doubt. The State discharges the obligation to protect life, liberty and property of the citizens by taking suitable preventive and punitive measures which also serve the object of preventing private retribution so essential for maintenance of peace and law and order in the society doubt and gives the benefit of doubt to the accused. It is the parties that determine the scope of dispute and decide largely, autonomously and in a selective manner on the evidence that they decide to present to the court. The trial is oral, continuous and confrontational. The parties use cross-examination of witnesses to undermine the opposing case and to

discover information the other side has not brought out. The judge in his anxiety to maintain his position of neutrality never takes any initiative to discover truth. He does not correct the aberrations in the investigation or in the matter of production of evidence before court……."

2.15 "The Adversarial System lacks dynamism because it has no lofty ideal to inspire. It has not been entrusted with a positive duty to discover truth as in the Inquisitorial System. When the investigation is perfunctory or ineffective, Judges seldom take any initiative to remedy the situation. During the trial, the Judges do not bother if relevant evidence is not produced and plays a passive role as he has no duty to search for truth….."

2.16.9. Truth being the cherished ideal and ethos of India, pursuit of truth should be the guiding star of the Criminal Justice System. For justice to be done truth must prevail. It is truth that must protect the innocent and it is truth that must be the basis to punish the guilty. Truth is the very soul of justice. Therefore truth should become the ideal to inspire the courts to pursue. This can be achieved by statutorily mandating the courts to become active seekers of truth. It is of seminal importance to inject vitality into our system if we have to regain the lost confidence of the people. Concern for and duty to seek truth should not become the limited concern of the courts. It should become the paramount duty of everyone to assist the court in its quest for truth.

45. In *Chandra Shashi v. Anil Kumar Verma* (1995) 1 SCC 421 to enable the Courts to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, pre-variation and motivated falsehoods have to be appropriately dealt with, without which it would not be possible for any Court to administer justice in the true sense and to the satisfaction of those who approach it in the hope that truth would ultimately prevail. People would have faith in Courts when

they would find that truth alone triumphs in Courts.

46. Truth has been foundation of other judicial systems, such as, the United States of America, the United Kingdom and other countries.

47. In *James v. Giles et al. v. State of Maryland* 386 U.S. 66, 87, S.Ct. 793), the US Supreme Court, in ruling on the conduct of prosecution in suppressing evidence favourable to the defendants and use of perjured testimony held that such rules existed for a purpose as a necessary component of the search for truth and justice that judges, like prosecutors must undertake. It further held that the State's obligation under the Due Process Clause "is not to convict, but to see that so far as possible, truth emerges."

48. The obligation to pursue truth has been carried to extremes. Thus, in *United States v. J.Lee Havens* 446 U.S. 620, 100 St.Ct.1912, it was held that the government may use illegally obtained evidence to impeach a defendant's fraudulent statements during cross-examination for the purpose of seeking justice, for the purpose of "arriving at the truth, which is a fundamental goal of our legal system".

49. Justice Cardozo in his widely read and appreciated book "The Nature of the Judicial Process" discusses the role of the judges. The relevant part is reproduced as under:-

> "There has been a certain lack of candour," "in much of the discussion of the theme [of judges' humanity], or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations." I do not doubt the grandeur of conception which lifts them into the realm of pure reason, above and beyond the sweep of perturbing and deflecting forces. None the less, if there is anything of reality in my analysis of the judicial process, they do not stand aloof on these chill and distant heights; and we shall not help the

cause of truth by acting and speaking as if they do."

50. Aharon Barak, President of Israeli Supreme Court from 1995 to 2006 takes the position that:

> "For issues in which stability is actually more important than the substance of the solution – and there are many such case – I will join the majority, without restating my dissent each time. Only when my dissenting opinion reflects an issue that is central for me – that goes to the core of my role as a judge – will I not capitulate, and will I continue to restate my dissenting opinion: "Truth or stability – truth is preferable".
>
> "On the contrary, public confidence means ruling according to the law and according to the judge's conscience, whatever the attitude of the public may be. Public confidence means giving expression to history, not to hysteria. Public confidence is ensured by the recognition that the judge is doing justice within the framework of the law and its provisions. Judges must act – inside and outside the court – in a manner that preserves public confidence in them. They must understand that judging is not merely a job but a way of life. It is a way of life that does not include the pursuit of material wealth or publicity; it is a way of life based on spiritual wealth; it is a way of life that includes an objective and impartial search for truth."

51. In the administration of justice, judges and lawyers play equal roles. Like judges, lawyers also must ensure that truth triumphs in the administration of justice.

52. Truth is the foundation of justice. It must be the endeavour of all the judicial officers and judges to ascertain truth in every matter and no stone should be left unturned in achieving this object. Courts must give greater emphasis on the veracity of pleadings and documents in order to ascertain the truth.

Pleadings

53. Pleadings are the foundation of litigation. In pleadings, only the necessary and relevant material must be included and unnecessary and irrelevant material must be excluded. Pleadings are given utmost importance in similar systems of adjudication, such as, the United Kingdom and the United States of America.

54. In the United Kingdom, after the Woolf Report, Civil Procedure Rules, 1998 were enacted. Rule 3.4(2) has some relevance and the same is reproduced as under:

> (2) The Court may strike out a statement of case if it appears to the Court -
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the Court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
>
> (c) that there has been a failure to comply with a rule, practice direction or Court order.

55. In so far as denials are concerned, Rule 16.5 provides that where the defendant denies an allegation, he must state his reasons for doing so, and if he intends to put forward a different version of events from that given by the plaintiff, he must state his own version.

56. The various practice directions and prescribed forms give an indication of the particulars required. In fact, the 1998 Rules go further and provide for summary judgment. Rule 24.2 of the Civil Procedure Rules, 1998 reads as under:

> **24.2** The Court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if-

(a) it considers that-

(i) that claimant has no real prospect of succeeding on the claim or issue; or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.

57. After enactment of the Civil Procedure Rules 1998, much greater emphasis is given on pleadings in the United Kingdom. Similarly, in the United States of America, much greater emphasis is given on pleadings, particularly after two well known decisions of the US Supreme Court, viz., *Bell Atlantic Corporation et al. v. William Twombly* [550 U.S. 544, 127 S.Ct. 1955] and *John. D.* Ashcroft, *Former Attorney General, et al. v. Javaid Iqbal et al.* [556 U.S. 662, 129 S.Ct.1937].

58. In *Bell Atlantic* (supra), the Court has observed that factual allegations must be enough to raise a right to relief above the speculative level. The pleadings must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action.

59. In *Ashcroft* (supra) the majority Judges of the U.S. Supreme Court observed as under:

> "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as a true, we are not bound to accept as true a legal conclusion couched as a factual allegation … … … only a complaint that states a plausible claim for relief survives a motion to dismiss."

60. The aforementioned two decisions of the U.S. Supreme Court re-emphasized and reiterated the importance of pleadings.

61. In civil cases, pleadings are extremely important for ascertaining the title and possession of the property in question.

62. Possession is an incidence of ownership and can be transferred by the owner of an immovable property to another such as in a mortgage or lease. A licensee holds possession on behalf of the owner.

63. Possession is important when there are no title documents and other relevant records before the Court, but, once the documents and records of title come before the Court, it is the title which has to be looked at first and due weightage be given to it. Possession cannot be considered in vacuum.

64. There is a presumption that possession of a person, other than the owner, if at all it is to be called possession, is permissive on behalf of the title-holder. Further, possession of the past is one thing, and the right to remain or continue in future is another thing. It is the latter which is usually more in controversy than the former, and it is the latter which has seen much abuse and misuse before the Courts.

65. A suit can be filed by the title holder for recovery of possession or it can be one for ejectment of an ex-lessee or for mandatory injunction requiring a person to remove himself or it can be a suit under Section 6 of the Specific Relief Act to recover possession.

66. A title suit for possession has two parts – first, adjudication of title, and second, adjudication of possession. If the title dispute is removed and the title is established in one or the other, then, in effect, it becomes a suit for ejectment where the defendant must plead and prove why he must not be ejected.

67. In an action for recovery of possession of immovable property, or for protecting possession thereof, upon the legal title to the property being established, the possession or occupation of the property by a person other than the holder of the legal title will be presumed to have been under and in subordination to the legal title, and it will be for the person resisting a claim for recovery of possession or claiming a right to continue in possession, to establish that he has such a right. To put it differently, wherever pleadings and documents establish title to a particular property and possession is in question, it will be for the person in possession to give sufficiently detailed pleadings, particulars and documents to support his claim in order to continue in possession.

68. In order to do justice, it is necessary to direct the parties to give all details of pleadings with particulars. Once the title is prima facie established, it is for the person who is resisting the title holder's claim to possession to plead with sufficient particularity on the basis of his claim to remain in possession and place before the Court all such documents as in the ordinary course of human affairs are expected to be there. Only if the pleadings are sufficient, would an issue be struck and the matter sent to trial, where the onus will be on him to prove the averred facts and documents.

69. The person averring a right to continue in possession shall, as far as possible, give a detailed particularized specific pleading along with documents to support his claim and details of subsequent conduct which establish his possession.

70. It would be imperative that one who claims possession must give all such details as enumerated hereunder. They are only illustrative and not exhaustive.

(a) who is or are the owner or owners of the property;

(b) title of the property;

(c) who is in possession of the title documents

(d) identity of the claimant or claimants to possession;

(e) the date of entry into possession;

(f) how he came into possession - whether he purchased the property or inherited or got the same in gift or by any other method;

(g) in case he purchased the property, what is the consideration; if he has taken it on rent, how much is the rent, license fee or lease amount;

(h) If taken on rent, license fee or lease - then insist on rent deed, license deed or lease deed;

(i) who are the persons in possession/occupation or otherwise living with him, in what capacity; as family members, friends or servants etc.;

(j) subsequent conduct, i.e., any event which might have extinguished his entitlement to possession or caused shift therein; and

(k) basis of his claim that not to deliver possession but continue in possession.

71. Apart from these pleadings, the Court must insist on documentary proof in support of the pleadings. All those documents would be relevant which come into existence after the transfer of title or possession or the encumbrance as is claimed. While dealing with the civil suits, at the threshold, the Court must carefully and critically examine pleadings and documents.

72. The Court will examine the pleadings for specificity as also the supporting material for sufficiency and then pass appropriate orders.

73. Discovery and production of documents and answers to interrogatories, together with an approach of considering

what in ordinary course of human affairs is more likely to have been the probability, will prevent many a false claims or defences from sailing beyond the stage for issues.

74. If the pleadings do not give sufficient details, they will not raise an issue, and the Court can reject the claim or pass a decree on admission.

75. On vague pleadings, no issue arises. Only when he so establishes, does the question of framing an issue arise. Framing of issues is an extremely important stage in a civil trial. Judges are expected to carefully examine the pleadings and documents before framing of issues in a given case.

76. In pleadings, whenever a person claims right to continue in possession of another property, it becomes necessary for him to plead with specificity about who was the owner, on what date did he enter into possession, in what capacity and in what manner did he conduct his relationship with the owner over the years till the date of suit. He must also give details on what basis he is claiming a right to continue in possession. Until the pleadings raise a sufficient case, they will not constitute sufficient claim of defence.

77. Dr. Arun Mohan in his classic treatise on "Justice, Courts and Delays" has dealt with these fundamental principles of law exhaustively.

78. The Court must ensure that pleadings of a case must contain sufficient particulars. Insistence on details reduces the ability to put forward a non-existent or false claim or defence.

79. In dealing with a civil case, pleadings, title documents and relevant records play a vital role and that would ordinarily decide the fate of the case.

Suit for Mandatory Injunction

80. It is a settled principle of law that no one can take law

in his own hands. Even a trespasser in settled possession cannot be dispossessed without recourse of law. It must be the endeavour of the Court that if a suit for mandatory injunction is filed, then it is its bounden duty and obligation to critically examine the pleadings and documents and pass an order of injunction while taking pragmatic realities including prevalent market rent of similar premises in similar localities in consideration. The Court's primary concern has to be to do substantial justice. Even if the Court in an extraordinary case decides to grant *ex-parte* ad interim injunction in favour of the plaintiff who does not have a clear title, then at least the plaintiff be directed to give an undertaking that in case the suit is ultimately dismissed, then he would be required to pay market rent of the property from the date when an ad interim injunction was obtained by him. It is the duty and the obligation of the Court to at least dispose off application of grant of injunction as expeditiously as possible. It is the demand of equity and justice.

Due process of Law

81. Due process of law means nobody ought to be condemned unheard. The due process of law means a person in settled possession will not be dispossessed except by due process of law. Due process means an opportunity for the defendant to file pleadings including written statement and documents before the Court of law. It does not mean the whole trial. Due process of law is satisfied the moment rights of the parties are adjudicated by a competent Court.

82. The High Court of Delhi in a case *Thomas Cook (India) Limited v. Hotel Imperial* 2006 (88) DRJ 545 held as under:

> "28. The expressions `due process of law', `due course of law' and `recourse to law' have been interchangeably used in the decisions referred to above which say that the settled possession of even a person in unlawful possession

cannot be disturbed `forcibly' by the true owner taking law in his own hands. All these expressions, however, mean the same thing — ejectment from settled possession can only be had by recourse to a court of law. Clearly, `due process of law' or `due course of law', here, simply mean that a person in settled possession cannot be ejected without a court of law having adjudicated upon his rights qua the true owner.

Now, this 'due process' or 'due course' condition is satisfied the moment the rights of the parties are adjudicated upon by a court of competent jurisdiction. It does not matter who brought the action to court. It could be the owner in an action for enforcement of his right to eject the person in unlawful possession. It could be the person who is sought to be ejected, in an action preventing the owner from ejecting him. Whether the action is for enforcement of a right (recovery of possession) or protection of a right (injunction against dispossession), is not of much consequence. What is important is that in either event it is an action before the court and the court adjudicates upon it. If that is done then, the 'bare minimum' requirement of 'due process' or 'due course' of law would stand satisfied as recourse to law would have been taken. In this context, when a party approaches a court seeking a protective remedy such as an injunction and it fails in setting up a good case, can it then say that the other party must now institute an action in a court of law for enforcing his rights i.e., for taking back something from the first party who holds it unlawfully, and, till such time, the court hearing the injunction action must grant an injunction anyway? I would think not. In any event, the 'recourse to law' stipulation stands satisfied when a judicial determination is made with regard to the first party's protective action. Thus, in the present case, the plaintiff's failure to make out a case for an injunction does not mean that its consequent cessation of user of the said two rooms would have been

brought about without recourse to law."

83. We approve the findings of the High Court of Delhi on this issue in the aforesaid case.

False claims and false defences

84. False claims and defences are really serious problems with real estate litigation, predominantly because of ever escalating prices of the real estate. Litigation pertaining to valuable real estate properties is dragged on by unscrupulous litigants in the hope that the other party will tire out and ultimately would settle with them by paying a huge amount. This happens because of the enormous delay in adjudication of cases in our Courts. If pragmatic approach is adopted, then this problem can be minimized to a large extent.

85. This Court in a recent judgment in *Ramrameshwari Devi and Others* (supra) aptly observed at page 266 that unless wrongdoers are denied profit from frivolous litigation, it would be difficult to prevent it. In order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that Court's otherwise scarce time is consumed or more appropriately, wasted in a large number of uncalled for cases. In this very judgment, the Court provided that this problem can be solved or at least be minimized if exemplary cost is imposed for instituting frivolous litigation. The Court observed at pages 267-268 that imposition of actual, realistic or proper costs and/or ordering prosecution in appropriate cases would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases, the Courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

Grant or refusal of an injunction

86. Grant or refusal of an injunction in a civil suit is the most important stage in the civil trial. Due care, caution, diligence and attention must be bestowed by the judicial officers and judges while granting or refusing injunction. In most cases, the fate of the case is decided by grant or refusal of an injunction. Experience has shown that once an injunction is granted, getting it vacated would become a nightmare for the defendant. In order to grant or refuse injunction, the judicial officer or the judge must carefully examine the entire pleadings and documents with utmost care and seriousness.

87. The safe and better course is to give short notice on injunction application and pass an appropriate order after hearing both the sides. In case of grave urgency, if it becomes imperative to grant an ex-parte ad interim injunction, it should be granted for a specified period, such as, for two weeks. In those cases, the plaintiff will have no inherent interest in delaying disposal of injunction application after obtaining an ex-parte ad interim injunction. The Court, in order to avoid abuse of the process of law may also record in the injunction order that if the suit is eventually dismissed, the plaintiff undertakes to pay restitution, actual or realistic costs. While passing the order, the Court must take into consideration the pragmatic realities and pass proper order for mesne profits. The Court must make serious endeavour to ensure that even-handed justice is given to both the parties.

88. Ordinarily, three main principles govern the grant or refusal of injunction.

(a) prima facie case;

(b) balance of convenience; and

(c) irreparable injury, which guide the Court in this regard.

89. In the broad category of prima facie case, it is imperative for the Court to carefully analyse the pleadings and the documents on record and only on that basis the Court must be governed by the prima facie case. In grant and refusal of injunction, pleadings and documents play vital role.

Mesne Profits

90. Experience has shown that all kinds of pleadings are introduced and even false and fabricated documents are filed in civil cases because there is an inherent profit in continuation of possession. In a large number of cases, honest litigants suffer and dishonest litigants get undue benefit by grant or refusal of an injunction because the Courts do not critically examine pleadings and documents on record. In case while granting or refusing injunction, the Court properly considers pleadings and documents and takes the pragmatic view and grants appropriate mesne profit, then the inherent interest to continue frivolous litigation by unscrupulous litigants would be reduced to a large extent.

91. The Court while granting injunction should broadly take into consideration the prevailing market rentals in the locality for similar premises. Based on that, the Court should fix *adhoc* amount which the person continuing in possession must pay and on such payment, the plaintiff may withdraw after furnishing an undertaking and also making it clear that should the Court pass any order for reimbursement, it will be a charge upon the property.

92. The Court can also direct payment of a particular amount and for a differential, direct furnishing of a security by the person who wishes to continue in possession. If such amount, as may be fixed by the Court, is not paid as security, the Court may remove the person and appoint a receiver of the property or strike out the claim or defence. This is a very important exercise for balancing equities. Courts must carry out this exercise with extreme care and caution while keeping

pragmatic realities in mind and make a proper order of granting mesne profit. This is the requirement of equity and justice.

93. In the instant case, if the Courts below would have carefully looked into the pleadings, documents and had applied principle of the grant of mesne profit, then injustice and illegality would not have perpetuated for more than two decades.

94. We have heard the learned counsel for the parties at length and perused the relevant judgments cited at the Bar. In the instant case, admittedly, the respondent did not claim any title to the suit property. Undoubtedly, the appellant has a valid title to the property which is clearly proved from the pleadings and documents on record.

95. The respondent has not been able to establish the family arrangement by which this house was given to the respondent for his residence. The Courts below have failed to appreciate that the premises in question was given by the appellant to her brother respondent herein as a caretaker. The appellant was married to a Naval Officer who was transferred from time to time outside Goa. Therefore, on the request of her brother she gave possession of the premises to him as a caretaker. The caretaker holds the property of the principal only on behalf of the principal.

96. The respondent's suit for injunction against the true owner – the appellant was not maintainable, particularly when it was established beyond doubt that the respondent was only a caretaker and he ought to have given possession of the premises to the true owner of the suit property on demand. Admittedly, the respondent does not claim any title over the suit property and he had not filed any proceedings disputing the title of the appellant.

97. This Court in *Puran Singh v. The State of Punjab* (1975) 4 SCC 518 held that an occupation of the property by a person as an agent or a servant at the instance of the owner will not amount to actual physical possession.

98. This Court in *Mahabir Prasad Jain* (supra) has held that the possession of a servant or agent is that of his master or principal as the case may be for all purposes and the former cannot maintain a suit against the latter on the basis of such possession.

99. In *Sham Lal v. Rajinder Kumar & Others* 1994 (30) DRJ 596, the High Court of Delhi held thus:

> "On the basis of the material available on record, it will be a misnomer to say that the plaintiff has been in 'possession' of the suit property. The plaintiff is neither a tenant, nor a licensee, nor a person even in unlawful possession of the suit property. Possession of servant is possession of the real owner. A servant cannot be said to be having any interest in the suit property. It cannot be said that a servant or a chowkidar can exercise such a possession or right to possession over the property as to exclude the master and the real owner of the property from his possession or exercising right to possession over the property.
>
> Possession is flexible term and is not necessarily restricted to mere actual possession of the property. The legal conception of possession may be in various forms. The two elements of possession are the corpus and the animus. A person though in physical possession may not be in possession in the eye of law, if the animus be lacking. On the contrary, to be in possession, it is not necessary that one must be in actual physical contact. To gain the complete idea of possession, one must consider (i) the person possessing, (ii) the things possessed and, (iii) the persons excluded from possession. A man may hold an object without claiming any interest therein for himself. A servant though holding an object, holds it for his master. He has, therefore, merely custody of the thing and not the possession which would always be with the master though the master may not be in actual contact of the thing.

It is in this light in which the concept of possession has to be understood in the context of a servant and & master."

100. The ratio of this judgment in *Sham Lal* (supra) is that merely because the plaintiff was employed as a servant or chowkidar to look after the property, it cannot be said that he had entered into such possession of the property as would entitle him to exclude even the master from enjoying or claiming possession of the property or as would entitle him to compel the master from staying away from his own property.

101. Principles of law which emerge in this case are crystallized as under:-

1. No one acquires title to the property if he or she was allowed to stay in the premises gratuitously. Even by long possession of years or decades such person would not acquire any right or interest in the said property.

2. Caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession. The caretaker or servant has to give possession forthwith on demand.

3. The Courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant.

4. The protection of the Court can only be granted or extended to the person who has valid, subsisting rent agreement, lease agreement or license agreement in his favour.

5. The caretaker or agent holds property of the principal only on behalf of the principal. He acquires no right or interest whatsoever for himself in such property irrespective of his long stay or possession.

102. In this view of the matter, the impugned judgment of the High Court as also of the Trial Court deserve to be set aside and we accordingly do so. Consequently, this Court directs that the possession of the suit premises be handed over to the appellant, who is admittedly the owner of the suit property.

103. In the peculiar facts and circumstances of this case, the legal representatives of the respondent are granted three months time to vacate the suit premises. They are further directed that after the expiry of the three months period, the vacant and peaceful possession of the suit property be handed over to the appellant. The usual undertaking to this effect be filed by the legal representatives of the respondent in this Court within two weeks.

104. The legal representatives of the respondent are also directed to pay Rs.1,00,000/- (Rupees one Lakh) per month towards the use and occupation of the premises for a period of three months. The said amount for use and occupation be given to the appellant on or before the 10th of every month. In case the legal representatives of the respondent are not willing to pay the amount for use and occupation as directed by this Court, they must hand over the possession of the premises within two weeks from the date of this judgment. Thereafter, if the legal representatives of the respondent do not hand over peaceful possession of the suit property, in that event, the appellant would be at liberty to get the possession of the premises by taking police help.

105. As a result, the appeal of the appellant is allowed. In the facts and circumstances of the case, the respondents are directed to pay a cost of Rs.50,000/- to the appellant within four weeks. (We have imposed the moderate cost in view of the fact that the original respondent has expired). Ordered accordingly.

D.G. Appeal allowed.