LEE KUN HEE & ORS.
v.
STATE OF U.P. & ORS.
(Criminal Appeal No. 304 of 2012)

FEBRUARY 1, 2012

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

Penal Code, 1860 – ss. 2, 403, 405, 415, 418, 420 and 423 r/w ss. 120B and 34:

Territorial jurisdiction of courts in India – Agreement between intermediary buyer (based abroad) and seller (based in Delhi, India) to purchase certain products which were to be further transferred by the intermediary buyer to ultimate beneficiary (foreign company, based in Dubai) – Upon supply of the product, the ultimate beneficiary was to issue a Bill of Exchange in favour of the intermediary buyer who was to further endorse the same to the seller towards payment of goods which were supplied by the seller from Ghaziabad – Ultimate beneficiary not honouring its commitment under the bill of exchange – Issuance of legal notice by seller to the ultimate beneficiary – However, the ultimate beneficiary not making payment – Criminal complaint by seller u/ss. 403, 405, 415, 418, 420 and 423 r/w ss. 120B and 34 before the Magistrate at Ghaziabad against appellants-the ultimate beneficiary and the foreign parties (officials allegedly connected with the offence) – Summoning order u/ss. 403, 405, 420 and 423 r/w ss. 120B and 34 – Challenged by the appellants on the ground that courts in India had no jurisdiction to entertain the criminal complaint filed by the seller against the appellants – Held: The competent court at Ghaziabad has the jurisdiction to entertain the complaint in the matter u/s. 179, 181(4) and 182 Cr.P.C. – The factum of

supply of goods from Ghaziabad (in India) to Dubai (in the United Arab Emirates), as an essential component of the offences allegedly committed by the accused, is relatable to the words "anything which has been done" used in s.179 – Since the complainant-seller allegedly held the bill of exchange at Ghaziabad in India, the consequence emerging out of the said denial of encashment of the bill of exchange, 'ensued' at Ghaziabad in India – Bill of exchange issued by the ultimate beneficiary was received and is allegedly being held by seller at Ghaziabad in India – Ultimate beneficiary by a letter denied its liability towards seller under the bill of exchange and the said response on behalf of ultimate beneficiary was received by seller at Ghaziabad in India – Thus, it cannot be said that the actions attributed by the seller to the appellants have no connectivity to territorial jurisdiction in India – Submission of the appellants about their foreign nationality, their residence outside India, and the fact that they were not present in India when the offence(s) was/were allegedly committed, of no consequence – They would not be protected u/s. 2 – Code of Criminal Procedure, 1973 – ss. 179, 181 and 182 – Jurisdiction.

Summoning order u/ss. 403, 405, 420 and 423 r/w ss. 120B and 34 – Challenge to – On the ground that the appellants- ultimate beneficiary and the foreign parties (officials allegedly connected with the offence) were not privy to contract/agreement thus, could not be proceeded against for breach of the agreement – Held: Pleadings prima facie demonstrate connectivity of the appellants with the foundational basis expressed in the complaint – One of the accused also supported the accusation – Thus, at this stage it is not desirable to exculpate the appellants from proceedings initiated by the complainant before the Magistrate – Said issue may be re-agitated after production of evidence by rival parties before the trial court.

Summoning order u/ss. 403, 405, 420 and 423 r/w ss.

120B and 34 – Challenge to – On the ground that the charges not made out against the appellants-ultimate beneficiary and the foreign parties (officials allegedly connected with the offence); that the appellants being functionaries of a company per se could not be made vicariously liable for offences emerging out of actions taken in discharge of their responsibilities towards the company; and that the appellants had no concern with the allegations leveled by the complainant – Held: Statement of the complainant u/s. 200 Cr.P.C. categorically asserted that the appellants were jointly and severally liable to honour the bill of exchange endorsed in the favour of the buyer – Acts of omission and commission presented by the complainant specific and categoric – Allegations leveled by the complainant fully incorporate all the basic facts necessary to make out the offences whereunder the summoning order was passed – Also, instant case does not suffer from any of the impairments referred in Iridium Telecom Limited's case – Appellants granted liberty to raise the legal issues before the trial court.

Complaint under, for dishonour of bill of exchange by the accused – Order of summoning under the Sections – Civil suit already filed at the behest of the complainant, based on the alleged breach of the agreement – Maintainability of the criminal proceedings – Held: In offences of the nature contemplated under the summoning order, there can be civil liability coupled with criminal culpability – It cannot be said that since a civil claim has been raised by the complainant it can be prevented from initiating proceedings for penal consequences for the alleged offences committed by the accused under the Penal Code.

Code of Criminal Procedure, 1973 – ss. 179, 181(4) and 182 - Jurisdiction of courts in India for trial of a case – Determination of – Explained.

In terms of the agreement, the seller (based in Delhi,

India) supplied certain products to the intermediary buyer (based abroad) which was further transferred to ultimate beneficiary (foreign Company). The ultimate beneficiary executed a bill of exchange in favour of the intermediary buyer and the intermediary buyer endorsed the bill of exchange in favour of the seller, towards payment for products. The ultimate beneficiary did not honour its commitment under the bill of exchange. The seller issued legal notice to the ultimate beneficiary calling them to make the payment to the seller within the stipulated period. Despite repeated demands, the ultimate beneficiary denied its liability. The seller carrying its business activities either in Delhi or Ghaziabad, through its sole proprietor filed a criminal complaint u/ss. 403, 405, 415, 418, 420 and 423 read with Sections 120B and 34 IPC before the Magistrate at Ghaziabad, against the ultimate beneficiary and the parties who were allegedly involved in the matter (appellant no. 1 to 5 and others). The Magistrate passed an order summoning the accused under Sections 403, 405, 420 and 423 read with Sections 120B and 34 IPC. The five appellants challenged the order before the High Court and the same was disposed of. Thus, the appellants filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1. The two phrases of Section 179 Cr.P.C. "anything which has been done", with reference to the offence and "consequence which has ensued" substantially enlarge and magnify the scope of jurisdiction contemplated under Section 179, so as to extend the same over areas contemplated by the two phrases. In the instant case, the offence(s) alleged in the complaint emerge from the fact, that even though the complainant faithfully performed its obligations under the agreement/contract, the accused dishonestly/ fraudulently/falsely denied/avoided the reciprocal

obligation(s) which they were obliged to perform thereunder. The words "anything which has been done", would extend to anything which has been done in furtherance of the execution of the agreement. The facts constituting the performance of obligations by the complainant, actually constitute the foundational basis for the criminal accusation levelled against the accused (in refusing to honour the corresponding obligation). The instant foundational basis for establishing the commission of the offence, would fall within the ambit of the words "anything which has been done" used in the said provision. In the absence of the instant affirmation of the factual position, the culpability of the accused cannot be established. In the complaint it is asserted, that the contracted goods/product were/was supplied by JCE Consultancy (seller) from Ghaziabad in India. The factum of having supplied the goods/product to 'S' Company in Dubai (the ultimate beneficiary) through 'SI' Company (intermediary buyer), is sought to be established not only through a delivery receipt dated 28.1.2002 (issued by the intermediary buyer-'SI' Company, but also, on the basis of the bill of exchange executed by 'S' Company in Dubai (the ultimate beneficiary), constituting the payment for the goods/product purchased. The factum of supply of goods from Ghaziabad (in India) to Dubai (in the United Arab Emirates), as an essential component of the offence(s) allegedly committed by the accused, is relatable to the words "anything which has been done" used in Section 179. This factual position, is sufficient to vest jurisdiction under Section 179 Cr.P.C., with a competent Court at Ghaziabad. [Para 12] [312-G-H; 313-A-G]

1.2. Under Section 179 Cr.P.C., even the place(s) wherein the consequence (of the criminal act) "ensues", would be relevant to determine the court of competent jurisdiction. Therefore, even the courts within whose local jurisdiction, the repercussion/effect of the criminal act

occurs, would have jurisdiction in the matter. The reciprocal consideration, flowing out of the agreement, is comprised of a monetary payback. The said monetary payback was allegedly transmitted by the recipient of goods ('S' Company in Dubai) to the intermediary buyer ('SI' Limited), by way of a bill of exchange valued at US$ 14,32,745, on 1.2.2002. The said bill of exchange was then endorsed by 'SI' Limited to the complainant-JCE Consultancy. JCE Consultancy maintains that it holds the said bill of exchange at Ghaziabad in India. The execution of the bill of exchange by 'S' Company in Dubai and its endorsement by 'SI' Limited is in consonance with the terms and conditions of the agreement. Upon alleged denial of payment to JCE Consultancy (under the bill of exchange), a legal notice was issued demanding payment. In its response, 'S' Company in Dubai, allegedly dishonestly/fraudulently/falsely denied liability/ responsibility. Since the complainant is allegedly holding the bill of exchange at Ghaziabad in India, the consequence emerging out of the said denial of encashment of the bill of exchange, would be deemed to "ensue" at Ghaziabad in India. Thus, the competent Court at Ghaziabad in India, would have jurisdiction in the matter under Section 179 Cr.P.C. [Para 13] [313-H; 314-A-F]

1.3. A perusal of Section 181 Cr.P.C. leaves no room for any doubt that in offences of the nature as are subject matter of consideration, the court within whose local jurisdiction, the whole or a part of the consideration "…were required to be returned or accounted for…" would have jurisdiction in the matter. In the instant case, a bill of exchange dated 1.2.2002 was issued on behalf of 'S' Company in Dubai, to 'SI' Company Limited; 'SI' Company, in terms of the agreement, endorsed the said bill of exchange in favour of the complainant-'JCE' Company; JCE Company claims to be holding the said

bill of exchange at Ghaziabad in India. Being holder of the bill of exchange, JCE Company demanded the right of payment thereunder, which is being denied by the accused. Since the bill of exchange issued by 'S' Company in Dubai for US$14,32,745 was received, and is allegedly being held by 'JCE''Company at Ghaizabad in India; the said bill of exchange, according to the complainant, has to be honoured/realized at the place where it is held (i.e. at Ghaziabad, in India). In the instant alleged factual background of the matter, the competent court at Ghaziabad in India, would have jurisdiction to hold the trial of the complaint under Section 181(4) Cr.P.C. [Para 14] [315-D-H]

1.4. A perusal of Section 182 Cr.P.C. reveals that the said provision can be invoked to determine jurisdiction in respect of a number of offences which include cheating as a component. When acts of fraud/dishonesty/ deception, relatable to the offence(s), contemplated u/s. 182 emerge from communications/messages/letters etc., the place(s) from where the communications/messages/ letters etc. were sent, as also, the places at which the same were received, would be relevant to determine the court of competent jurisdiction. The allegations contained in the complaint reveal, that the complainant-JCE Company addressed a legal notice to 'S' Company in Dubai, calling upon 'S' Company in Dubai, to honour its reciprocal commitment of the monetary payback contemplated under the agreement. In its response, 'S' Company in Dubai, denied liability, by asserting that 'S' Company in Dubai, had no commitment/responsibility towards JCE Company under the bill of exchange dated 1.2.2002. The said denial according to the complainant, constitutes the basis of the criminal complaint filed against the accused. The place at which the said response on behalf of 'S' Company in Dubai, was received, would be relevant to determine the court of

competent jurisdiction, under Section 182 Cr.P.C. Even if the response was received by the counsel for JCE Consultancy in a place other than Ghaziabad (though in India), still the competent court at Ghaziabad in India, would be vested with jurisdiction, as under Section 178 (d) Cr.P.C., in cases where an offence consists of several acts carried out under different jurisdictions, a court having jurisdiction where any one of such acts was committed, would be competent to try the same. [Para 15] [316-F-H; 317-A-D]

1.5. In view of the said deliberations, it is not legitimate for the appellants to contend, that the actions attributed by JCE Consultancy to the accused, have no connectivity to territorial jurisdiction in India. Section 179 Cr.P.C. vests jurisdiction for inquiry and trial in a court, within whose jurisdiction anything has been done with reference to an alleged crime, and also, where the consequence of the criminal action ensues. Section 181(4) Cr.P.C. leaves no room for any doubt, that culpability is relatable even to the place at which consideration is required to be returned or accounted for. Finally, Section 182 Cr.P.C. postulates that for offences of which cheating is a component, if the alleged act of deception is shown to have been committed, through communications/letters/messages, the court within whose jurisdiction the said communications/letters/ messages were sent (were received), would be competent to inquire into and try the same. Thus, viewed, it is not justified for the appellants to contend, that the allegations levelled by the complainant against the accused, specially in respect of the five appellants, are not relatable to territorial jurisdiction in India, under the provisions of the Code of Criminal Procedure. [Para 16] [317-E-H; 318-A]

1.6. All components of the submissions advanced by the appellants, more particularly their foreign nationality, their residence outside India, and the fact that they were

not present in India when the offence(s) was/were allegedly committed, are of no consequence. They would not be protected u/s. 2 IPC. There is no merit in the first contention that the Magistrate could not have entertained the complaint filed by JCE Consultancy against the appellants. [Para 17] [324-F-H; 325-A]

Mobarik Ali Ahmed vs. The State of Bombay **(1958) SCR 328 – relied on.**

2. It was submitted that that the complaint lodged by JCE Consultancy was based on an agreement between JCE Consultancy and 'SI" Company; that the appellants were not privy to the said contract/agreement, and as such the grievance of the complainant, if any could have been raised only as against 'SI' Company; and that the appellants having no role to play under the contract/ agreement were wrongfully involved in the controversy by the complainant. In the complaint filed by JCE Consultancy, it was expressly averred that all the appellants were involved in "each and every act done by the company" ('S' Company in Dubai). In the statement recorded under Section 200 Cr.P.C., the complainant deposed that the appellants were individually and jointly liable for the commission of offences emerging from the complaint. How they were liable (if at all), is a question of evidence, which would emerge only after evidence is recorded by the trial court. But what is interesting is, that 'SI' Company though an accused in the complaint filed by JCE Company totally supported the accusation(s) levelled by the complainant against the appellants. In a detailed response to the culpability of the appellants 'SI' Company adopted a firm stance. Even the pleadings, prima facie demonstrate the connectivity of the appellants, with the foundational basis expressed in the complaint. It is undesirable to exculpate the appellants from the proceedings initiated by 'JCE' Company before the Magistrate, Ghaziabad. The issue under reference

may be re-agitated, after evidence has been produced by the rival parties before the trial court. [Paras 20, 21] [326-C-D, E-G; 327-A-D; 329-G-H; 330-A]

3. Through the complaint, as also, in the statement of the complainant recorded under Section 200 Cr.P.C., JCE Consultancy categorically asserted that the appellants were jointly or severally liable to honour the bill of exchange, which had been endorsed in its (JCE Consultancy's) favour. In order to demonstrate the appellant's liability, a series of documents were also placed before the trial court. The Magistrate having considered the said material, issued the summoning order. The culpability of the appellants would obviously depend upon the evidence produced before the jurisdictional court. It can definitely be stated from the pleadings before this Court, that one of the accused, namely, 'SI' Company totally supported the cause of the complainant-JCE Consultancy, through its written reply. The factual details emerging from the evidence to be produced by the rival parties, would be necessary to project a clear picture. It is only thereafter, that a rightful decision on this issue canvassed would be possible. The factual foundation/background of the acts of omission and commission presented by the complainant is specific and categoric. The allegations levelled by the complainant, fully incorporate all the basic facts which are necessary to make out the offences whereunder the impugned summoning order was passed. The instant case does not suffer from any impairments referred in *Iridum India Telecom Limited* Case. It is left open to the appellants to canvass the legal issues, before the trial court. After the rival parties have led their evidence, the trial court would return its finding thereon, in accordance with law, without being influenced by any observations made on the merits of the controversy. [Para 23] [336-H; 337-A-H]

Iridium India Telecom Limited vs. Motorola Incorporated and Ors. **(2011) 1 SCC 74: 2010 (14) SCR 591;** *Haryana vs. Bhajan Lal* **1992 Supp. (1) SCC 335: 1990 (3) Suppl. SCR 259;** *M.N. Ojha vs. Alok Kumar Srivastav* **(2009) 9 SCC 682: 2009 (13) SCR 444 – referred to.**

4. In offences of the nature contemplated under the summoning order, there can be civil liability coupled with criminal culpability. What a party has been deprived of by an act of cheating, can be claimed through a civil action. The same deprivation based on denial by way of deception, emerging from an act of cheating, would also attract criminal liability. In the course of criminal prosecution, a complainant cannot seek a reciprocal relief, for the actions of the accused. As in the instant case, the monetary consideration under the bill of exchange, cannot be claimed in the criminal proceedings, for that relief the remedy would be only through a civil suit. Therefore, it is not possible to accept, that since a civil claim was raised by the complainant-JCE Consultancy, based on the alleged breach of the agreement, it can be prevented from initiating proceedings for penal consequences for the alleged offences committed by the accused under the Penal Code. It would not be appropriate to delve into the culpability of the appellants at the instant juncture, on the basis of the factual position projected by the rival parties. The culpability (if at all) would emerge only after evidence is adduced by the rival parties before the trial court. Even on the basis of the submission it is not possible to quash the summoning order at this stage. Thus, it is left open to the appellants to raise their objections, if they are so advised, before the trial court. [Para 26] [341-A-F]

Case Law Reference:

(1958) SCR 328	**Relied on.**	**Para 17**

2010 (14) SCR 591	**Referred to.**	**Para 22**
1990 (3) Suppl. SCR 259	**Referred to.**	**Para 22**
2009 (13) SCR 444	**Referred to.**	**Para 22**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 304 of 2012.

From the Judgment & Order dated 13.11.2009 of the High Court of Judicature at Allahabad in Criminal Misc. Application No. 11404 of 2006.

Ram Jethmalani, Joy Basu, Neeraj Singh, Bikas Kargupta, Meenakshi Midha, Karan Kalia, Avijit Bhattacharjee, Pranav Diesh, Pratik Datta for the Appellants.

S.S. Gandhi, R.K. Dash, Prashant Chandra, Sanjay Sareen Rahul Sharma, P.N. Puri, Pooja M. Saigal, T.N. Singh, Rajeev Dubey, Kamlendra Mishra, S.K. Dwivedi, M.S. Vinaik, Ajay Kumar Talesara for the Respondents.

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. Leave granted.

2. Sky Impex Limited (as buyer) entered into an agreement with JCE Consultancy (as seller) on 1.12.2001. The sale consideration for the products to be supplied by JCE Consultancy was determined at US$13,70,000 (approximately Rs.9 crores). The product was to be delivered no later than 30.1.2002. The buyer was to confirm receipt and certify quality and quantity. As per the agreement, the product was to be further transferred by the buyer (Sky Impex Limited) to Samsung Gulf Electronics, Dubai (hereafter referred to as "Samsung, Dubai"), a wholly owned subsidiary of Samsung Corporation, South Korea (hereinafter referred to as "Samsung, South Korea). Consequent upon supply of the product under the contract/agreement dated 1.12.2001, Samsung Dubai was to issue a bill of exchange valued at

US$14,32,000, in favour of the buyer Sky Impex Limited. Sky Impex Limited was to further endorse the bill of exchange in favour of the seller (JCE Consultancy). Within 72 hours wherefrom the seller was required to transfer to Sky Impex Limited US$62,000 as commission. Alternatively, the buyer (Sky Impex Limited) could transfer, upon delivery, a sum of US$13,70,000, as sale consideration for the product. It was also provided in the agreement, that after endorsement of bill of exchange, the liability of the buyer towards the seller would stand exhausted. Thereupon, the seller would hold the bill of exchange, in due course, and get vested with the authority under the Negotiable Instrument Act, to claim value, directly from Samsung, Dubai. Importantly, the agreement dated 1.12.2001 provided that the contract would be governed by the laws of India. The agreement dated 1.12.2001 being of substantial relevance in the present controversy, is being extracted hereinunder:-

"Sky Impex Limited BVI
Agreement No.SA/100/019

This agreement is made this day December the 1st 2001 between M/s. Sky Impex Ltd., having its registered office at Omer Hodge Bldg., 2nd Floor, Wickham's Cay1, P.O. Box-985, Road Town, Tortola, British Virgin Islands, herein referred to as the 'the Buyer' and M/s. J.C.E. Consultancy a proprietorship Company having its office at 108, Rohini Complex, WA-121, Shakarpur, Delhi–110092, India, herein referred to as 'the Seller'.

The Agreement between the two parties constitute the following:

1. The buyer has agreed to purchase Coke Calcination packages from the Seller to the value of USD 1,370,000 as per order sheet dated November, 25th, 2001 and duly acknowledge by the Seller.

2. The above packages will be delivered by the Seller to

the Buyer, no later than January, 30th 2002. The packages shall be handed over by the Seller to the Buyer's representative as per communication in writing to be sent by the Buyer to the Seller.

3. The Buyer should provide a Performance Certificate to the Seller, confirming that the above packages are in accordance with the order placed and thereafter the Buyer shall not have any claims against the Seller in respect to the quality of the packages and quantity ordered.

4. it is understood by the Seller that the said packages are to be further transferred by the Buyer to M/s. Samsung Gulf Electronics, Dubai, a company registered under the laws of Dubai, UAE and which is a wholly owned subsidiary of Samsung Corporation, South Korea.

5. The Buyer shall receive from Samsung Gulf Electronics, Dubai a Bill of Exchange for the value of approx. USD 1,432,000 due for payment of July, 2002 and shall endorse the same to the seller as consideration for the sale of the packages to the Buyer. Within 72 hours of receiving settlement of the said Bill of Exchange the Seller shall transfer to the Buyer the amount of USD 62,000 to the nominated account of the Buyer as his commission. Alternatively the Buyer shall transfer to the Seller the sum of USD 1,370,000 against delivery of goods to a Bank account that shall be nominated by the Seller.

6. After endorsement of the said Bill of Exchange, the liability of the Buyer towards the Seller ceases and the Seller shall become holder in due course of the Bill of Exchange with all the rights as per the Negotiable Instrument Act to claim value directly from the Samsung Gulf Electronics, Dubai.

7. The Buyer, however, in good faith shall follow up with Samsung Gulf Electronics, for payment of the said Bill of

Exchange at maturity expected in July, 2002 and shall in good faith keep the Seller informed of any development in respect of settlement of the Bill.

8. This contract is governed by the Laws of India."

3. Through a delivery receipt dated 28.1.2002, Sky Impex Limited confirmed having received the product valued at US$13,70,000 under the contract/agreement dated 1.12.2001. The buyer neither complained about quality nor quantity. There was also no protest that the goods/product was not received in time. The aforesaid receipt of goods implies the delivery of the product by JCE Consultancy to Sky Impex Limited. On 1.2.2002, Samsung, Dubai executed a bill of exchange valued at US$14,32,745 in favour of the buyer Sky Impex Limited. This implies further delivery of goods/product from Sky Impex Limited to Samsung, Dubai. The said bill of exchange was then endorsed in favour of the seller JCE Consultancy, in terms of agreement dated 1.12.2001.

4. Allegedly, on account of Samsung, Dubai not honouring its commitment under the bill of exchange dated 1.2.2002, a legal notice dated 20.12.2004 was issued by JCE Consultancy (the seller) through counsel, on instructions from M.A. Packir (Shaikh Allauddin Paker Maiddin - sole proprietor of JCE Consultancy) to Samsung, Dubai. Through the aforesaid notice Samsung, Dubai, was called upon to make payment of US$14,32,000 to JCE Consultancy within 48 hours, either by way of bank draft or other smart investment. Samsung, Dubai, was warned, that in case of non-receipt of payment, JCE Consultancy would be constrained to take recourse to legal remedies, both civil and criminal. The legal notice issued by JCE Consultancy dated 20.12.2004 was responded to by Samsung, Dubai, through counsel on 21.12.2004. In response, it was inter alia asserted:

"…that a Credit Note was already been issued by the beneficiary for the Bill of Exchange, Sky Impex Limited on

22 June 2002 and before the due date of payment. Therefore, our client has no commitment or responsibility to pay your client any amount in relating to the above mentioned Bill of Exchange and your client can simply demand the amount of the Bill of Exchange from Sky Impex Limited, who mislead your client…"

It is therefore apparent, that in its response Samsung, Dubai, acknowledged execution of a bill of exchange valued at US$14,32,000, in favour of Sky Impex Limited, and thereby, its liability under the contract dated 1.12.2001. Inspite thereof Samsung, Dubai, as a matter of defence, in order to avoid liability, took up the position, that the bill of exchange executed by it in favour of Sky Impex Limited had been satisfied, and the beneficiary (Sky Impex Limited) had already issued a credit note in its (Samsung, Dubai) favour on 22.6.2002.

5. JCE Consultancy filed a criminal complaint (complaint no.30 of 2005) under Sections 403, 405, 415, 418, 420 and 423 read with Sections 120B and 34 of the Indian Penal Code before the VIIth Additional Chief Judicial Magistrate, Ghaziabad. In the complaint filed by Shaikh Allauddin Pakir Maiddin - the sole proprietor of JCE Consultancy, Samsung, Dubai, was impleaded as accused no.1 (appellant no. 5, herein); Byung Woo Lee, Managing Director of Samsung, Dubai, was impleaded as accused no.2 (appellant no.3, herein); Lee Kun Hee, President, Samsung Corporation, was impleaded as accused no.3 (appellant no.1, herein); Yon Jung Yung, Vice President and Chief Executive Officer, Samsung Corporation, was impleaded as accused no.4 (appellant no. 2, herein); Dong Kwon Byon, Ex. Managing Director, Samsung, Dubai, was impleaded as accused no.5 (appellant No. 4, herein); S.C. Baek, ex. Financial Advisor, Samsung, Dubai, was impleaded as accused no.6; Sky Impex Limited, was impleaded as accused no.7; and the Chairman of Sky Impex Limited, was impleaded as accused no.8. Since the contents of the complaint are of substantial relevance to the present

controversy, the same are being extracted hereunder:

"1. That the complainant company is dealing in consultancy in the Engineering Field and Sh.Sheikh Allauddin Pakir Maddin is its sole Prop. Who has been authorized on behalf of the company to sign, verify and present the complaint and is empowered to do all the acts.

2. That the accused no.1 is a Multi National Company who have business in Foreign Countries and is reputed. Accused No.2 is the Managing Director of accused No.1, Accused No.3 the President, Accused No.4 the Vice President and Chief Executive Officer, Accused No.5 the Ex. Managing Director, Accused No.6 the Ex-Financial Controller, who are being officers of the company and are responsible each and every done by the company.

3. That on dated 25.11.2011, the Accused no.7 placed order for supply of Coke Calcination package with complainant company and was told to make supply of the said items to accused no.1 which paper is Annexure K-1. In this regard an agreement (contract) between Accused No.7 and the complainant company was executed vide L.A./100/019 dt.1.12.01 which was signed by the Accused No.7 and the authorized signatory of the complainant company which paper is Annexure K-2.

4. That in compliance of the order dt.25.11.01 complainant company supplied the ordered goods to Accused No.7 the acknowledgement receipt was given by Accused No.7 vide letter dt.28.1.02 which paper is Annexure K-3.

5. That the Accused No.7 handed over the supplied goods by the complainant company to Accused No.1 and the handig over – taking over receipt was acknowledged by the Accused No.1 vide letter dt.1.2.02 in favour of the Accused no.7 which paper is Annexure K-4.

6. That as per the clause No.5 of the agreement executed between the complainant company and the Accused no.7 the due payment of the received goods was to be made by the Accused No.1 in the form of Bill of Exchange through Accused No.7. The accused No.7 was to endorse the bill of Exchange in favour of the complainant company so received by the Accused No.7.

7. That the Accused No.1 in its Board Meeting of the company passed a resolution on 15.8.01 by virtue of which Accused No.6 in addition to other works was also authorized to sign Bill of Exchange. The said resolution has been signed by Accused No.5 in the capacity of Director and Secretary, the same is Annexure K-5.

8. That in accordance with aforesaid resolution, Accused No.1 intimated their Bank Manager vide their letter dt.26.1.02 informing that Accused No.6 is authorized to issue Bill of Exchange on behalf of Accused No.1 and the signatures of the Accused No.6 were also attested vide the abovesaid letter. The signature of Accused no.6 have been attested by the Bank Officer of Accused No.1 which is Annexure K-6.

9. That Accused no.6 for and on behalf of Accused No.1 issued Bill of Exchange No.S.M.I.C. dt:1.2.02 for Rs.14,32,745/- American Dollars under his signature in favour of Accused No.7 after having received the ordered goods and on being satisfied of its quality, the same was endorsed by the Accused No.7 in favour of the complainant company in view of the agreement executed between him and the complainant company which is Annexure K-7.

10. That the complainant company made demand of payment from the Accused No.1 against the Bill of Exchange issued in favour of the Accused No.7 and endorsement thereon which the Accused No.1 did not pay despite repeated demands from time to time. The

complainant company sent a legal demand notice dt: 20.12.04 through their Advocate to Accused No.1 on not receiving the due payment which is Annexure K-8, and a reply to the same was sent by Accused No.1 on 21.12.04 through their Advocate stating therein that the payment of the alleged Bill of Exchange has already been made in favour of Accused No.7 on 22.6.02, they, therefore, have no liability to discharge with regard to payment. The reply to notice is Annexure K-9.

11. That the aforesaid statement of Accused No.1 is illegal and contrary to law. The complainant company is the real holder of the Bill of Exchange. Till the demand for payment against the Bill of Exchange is made there is no question of payment of the same. Only the holder is entitled to receive the payment, therefore, the Accused No.1 along with Accused No.7 do not want to make the payment to the complainant company and they want to misappropriate the same.

12. That the complainant company is entitled to receive the payment against the supplied goods which amounts to 14,32,745/- American Dollars from the Accused no.1 personally and jointly and the accused persons have deliberately not paid the same.

13. That the accused persons have committed the above offence punishable under Sec.403, 405, 415, 418, 420, 423, 120B, 34 Indian Penal Code.

It is therefore prayed that this Hon'ble Court may be pleased to summon the accused persons and on proof they be punished."

Shaikh Allauddin Pakir Maiddin - the sole proprietor of JCE Consultancy, examined himself under Section 200 of the Code of Criminal Procedure before the VIIth Additional Chief Judicial Magistrate on 7.1.2005. In his testimony he, inter alia, asserted

that accused nos.2 to 6 were individually and jointly liable/ responsible for the activities of accused no.1 (Samsung, Dubai). He deposed that on 25.11.2001 accused no.7 Sky Impex Limited had placed an order with the complainant, whereupon an agreement dated 1.12.2001 was executed between Sky Impex Limited (as buyer) and the complainant – JCE Consultancy (as seller). He maintained, that the complainant delivered the contracted goods to accused no.7 (Sky Impex Limited), who further delivered the contracted goods to accused no.1 (Samsung, Dubai). He affirmed, that a receipt of the goods was also issued by accused no.7 (Sky Impex Limited) vide a letter dated 1.2.2002. It was maintained, in the statement of Shaikh Allauddin Pakir Maiddin, that accused no.1, in a Board meeting, approved the proposal to authorize accused no.6 (S.C. Baek, ex.-Financial Advisor, Samsung, Dubai) to sign and issue bills of exchange, for and on behalf of Samsung, Dubai. He also asserted, that a bill of exchange for US$14,32,745 was signed and issued by accused no.6 on behalf of Samsung, Dubai, to accused no.7 (Sky Implex Limited). He also deposed, that the said bill of exchange was endorsed in favour of the complainant - JCE Consultancy, by accused no.7 (Sky Impex Limited). Shaikh Allauddin Pakir Maiddin averred, in his statement, that despite repeated demands made to accused no.1, to honour the bill of exchange dated 1.2.2002, no payment came to be made by accused no. 1 to the complainant. Resultantly, on 20.12.2004 the complainant sent a legal notice, through counsel, to accused no.1. In its response dated 21.12.2004, through counsel, it was stated on behalf of the accused (Samsung, Dubai), that the amount of the said bill of exchange had already been made over to accused no.7 on 22.6.2002. He also asserted, that in reply to the notice, the accused adopted the position of no liability towards the complainant under the bill of exchange dated 1.2.2002. Shaikh Allauddin Pakir Maiddin, in his statement under Section 200 of the Code of Criminal Procedure, contested the stance adopted by the accused in response to the legal notice, by testifying that the complainant

company was the holder of the bill of exchange, consequent upon an endorsement made thereupon by Sky Impex Limited. As such, the complainant - JCE Consultancy maintained, that it was entitled to payment under the bill of exchange. He also averred, that accused no.1 (Samsung, Dubai), in collusion with accused no.7 (Sky Impex Limited), in order to deny payment to the complainant, had adopted the aforesaid position. He asserted, that the complainant – JCE Consultancy was entitled to recover payment under the bill of exchange, individually and jointly from the accused. Besides recording his statement under Section 200 of the Code of Criminal Procedure, Shaikh Allauddin Pakir Maiddin also tendered copies of the order sheet dated 2.11.2001, the agreement dated 1.12.2001, the delivery receipt dated 28.1.2002, the performance certificate dated 1.2.2002, proceedings of the Board meeting of accused no.1 approving the proposal to authorize accused no.6, the letter dated 26.1.2002 (issued by accused no.1 to its banker, informing its banker that accused no.6 was its authorized signatory), the bill of exchange dated 1.2.2002 in the sum of US$14,32,745 (issued in favour of Sky Impex Limited, duly endorsed to JCE Consultancy), the legal notice dated 20.12.2004 and its reply dated 21.12.2004.

6. Based on the aforesaid criminal complaint, the statement of Shaikh Allauddin Pakir Maiddin under Section 200 of the Code of Criminal Procedure, as also, the supporting documents, the VIIth Additional Chief Judicial Magistrate, Ghaziabad passed an order dated 12.1.2005 summoning the accused under Sections 403, 405, 420 and 423 read with Sections 120B and 34 of the Indian Penal Code for 3.2.2005. The order passed by the VIIth Additional Chief Judicial Magistrate, Ghaziabad was first assailed by the five appellants herein before the High Court of Judicature at Allahabad by filing Criminal Miscellaneous Application No. 11404 of 2006. The aforesaid Criminal Miscellaneous Application was disposed of on 13.11.2009. Through the instant appeal the appellants have assailed the order passed by the High Court on 13.11.2009.

7. The primary contention advanced at the hands of the learned counsel representing the five appellants before this Court was based on an admitted sequence of facts. It was submitted, that none of the appellants is an Indian citizen. It was also submitted, that none of the appellants have resided in India, either before, or after the execution of the agreement dated 1.12.2001, nor during its implementation. It was submitted, that neither the criminal complaint nor the pre-summoning evidence recorded under Section 200 of the Code of Criminal Procedure, attributes any act of omission/commission, within the territorial jurisdiction of India, to any of the five appellants herein. As such, according to learned counsel, the provisions of the Indian Penal Code cannot be relied upon to determine the culpability of the appellants. In order to substantiate the instant contention, our attention was invited by the learned counsel for the appellants, to Section 2 of the Indian Penal Code, which reads as under:

> "**2. Punishment of offences committed within India** – Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India.

Based on the Section 2 of the Indian Penal Code, it was sought to be emphasized, that culpability of an accused under Section 2 of the Indian Penal Code can only be relatable to an act "…of which he shall be guilty within India". Based on aforesaid legal and factual position, it was sought to be emphasized, that the appellants having not committed any act within the territorial jurisdiction of India, cannot be blamed of being guilty of an act "within India", and as such, cannot be proceeded against in a Court in India for facing prosecution under the provisions of the Indian Penal Code.

8. In order to support the aforesaid primary contention, it was also emphasized, that appellant nos. 1 to 4 are all foreign citizens, whereas, appellant no. 5 is a foreign company incorporated in Dubai. Appellant no. 1, we are told, was Chairman and Director of Samsung, South Korea. It is

contended, that he has had nothing to do with Samsung, Dubai. We are informed, that he lives in South Korea. Appellant no. 2, we are informed, was a former Vice Chairman and CEO of Samsung, South Korea. He also has had nothing to do with Samsung, Dubai. He too lives in South Korea. Learned counsel for the appellant contends, that on the date of the execution of the agreement dated 1.12.2001, appellant no. 3 was the Managing Director, of Samsung, Dubai. He is no longer so. He too now resides in South Korea. Likewise, according to learned counsel, appellant no. 4, on the date of execution of the agreement dated 1.12.2001, was ex-Managing Director of Samsung, Dubai. He also resides in South Korea. Appellant no. 5, we were told, is a foreign company incorporated in Dubai (in the United Arab Emirates). It has its registered office at Dubai. It is also asserted, that the five appellants herein, have no concern with the other accused, in the criminal complaint filed by JCE Consultancy.

9. Additionally, it was submitted, that respondent no. 2-JCE Consultancy, is a proprietary concern under the sole ownership of Shaikh Allauddin Pakir Maiddin. The aforesaid concern according to the appellants carries on its business activities either in Delhi or at Ghaziabad, in India. It was contended on behalf of the appellants, that as per the averments made in the complaint, it was Sky Impex Limited which had placed an order with JCE Consultancy under the agreement dated 1.12.2001. Sky Impex Limited, according to the learned counsel for the appellants, is a foreign company registered in the British Virgin Islands. It was submitted, that the complainant has not disclosed where and how the agreement was executed. It was submitted, that there is no averment at the hands of the complainant, that the agreement dated 1.12.2001 was executed in India. It was asserted, that even according to the averments made in the complaint, the goods were supplied to Sky Impex Limited, and not to any one or more of the appellants herein. It was pointed out, that the complaint does not even narrate how or from where the goods were exported from India. Or how, and from where,

delivery was taken by Sky Impex Limited. It was contended, that the complainant has merely asserted, that the goods were delivered by Sky Impex Limited to Samsung, Dubai. It is pointed out, that the complaint does not disclose how and where, the delivery of goods was made by Sky Impex Limited to Samsung, Dubai.

10. We shall now endeavour to deal with the primary contention advanced on behalf of the appellant. The instant contention has a jurisdictional flavour. We shall deal with the matter, firstly on the basis of an analysis of some of the provisions of the Code of Criminal Procedure. For the instant purpose reference may first of all be made to Section 4 of the Code of Criminal Procedure which is reproduced hereunder :

> **4. <u>Trial of offense under the Indian Penal Code and other laws-</u>**
>
> 1. All offences under the Indian Penal Code (45 of 2860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.
>
> 2. All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

It is apparent, from a perusal of Section 4, that inquiry and trial of offences contemplated under the Indian Penal Code, are to be conducted in the manner stipulated under the Code of Criminal Procedure. The offences in this case, as noticed above, have been framed under sections 403 (dishonest misappropriation), 405 (criminal breach of trust), 420 (cheating) and 423 (dishonest/fraudulent execution of an instrument

containing a false statement relating to consideration) of the Indian Penal Code. The denial of liability by the accused under the agreement dated 1.12.2001 is allegedly the basis of the criminal complaint lodged by JCE Consultancy. The place where the agreement was executed, as well as, the places where different constituents of the agreement were carried out, are material factors to determine the relevant court(s) which would/could have jurisdiction in the matter. The place where the consequence of the criminal action (alleged in the complaint) ensues, may also be relevant for the said purpose. And finally, place(s) of receipt and dispatch of communications exchanged by the rival parties, revealing deception as an ingredient of cheating alleged by the complainant, can also be relevant to identify the court(s) having jurisdiction in the matter. The aforesaid relevance becomes apparent from Sections 179, 181 and 182 of the Code of Criminal Procedure, which we shall presently examine.

11. The aforesaid examination has to be based on certain salient facts, which we may first recapitulate. The complaint alleges the execution of a contract dated 1.12.2001, wherein consideration in the form of goods/product produced in India, by the seller (JCE Consultancy) stationed in India, were to be supplied to the buyer (Sky Impex Ltd.), in Dubai. The reciprocal consideration in the agreement was in the form of a monetary payback, by the eventual recipient of goods (Samsung, Dubai), to the seller in India (JCE Consultancy). The complaint narrates a circuitous passage of the goods from the seller (JCE Consultancy) to the eventual buyer (Samsung, Dubai), as also, the return consideration from the said buyer (Samsung, Dubai) to the seller. Both the aforesaid transactions, according to the complainant, passed through an intermediary – Sky Impex Limited. The agreement, according to the complainant, also contemplates commission for the intermediary (Sky Impex Ltd.). There is definiteness in the complainant's allegations of the transfer of goods from India, as also, the receipt of monetary consideration in India. The complainant has supported his

allegations on the basis of documents, wherein each document connects the passing of goods from the seller, and of the reciprocal monetary consideration from the eventual buyer (Samsung, Dubai) to the seller (JCE Consultancy) through a fine unbroken chain of events. The foundation of the complaint has been laid on the basis of the agreement dated 1.12.2001, whereby the complainant wishes to establish the corresponding obligations of the rival parties. Through the delivery receipt dated 28.1.2002, the complainant desires to demonstrate communication of the goods by the seller, as also, their receipt by the buyer. Based on the execution of the bill of exchange on 1.2.2002 by, the authorized signatory of Samsung, Dubai, and the endorsement of the bill of exchange on 1.2.2002 itself by Sky Impex Limited, in favour of the complainant JCE Consultancy as reciprocal consideration; exactly in the manner contemplated under the agreement dated 1.12.2001; the complainant desires to establish the liability of Samsung, Dubai, under the agreement dated 1.12.2001.

12. On the question of jurisdiction, based on the factual position indicated above, reference may first be made to Section 179 of the Criminal Procedure Code which is being reproduced hereunder:-

> "179. **Offence triable where act is done or consequence ensues:** When an act is an offence by reasons of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued."

In Section 179 aforesaid, two phrases need to be noticed. Firstly, "anything which has been done", with reference to the offence. And secondly, "consequence which has ensued", also with reference to the offence. Both the aforesaid phrases substantially enlarge and magnify the scope of jurisdiction contemplated under Section 179 aforesaid, so as to extend the

same over areas contemplated by the two phrases. In so far as the present controversy is concerned, the offence(s) alleged in the complaint emerge from the fact, that even though the complainant faithfully performed its obligations under the agreement/contract dated 1.12.2001, the accused dishonestly/ fraudulently/falsely denied/avoided the reciprocal obligation(s) which they were obliged to perform thereunder. In our view, the words "anything which has been done", for the present controversy, would extend to anything which has been done in furtherance of the execution of the agreement dated 1.12.2001. The facts constituting the performance of obligations by the complainant, actually constitute the foundational basis for the criminal accusation levelled against the accused (in refusing to honour the corresponding obligation). The instant foundational basis for establishing the commission of the offence, in our view, would fall within the ambit of the words "anything which has been done" used in the aforesaid provision. In the absence of the instant affirmation of the factual position, in the present controversy, the culpability of the accused cannot be established. In the complaint it is asserted, that the contracted goods/product were/was supplied by JCE Consultancy from Ghaziabad in India. The factum of having supplied the goods/ product to Samsung, Dubai through Sky Impex Limited, is sought to be established not only through a delivery receipt dated 28.1.2002 (issued by the intermediary buyer - Sky Impex Limited), but also, on the basis of the bill of exchange executed on 1.2.2002 by Samsung, Dubai (the ultimate beneficiary), constituting the payment for the goods/product purchased. The factum of supply of goods from Ghaziabad (in India) to Dubai (in the United Arab Emirates), as an essential component of the offence(s) allegedly committed by the accused, in our view, is relatable to the words "anything which has been done" used in Section 179 aforesaid. This factual position, in our view, is sufficient to vest jurisdiction under Section 179 of the Code of Criminal Procedure, with a competent Court at Ghaziabad.

13. Besides the aforesaid, under Section 179 of the Code

of Criminal Procedure, even the place(s) wherein the consequence (of the criminal act) "ensues", would be relevant to determine the court of competent jurisdiction. Therefore, even the courts within whose local jurisdiction, the repercussion/ effect of the criminal act occurs, would have jurisdiction in the matter. The reciprocal consideration, flowing out of the agreement dated 1.12.2001, is comprised of a monetary payback. The aforesaid monetary payback was allegedly transmitted by the recipient of goods (Samsung, Dubai) to the intermediary buyer (Sky Impex Limited), by way of a bill of exchange valued at US$ 14,32,745, on 1.2.2002. The aforesaid bill of exchange was then endorsed by Sky Impex Limited, to the complainant-JCE Consultancy. JCE Consultancy maintains, that it holds the said bill of exchange at Ghaziabad in India. The execution of the bill of exchange (by Samsung, Dubai) and its endorsement (by Sky Impex Limited) is in consonance with the terms and conditions of the agreement dated 1.12.2001. Upon alleged denial of payment to JCE Consultancy (under the bill of exchange dated 1.2.2002), a legal notice dated 20.12.2004 came to be issued demanding payment. In its response dated 21.12.2004, Samsung, Dubai, allegedly dishonestly/ fraudulently/falsely denied liability/responsibility. Since the complainant is allegedly holding the bill of exchange dated 1.2.2001 at Ghaziabad in India, the consequence emerging out of the said denial of encashment of the bill of exchange, in our view, would be deemed to "ensue" at Ghaziabad in India. In the instant view of the matter, the competent Court at Ghaziabad in India, in our view, would have jurisdiction in the matter under Section 179 of the Code of Criminal Procedure.

14. Insofar as Section 181 of the Code of Criminal Procedure is concerned, while inviting our attention to the same, learned counsel for the complainant-JCE Consultancy, in order to emphasize the issue of jurisdiction, brought to our notice sub-section (4) thereof. Section 181(4) of the Code of Criminal Procedure is being extracted hereunder:-

181. **Place of trial in case of certain offences –**

(1) .....

(2) .....

(3) .....

(4) Any offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or any part of the property which is the subject of the offence was received or retained, or was required to be returned or accounted for, by the accused person.

A perusal of the aforesaid provision leaves no room for any doubt, that in offences of the nature as are subject matter of consideration in the present controversy, the court within whose local jurisdiction, the whole or a part of the consideration "…were required to be returned or accounted for…" would have jurisdiction in the matter. In the present case, a bill of exchange dated 1.2.2002 was issued on behalf of Samsung, Dubai, to Sky Impex Limited; Sky Impex Limited, in terms of the agreement dated 1.12.2001, endorsed the aforesaid bill of exchange in favour of the complainant-JCE Consultancy; JCE Consultancy claims to be holding the aforesaid bill of exchange at Ghaziabad in India. Being holder of the bill of exchange dated 1.2.2002, JCE Consultancy demanded the right of payment thereunder, which is being denied by the accused. Since the bill of exchange issued by Samsung, Dubai, dated 1.2.2002 for US$14,32,745 was received, and is allegedly being held by JCE Consultancy at Ghaizabad in India; the aforesaid bill of exchange, according to the complainant, has to be honoured/realized at the place where it is held (i.e. at Ghaziabad, in India). In the instant alleged factual background of the matter, we are of the view, that the competent court at Ghaziabad in India, would have jurisdiction to hold the trial of the complaint under Section 181(4) of the Code of Criminal Procedure.

15. Lastly, reference may be made to section 182 of the Criminal Procedure Code which is being reproduced hereunder:-

182. **Offences committed by letters, etc. –**

(1) Any offence which includes cheating may, if the deception is practiced by means of letters or telecommunication messages, be inquired into or tried by any Court within whose local jurisdiction such letters or messages were sent or were received; and any offence of cheating and dishonestly inducing delivery of property may be inquired into or tried by a Court within whose local jurisdiction the property was delivered by the person deceived or was received by the accused person.

(2) Any offence punishable under section 494 or section 495 of the Indian Penal Code (45 of 1860) may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or the offender last resided with his or her spouse by the first marriage, or the wife by first marriage has taken up permanent residence after the commission of offence."

A perusal of section 182 (extracted above) reveals that the said provision can be invoked to determine jurisdiction in respect of a number of offences which include cheating as a component. When acts of fraud/dishonesty/deception, relatable to the offence(s), contemplated under Section 182 aforementioned, emerge from communications/messages/ letters etc., the place(s) from where the communications/ messages/letters etc. were sent, as also, the places at which the same were received, would be relevant to determine the court of competent jurisdiction. The allegations contained in the complaint reveal, that the complainant-JCE Consultancy, addressed a legal notice dated 20.12.2004 to Samsung, Dubai, calling upon Samsung, Dubai, to honour its reciprocal commitment of the monetary payback contemplated under the

agreement dated 1.12.2001. In its response dated 21.12.2004, Samsung, Dubai, denied liability, by asserting that Samsung, Dubai, had no commitment/responsibility towards JCE Consultancy, under the bill of exchange dated 1.2.2002. The aforesaid denial according to the complainant, constitutes the basis of the criminal complaint filed against the accused. The place at which the said response on behalf of Samsung, Dubai, was received, in our view, would be relevant to determine the Court of competent jurisdiction, under Section 182 of the Criminal Procedure Code. Even if the response was received by the counsel for JCE Consultancy in a place other than Ghaziabad (though in India), still the competent court at Ghaziabad in India, in our view, would be vested with jurisdiction, as under Section 178 (d) of the Code of Criminal Procedure, in cases where an offence consists of several acts carried out under different jurisdictions, a court having jurisdiction where any one of such acts was committed, will be competent to try the same.

16. In view of the aforesaid deliberations, it is not legitimate for the appellants to contend, that the actions attributed by JCE Consultancy to the accused, have no connectivity to territorial jurisdiction in India. Section 179 of the Code of Criminal Procedure vests jurisdiction for inquiry and trial in a Court, within whose jurisdiction anything has been done with reference to an alleged crime, and also, where the consequence of the criminal action ensues. Section 181(4) of the Code of Criminal Procedure leaves no room for any doubt, that culpability is relatable even to the place at which consideration is required to be returned or accounted for. Finally, Section 182 of the Code of Criminal Procedure postulates that for offences of which cheating is a component, if the alleged act of deception is shown to have been committed, through communications/ letters/messages, the court within whose jurisdiction the said communications/letters/messages were sent (were received), would be competent to inquire into and try the same. Thus viewed, it is not justified for the appellants to contend, that the

allegations levelled by the complainant against the accused, specially in respect of the five appellants herein, are not relatable to territorial jurisdiction in India, under the provisions of the Code of Criminal Procedure.

17. Our deliberations in the preceding paragraphs are based on the facts of the present case, as also, the offences which have been incorporated in the impugned summoning order. We would have had to examine the scope of Section 2 of the Indian Penal Code, which constitutes the plank on which submissions advanced on behalf of the appellants rest. But that may not really be necessary, as our research lead us to the decision rendered by this Court in Mobarik Ali Ahmed vs. The State of Bombay (1958) SCR 328. This Court in the aforesaid judgment held as under:-

> "(24) It would be desirable at this stage to notice certain well-recognised concepts of International Law bearing on such a situation. Wheaton in his book on Elements of International Law (Fourth Edition) at page 183, dealing with criminal jurisdiction states as follows:
>
> "By the Common Law of England, which has been adopted, in this respect, in the United States, criminal offences are considered as altogether local, and are justiciable only by the courts of that country where the offence is committed."
>
> At page 182 thereof it is stated as follows :
>
> "The judicial power of every independent State, extends (with the qualifications mentioned earlier) to the punishment of all offences against the municipal laws of the State, by whomsoever committed, within the territory."
>
> In Hackworth's Digest of International Law (1941 Edition), Vol.II, at page 188 there is reference to opinions of certain eminent American Judges. It is enough to quote the following dictum of Holmes J. noticed therein :

"*Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power*."

In Hyde's International Law (Second Edition), Vol.I, at page 798, the following quotation from the judgment of the permanent Court of International Justice dated September 7, 1927, in the case relating to S.S. Lotus (Publications, Permanent Court of International Justice, Series A, Nos.10, 23) is very instructive :

"It is certain; that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there."

This quotation is also noticed in Openheim's International Law (Eighth Ed.), Vol.I at page 332 in the footnote. In noticing the provisions of International Law in this context we are conscious that what we have to deal with in the present case is a question merely of municipal law and not of any International Law. But as is seen above, the principles recognized in International Law in this behalf are virtually based on the recognition of those principles in the municipal law of various countries and is really part of the general jurisprudence relating to criminal responsibility under municipal law. *No doubt some of the above dicta have reference to offences actually committed outside the State by foreigners and treated as offences committed within the State by specific legislation. But the principle*

emerging therefrom is clear that once it is treated as committed within the State, the fact that he is a foreigner corporeally present outside at the time of such commission is no objection to the exercise of municipal jurisdiction under the Municipal law. This emphasizes the principle that exercise of criminal jurisdiction depends on the locality of the offence and not on the nationality of the alleged offender (except in a few specified cases such as Ambassadors, Princes etc.).

25. Learned counsel for the appellant has relied on various passages in the judgment of Cockburn, C. J., in the well-known case *The Queen* v. *Keyn* (*Franconia's case*) [(1876) 2 Ex D 63]. Fourteen learned Judges participated in that case and the case appears to have been argued twice. Eight of them including Cockburn, C. J., formed the majority. Undoubtedly there are various passages in the judgment of Cockburn, C. J., which prima facie seem capable of being urged in favour of the appellant's contention. In particular the following passage at p. 235 may be noticed:

"The question is not whether the death of the deceased, which no doubt took place in a British ship, was the act of the defendant in such ship, but whether the defendant, at the time the act was done, was himself within British jurisdiction."

The learned Chief Justice, however, recognized at p. 237 that there were certain American decisions to the contrary. Now the main debate in that case was whether the sea upto three mile limit from the shore is part of British territory or whether in respect of such three mile limit only limited and defined extraterritorial British jurisdiction extended which did not include the particular criminal jurisdiction under consideration. In respect of this question, as a result of the judgment, the Parliament had to enact the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict., c. 73) which

in substance overruled the view of the majority and of the learned Chief Justice on this point. The main principle of criminal jurisdiction, however, relevant for our purpose was enunciated in the minority judgment of Amphlett, J. A., at p. 118, that "it is the locality of the offence that determines the jurisdiction" implying by contrast that it is not the nationality of the offender.

26. The question, however, that still remains for consideration is whether there is anything in the language of the sections of the Indian Penal Code relating to the general scheme of the Code which compels the construction that the various sections of the Penal Code are not intended to apply to a foreigner who has committed an offence in India while not being corporeally present therein at the time. For this purpose we are not concerned with such of the sections of the Penal Code, if any, which indicate the actual presence of the culprit as a necessary ingredient of the offence. Of course, for such offences a foreigner ex hypothesi not present at the time in India cannot be guilty. The only general sections of the Indian Penal Code which indicate its scheme in this behalf are Sections 2, 3, and 4 and as they stand at present, they are as follows:

"2. Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India.

3. Any person liable, by any Indian Law, to be tried for an offence committed beyond India shall be dealt with according to the provisions of this Code for any act committed beyond India in the same manner as if such act had been committed within India.

4. The provisions of this Code apply also to any offence committed by-

(1) any citizen of India in any place without and beyond India;

(2) any person on any ship or aircraft registered in India wherever it may be.

Explanation:— In this section the word 'offence' includes every act committed outside India which, if committed in India, would be punishable under this Code."

Sections 3 and 4 deal with offences committed beyond the territorial limits of India and Section 2 obviously and by contrast refers to offences committed within India. *It appears clear that it is Section 2 that has to be looked to determine the liability and punishment of persons who have committed offences within India. The section asserts categorically that every person shall be liable to punishment under the Code for every act or omission contrary to the provisions of the Code and of which he shall be guilty within India*. This recognises the general principle of criminal jurisdiction over persons with reference to the locality of the offence committed by them, being within India. *The use of the phrase "every person" in Section 2 as contrasted with the use of the phrase "any person" in Section 3 as well as Section 4 (2) of the Code is indicative of the idea that to the extent that the guilt for an offence committed within India can be attributed to a person, every such person without exception is liable for punishment under the Code*. Learned counsel for the appellant suggests that the phrase "within India" towards the end of Section 2 must be read with the phrase "every person" at the commencement thereof. But this is far-fetched and untenable. *The plain meaning of the phrase "every person" is that it comprehends all persons without limitation and irrespective of nationality, allegiance, rank, status, caste, colour or creed*. This section must be understood as comprehending every person without

exception barring such as may be specially exempt from criminal proceedings or punishment thereunder by virtue of the Constitution (See Article 361(2) of the Constitution) or any statutory provisions or some well-recognised principle of international law, such as foreign sovereigns, ambassadors, diplomatic agents and so forth, accepted in the municipal law.

27. Learned counsel drew our attention to a number of sections in the Penal Code, viz., Sections 108-A, 177, 203, 212, 216, 216-A and 236. The argument based on reference to these sections is that wherever the legislature in framing the Penal Code wanted to legislate about anything that has reference to something done outside India it has specifically said so and that therefore it may be expected that if it was intended that the Penal Code would refer to a person actually present outside India at the time of the commission of the offence, it would have specifically said so. We are unable to accept this argument. These sections have reference to particular difficulties which arose with reference to what may be called, a related offence being committed in India in the context of the principal offence itself having been committed outside India — that is for instance, abetment, giving false information and harbouring within India in respect of offences outside India. Questions arose in such cases as to whether any criminal liability would arise with reference to the related offence, the principal offence itself not being punishable in India and these sections were intended to rectify the lacunae. On the other hand, a reference to Section 3 of the Code clearly indicates that it is implicit therein that a foreigner who commits an offence within India is guilty and can be punished as such without any limitation as to his corporeal presence in India at the time. For if it were not so, the legal fiction implicit in the phrase "as if such act had been committed within India" in Section 3 would not have been limited to the supposition

that such act had been committed within India, but would have extended also to a fiction as to his physical presence at the time in India.

28. *In the argument before us, there has been some debate as to what exactly is the implication of the clause "of which he shall be guilty within India" in Section 2 of the Code. It is unnecessary to come to any definite conclusion in respect thereto. But it is clear that it does not support the contention of the appellant's counsel. We have, therefore, no doubt that on a plain reading of Section 2 of the Penal Code, the Code does apply to a foreigner who has committed an offence within India notwithstanding that he was corporeally present outside*.

… … …

32. After giving our careful consideration to the questions raised before us, *we are clearly of the opinion that even on the assumption that the appellant has ceased to be an Indian citizen and was a Pakistani national at the time of the commission of the offence, he must be held guilty and punished under the Indian Penal Code notwithstanding his not being corporeally present in India at the time*." (emphasis is ours)

We are in respectful agreement with the conclusion drawn in Mobarik Ali Ahmed's case (supra). It is unnecessary for us to again repeat the same. In view of the above, we are satisfied that all components of the submissions advanced on behalf of the appellants, more particularly their foreign nationality, their residence outside India, and the fact that they were not present in India when the offence(s) was/were allegedly committed, are of no consequence, in view of the aforesaid decision rendered by this Court. We, therefore, find no merit in the first contention advanced on behalf of the appellants in the instant case, that the Court of the VIIth Additional Chief Judicial Magistrate could

not have entertained the complaint filed by JCE Consultancy against the appellants.

18. Another allied submission (the second submission), advanced on the same lines as the first contention was, that consequent upon the passing of goods/product to Samsung, Dubai, S.C. Baek (accused no. 7) is said to have paid the consideration amount through a bill of exchange. It was submitted, that even as per the averments made by the complainant-JCE Consultancy, the aforesaid bill of exchange was executed by S.C. Baek in Dubai. And as such, that liability under the aforesaid bill of exchange would ensue only at Dubai. It was also contended, that the aforesaid bill of exchange was allegedly drawn on behalf of Samsung, Dubai, which is a company registered at Dubai (in the United Arab Emirates). According to the learned counsel representing the appellants herein, even the consideration, as per the averments made in the complaint, was liable to pass from Samsung, Dubai, to Sky Impex Limited at Dubai (in the United Arab Emirates). It is submitted, that thereafter the said bill of exchange came to be settled between the executor thereof (Samsung, Dubai) and the beneficiary thereunder (Sky Impex Limited), inasmuch as, Sky Impex Limited, consequent upon the settlement of the said bill of exchange, allegedly executed a credit note in favour of Samsung, Dubai on 22.6.2002. This credit note was also allegedly executed at Dubai. It is further submitted, that the aforesaid bill of exchange was stated to have been endorsed in favour of the complainant by Sky Impex Limited. This endorsement, according to the learned counsel for the appellants, was also made at Dubai (in the United Arab Emirates). As such, it was contended by the learned counsel for the appellants, that even the passing of consideration in furtherance of the alleged contract dated 1.12.2001, took place beyond the territorial barriers of India. It was, therefore, asserted on behalf of the appellants, that Courts in India, by no stretch of imagination, can have jurisdiction over the matter.

19. It is not necessary for us to re-examine the issue projected at the hands of the learned counsel for the appellants, in terms of the factual position noticed in the foregoing paragraph, because the instant submission, is in sum and substance, exactly akin to the one raised on behalf of the appellants as their primary submission. Having threadbare examined the primary contention, we are satisfied in rejecting the instant contention of the appellants, for exactly the same reasons which had weighed with us while dealing with the primary contention raised on behalf of the appellants.

20. The third submission advanced at the hands of the learned counsel for the appellants was, that the complaint lodged by JCE Consultancy was based on an agreement dated 1.12.2001. The aforesaid agreement was between JCE Consultancy and Sky Impex Limited. It was submitted, that the appellants herein are not privy to the aforesaid contract/ agreement. Accordingly, it was contended, that the grievance of the complainant, if any, could have been raised only as against Sky Impex Limited. It was asserted, that the appellants are independent of the persons who are privy to the agreement dated 1.12.2001. It is asserted, that only such persons who are privy to the contract/agreement dated 1.12.2001, can be proceeded against for breach of the same. Stated differently, it is contended , that even if the parties to the contract/ agreement dated 1.12.2001 had breached the same, the appellants could not be held liable therefor. Accordingly, it is asserted, that the appellants herein having no role to play under the contract/agreement dated 1.12.2001, have been wrongfully involved in the controversy by the complainant-JCE Consultancy.

21. Having perused the pleadings filed before this Court, and having heard the learned counsel for the complainant-JCE Consultancy, as also, Sky Impex Limited, it becomes necessary for us to record their respective stances in respect of the involvement of the five appellants, with the allegations made by

JCE Consultancy. First and foremost, it is necessary to mention, that in the complaint filed by JCE Consultancy, it was expressly averred in paragraph 1, that all the appellants herein were involved in "each and every act done by the company" (Samsung, Dubai). In the statement recorded under Section 200 of the Code of Criminal Procedure, Shaikh Allauddin Paker Maiddin on 7.1.2005 deposed, that the appellants herein were individually and jointly liable for the commission of offences emerging from the complaint. How they were liable (if at all), is a question of evidence, which would emerge only after evidence is recorded by the trial court. But what is interesting is, that Sky Impex Limited, though an accused in the complaint filed by JCE Consultancy, has totally supported the accusation(s) levelled by the complainant against the appellants. In a detailed response to the culpability of the appellants herein, Sky Impex Limited has adopted a firm stance, wherein it has averred as under:-

> "10. It is submitted that the applicant, through other group companies Sky Impex Isle of Man, had been conducting business with petitioner/accused since the year 1999. Various other bills of exchange had been drawn by the applicant and accepted by S.C. Baek-accused with complete authority vested in him via Board resolutions issued by petitioner/accused and substantiated by petitioner/accused through Board resolution of their parent company in South Korea.
>
> 11. It is further pertinent to mention here that the applicant also had been involved in a bonafide discounting of bill numbers SM 4B for USD 2,550,432 (Rs.11 crores approx.) and SM 3B for USD 2,448,340 (Rs.11 crores approx.) maturing July 20th, 2002 with Bankhaus Wolbern in Germany and HSBC Bank (Hong Kong and Shangai Bank) in London/Dubai, which bills had been duly accepted by petitioner/accused with full knowledge of petitioner/accused, based at the head office in South Korea. It is submitted that in one of the cases, on July 24, 2002 Bankhaus Wolbern a bank in Germany, to whom the bills were endorsed by the applicant in 2002 made a demand for payment of bill numbers SM 4B and SM 3B to the office of petitioner/accused in South Korea as petitioner/accused was trying to renegade on their bonafide obligation to discharge the bills in their capacity as the acceptor. The bank after making their investigations concluded that operational control of these transactions were vested with the offices of the petitioner/accused in Seoul, South Korea and accordingly issued threat for legal action to the petitioner/accused at their Head Office in Seoul, to black list the Samsung Group. A true copy of the said letter dated July 24th, 2002 is being filed as Annexure A-8. It is submitted that within a short time span of receiving the said letters from Bankhaus Wolbern, USD 3.6 million (Rs.16.2 crores) the bills were paid by accused No. 1 through Emirates International Bank transfer signed jointly by accused no. 5 and to Bankhaus Wolbern on Aug. 14, 2002. A true copy of said transaction is being filed as Annexure A-9…….
>
> 12. It is submitted that in Nov. 2003 HSBC Bank Dubai was paid USD 4.85 million (approx. 21.8 crores) by accused no. 1 through bank transfer from Emirates Bank International instructions to discharge bill numbers SM 2A for USD 2,440,925 (approx. 11 crores) – drawn July 8th, 2002, No. SM 17 for USD 1,038,725 (approx. 4.6 crores) drawn July 14th, 2002 and No. SM 18 for USD 1,095,070 (approx. 5 crores) drawn July 14, 2002. It is submitted that these bills of exchange were from the same series as the bill of exchange drawn by the applicant and accepted by Mr. S.C. Baek (accused no. 6) that is now the subject of the criminal case filed at Ghaziabad by the complainant/respondent. These bills were endorsed to HSBC Bank in London and were duly and legally paid by accused number 1 under instructions from the office of the petitioner/accused under whose orders other set of bills amounting

to USD 3.6 million (16.2 crores) had been paid by accused no. 1 as indicated in para 11 above. The transfer instructions were duly signed jointly by accused no. 5, the Managing Director of accused no. 1 alongside accused Mr. S.C. Baek. The documents including the bills of exchange, and the instructions to remit are money are collectively filed and marked as Annexure A-10……..

It is quiet apparent that had the bills really been part of a criminal enterprise, as alleged, no corporation big or small would voluntarily pay out without protest or demur, these sums to the tune of approximately 18 crores to Bankhaus Wolbern in Germany and 21.8 crores to HSBC in Dubai. It would be pertinent to mention here that the bills to Bankhaus Wolbern were paid in August 2002 almost 18 months before the police complaint was filed in Dubai on January 7th, 2004 against the applicant and accused no. 6, Mr. S.C. Baek who continued in his job as Financial Controller with accused no. 1 right until Dec. 2003 i.e. sixteen (16) months after the bills were paid to Bankhaus Wolbern by accused no. 5 the Managing Director of accused no. 1." (the term applicant in the extract, is a reference to Sky Impex Limited; and the term petitioner/ accused, is a reference to the appellants).

Even though it was wholly unnecessary for us to examine, at the present juncture, the involvement or the culpability of the appellants herein, in the background of the accusations levelled by JCE Consultancy, and the supporting stance of Sky Impex Limited, we are of the view, that even the pleadings before us, prima facie demonstrate the connectivity of the appellants, with the foundational basis expressed in the complaint. We are, therefore, satisfied, at the present juncture, that it is undesirable to exculpate the appellants from the proceedings initiated by JCE Consultancy before the VIIth Additional Chief Judicial Magistrate, Ghaziabad. Needless to mention, that the issue

under reference may be reagitated, after evidence has been produced by the rival parties before the trial court.

22. The fourth contention advanced at the hands of the learned counsel for the appellants was aimed at demonstrating; firstly, that the charges, as have been depicted in the summoning order, were not made out; secondly, that the appellants herein were functionaries of a company, and therefore, per se could not be made vicariously liable for offences emerging out of actions allegedly taken in furtherance of the discharge of their responsibilities towards the company; and thirdly, that none of the appellants had any concern whatsoever (even as functionaries of the concerned company), with the allegations levelled by the complainant. To the credit of the learned counsel representing the appellants, we must place on record, that reliance was placed on legal precedent, to substantiate the aforesaid submissions. We are however of the view, that it is not necessary for us at the present juncture to deal with any of the aforesaid submissions, in view of the legal position expressed by this Court in its recent judgment in Iridium India Telecom Limited vs. Motorola Incorporated and others, (2011) 1 SCC 74, wherein while examining a matter similar to the one in hand, this Court examined at great length, not only the scope of interference under Section 482 of the Code of Criminal Procedure (including that under Articles 226 and 227 of the Constitution of India), but also, the culpability of a body corporate/company, including its functionaries, in respect of criminal charges. The only difference between the present controversy, and the one adjudicated upon by this Court in Iridium India Telecom Limited's case (supra) is, that while in the present controversy the accused have approached this Court, consequent upon the denial of reliefs sought from the High Court; in Iridium India Telecom Limited's case (supra) the claim raised by the accused had been accepted by the High Court, whereupon, the complainant had approached this Court. The submissions which came to be dealt with by this Court in Iridium India *Telecom Limited's* case (supra), at the behest of

the complainant party, are summarized in paragraph 23, which is being reproduced hereunder:-

> **"23.** The submissions made by Mr Jethmalani although very elaborate, may be summed up as follows:
>
> (*i*) The power to quash a criminal complaint that too at the stage of cognizance, is an extreme power, which must be exercised very sparingly and with abundant caution; that too in the rarest of rare cases.
>
> (*ii*) In exercise of its power under Section 482, the High Court has to consider the complaint as a whole, without examining the merits of the allegations i.e. genuineness of the allegations is not to be examined at this stage.
>
> (*iii*) The complaint is not required to verbatim reproduce the legal ingredients of the offence. If the necessary factual foundation is laid in the complaint, proceedings should not be quashed.
>
> (*iv*) Quashing of a complaint is warranted only where the complaint is so bereft of even basic facts which are absolutely necessary for making out an offence; that it would be a miscarriage of justice to permit the proceedings to continue.
>
> (*v*) In support of the aforesaid submissions, Mr Jethmalani has relied on the following judgments of this Court: *Nagawwa v. Veeranna Shivalingappa Konjalgi* (1976) 3 SCC 736, *MCD v. Ram Kishan Rohtagi* (1983) 1 SCC 1, *Dhanalakshmi v. R. Prasanna Kumar* 1990 Supp. SCC 686 and *State of Haryana v. Bhajan Lal* 1992 Supp.(1) SCC 335."

In paragraphs 24 to 30, this Court in *Iridium India Telecom Limited's* case (supra) noticed the facts pertaining to the controversy, and the emerging legal technicalities canvassed

at the hands of the appellants. In paragraph 31 to 37, this Court recorded the response thereto, at the behest of the accused. Thereupon, this Court in *Iridium India Telecom Limited's* case (supra) made the following observations in paragraph 38 :-

> **"38.** We have considered the submissions made by the learned Senior Counsel. A bare perusal of the submissions would be sufficient to amply demonstrate that this cannot be said to be an "open and shut" case for either of the parties. There is much to be said on both sides. The entire scenario painted by both the sides is circumscribed by "ifs" and "buts". A mere reading of the 1992 PPM would not be sufficient to conclude that the entire information has been given to the prospective investors. Similarly, merely because there may have been some gaps in the information provided in the PPM would not be sufficient to conclude that the respondents have made deliberate misrepresentations. In such circumstances, we have to examine whether it was appropriate for the High Court to exercise its jurisdiction under Section 482 CrPC to quash the proceedings at the stage when the Magistrate had merely issued process against the respondents."

In paragraphs 39 to 51, this Court examined the parameters, of the scope of exercise of jurisdiction in proceedings initiated to quash criminal charges/proceedings, under Section 482 of the Code of Criminal Procedure (and/or under Articles 226 or 227 of the Constitution of India). In this behalf, reliance was placed on past precedent including the decision rendered by this Court in State of Haryana vs. Bhajan Lal 1992 Supp.(1) SCC 335, wherein this Court inter alia held as under:-

> "102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and

reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(*1*) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(*2*) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(*3*) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(*4*) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(*5*) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(*6*) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(*7*) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice."

While dealing with the various judgments rendered by this Court on the subject, reference was also made to the decision in *M.N. Ojha vs. Alok Kumar Srivastav,* (2009) 9 SCC 682. In *M.N. Ojha's* case (supra) similar views as in *Bhajan Lal's* case (supra) came to be recorded in the following words :

"*25*. Had the learned SDJM applied his mind to the facts and circumstances and sequence of events and as well as the documents filed by the complainant himself along with the complaint, surely he would have dismissed the complaint. He would have realised that the complaint was only a counterblast to the FIR lodged by the Bank against

the complainant and others with regard to the same transaction.

* * *

27. The case on hand is a classic illustration of non-application of mind by the learned Magistrate. The learned Magistrate did not scrutinise even the contents of the complaint, leave aside the material documents available on record. The learned Magistrate truly was a silent spectator at the time of recording of preliminary evidence before summoning the appellants.

28. The High Court committed a manifest error in disposing of the petition filed by the appellants under Section 482 of the Code without even adverting to the basic facts which were placed before it for its consideration.

29. It is true that the Court in exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure cannot go into the truth or otherwise of the allegations and appreciate the evidence if any available on record. Normally, the High Court would not intervene in the criminal proceedings at the preliminary stage/when the investigation/enquiry is pending.

30. Interference by the High Court in exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure can only be where a clear case for such interference is made out. Frequent and uncalled for interference even at the preliminary stage by the High Court may result in causing obstruction in the progress of the inquiry in a criminal case which may not be in the public interest. But at the same time the High Court cannot refuse to exercise its jurisdiction if the interest of justice so required where the allegations made in the FIR or complaint are so absurd and inherently improbable on the

basis of which no fair-minded and informed observer can ever reach a just and proper conclusion as to the existence of sufficient grounds for proceeding. In such cases refusal to exercise the jurisdiction may equally result in injustice more particularly in cases where the complainant sets the criminal law in motion with a view to exert pressure and harass the persons arrayed as accused in the complaint."

In dealing with the issue under reference, this Court in *Iridium India Telecom Limited's* case (supra) also examined the scope of a body corporate/company being proceeded against in criminal cases, on the canvassed premise, that no mens rea could be attributed to them, and as such, criminal action could not be taken against them. For the said purpose reference was made to the legal position on the subject prevailing in the United Kingdom, the United States of America and Canada, and thereupon, this Court dealt with the declaration of the legal position on the subject, at the hands of this Court. Whereupon, its conclusion was recorded in paragraph 66 as under :

> **"66.** These observations leave no manner of doubt that a company/corporation cannot escape liability for a criminal offence merely because the punishment prescribed is that of imprisonment and fine. We are of the considered opinion that in view of the aforesaid judgment of this Court, the conclusion reached by the High Court that the respondent could not have the necessary mens rea is clearly erroneous."

In sum and substance, all the pleas canvassed on behalf of the complainant (already extracted above) were upheld by this Court in *Iridium India Telecom Limited's* case (supra).

23. Through the complaint, as also, in the statement of Shaikh Allauddin Paker Maiddin recorded under Section 200 of the Code of Criminal Procedure, JCE Consultancy has categorically asserted, that the appellants herein were jointly or severally liable to honour the bill of exchange dated 1.2.2002,

which had been endorsed in its (JCE Consultancy's) favour. In order to demonstrate the appellant's liability, a series of documents were also placed before the Trial Court. The VIIth Additional Chief Judicial Magistrate, having considered the said material, issued the summoning order. The culpability of the appellants herein would obviously depend upon the evidence produced before the jurisdictional Court. It can definitely be stated from the pleadings before this Court, that one of the accused, namely, Sky Impex Limited, has totally supported the cause of the complainant-JCE Consultancy, through its written reply. Relevant extracts of the said reply have already been reproduced hereinabove (during our deliberations on the third contention). The situation which emerges, in the case in hand, is similar to the one encountered by this Court in *Iridium India Telecom Limited's* case (supra), wherein, this Court on being confronted with the factual and legal position was constrained to record, that the scenario painted by both the sides is circumscribed by "ifs" and "buts". Herein also, factual details emerging from the evidence to be produced by the rival parties, would be necessary to project a clear picture. It is only thereafter, that a rightful decision on this issue canvassed will be possible. As of now we are satisfied, that the factual foundation/background of the acts of omission and commission presented by the complainant is specific and categoric. We are also satisfied that the allegations levelled by the complainant, fully incorporate all the basic facts which are necessary to make out the offences whereunder the impugned summoning order dated 12.1.2005 has been passed. The instant controversy does not suffer from any of the impairments referred in *Iridium India Telecom Limited's* case (supra). Accordingly, we leave it open to the appellants to canvass the legal issues, as were canvassed before us, before the trial court. After the rival parties have led their evidence, the trial court will return its finding thereon, in accordance with law, without being influenced by any observations made on the merits of the controversy hereinabove, or hereafter.

24. The last contention advanced at the hands of the learned counsel for the appellants, was based on the assertion, that the complainant – JCE Consultancy had filed a civil suit bearing Commercial Action No.482 of 2005 before the Court of First Instance, Dubai, praying for the recovery of the amount depicted in the bill of exchange dated 1.2.2002. It was submitted, that in the pleadings of the aforesaid civil suit, there was no allegation against the appellants herein, depicting their criminal involvement. It was the contention of the learned counsel for the appellants, based on the averments made in ground D (of the petition for special leave to appeal) filed before this Court, that JCE Consultancy had lead evidence in the aforesaid civil suit, whereupon, the said civil suit was dismissed on 24.9.2008. It is further asserted, that the Court of First Instance, Dubai, while dismissing the civil suit had held, that the bill of exchange dated 1.2.2002 had nothing to do with the alleged supply of goods, by the complainant-JCE Consultancy to Sky Impex Limited. It was also sought to be asserted, that the said bill of exchange was merely an accommodation bill, to enable the complainant-JCE Consultancy "to raise money, and to use the bill of exchange as a collateral". It was further submitted, on behalf of the appellants, that the liability emerging out of the bill of exchange dated 1.2.2002, can either have civil consequences or criminal liability. The fact that the aforesaid civil suit came to be filed at the behest of JCE Consultancy, according to learned counsel, is an acknowledgement at the hands of the complainant (JCE Consultancy), that the liability emerging out of the bill of exchange dated 1.2.2002 was civil in nature. As such, it was asserted at the hands of the learned counsel for the appellants, that the very initiation of criminal proceedings by the complainant, against the appellants herein, was misconceived. It is also contended, that the filing of the criminal complaint by JCE Consultancy, must be deemed to be an act emerging out of extraneous considerations, so as to browbeat the appellants herein, and thereby, compel them to succumb to the illegal demands of the complainant-JCE Consultancy. Additionally, it was submitted by the learned

counsel for the appellants, that in the civil claim raised by JCE Consultancy before the Court of First Instance, Dubai, from amongst the appellants, only Samsung, Dubai, was impleaded as a defendant, whereas, no action was initiated even for the recovery of the dues under the bill of exchange dated 1.2.2002, against the other four appellants herein. Based on the aforesaid factual and legal submissions, it was the contention of the learned counsel for the appellants, that criminal prosecution initiated by the complainant-JCE Consultancy against the appellants herein, is liable to be quashed.

25. In response to the aforesaid averments made on behalf of the appellants, it was the contention of the learned counsel for the respondents that the civil proceeding initiated by JCE Consultancy in the Court of First Instance, Dubai, is still pending in appeal. In this behalf, it was pointed out, that the Dubai Appeals Court passed an order dated 21.7.2010 directing the reattachment of assets of the defendants in the aforesaid civil suit, in the sum of Dhs.30 million (approximately Rs.45 crores). A copy of the aforesaid order dated 21.7.2010 has been appended to the reply filed by Sky Impex Limited (to the averments made in the petition for special leave to appeal) as Annexure A-11. It was submitted, that consequent upon the passing of the order dated 21.7.2010, the Dubai Judicial Administration executed the attachment of Dhs.30 million. In order to substantiate the aforesaid factual position, Sky Impex Limited has appended to its reply Annexure A-12, a bank guarantee dated 22.9.2010, issued by Emirates Bank International, on behalf of Samsung Dubai, in favour of JCE Consultancy. It is also pointed out by the learned counsel for the respondents, that an act of omission or commission at the hands of a party, may lead to civil, as well as, criminal consequences. In this behalf, learned counsel for the respondents also invited our attention to the order passed by the Dubai Appeals Court dated 21.7.2010, wherein, it was pointed out, that there was no connection between the criminal action brought out by JCE Consultancy (in the proceedings

initiated by it, before the VIIth Additional Chief Judicial Magistrate, Ghaziabad) and the civil suit filed by JCE Consultancy (before the Court of First Instance, Dubai). It was also the contention of the learned counsel for the respondents, that the civil liability, in the instant case, was raised as against the eventual purchaser of the goods/product (Samsung, Dubai), in lieu of the goods/product supplied by the complainant-JCE Consultancy, which had passed onto the purchasers under the agreement dated 1.12.2001. Accordingly, the civil liability was only raised as against Samsung, Dubai. However, insofar as the criminal liability is concerned, Samsung Dubai being one of the subsidiary companies of Samsung, South Korea, it was allegedly under the overall control exercised by Samsung, South Korea. Samsung, South Korea, according to the complainant, was instrumental in the eventual decision taken by Samsung, Dubai, to deny the passing of the reciprocal monetary consideration, for the goods supplied under the agreement dated 1.12.2001. This, according to the respondents, has been the categorical stance of JCE Consultancy in the criminal complaint, as also, in the pre-summoning evidence recorded before the VIIth Additional Chief Judicial Magistrate, Ghaziabad under Section 200 of the Code of Criminal Procedure. These allegations made by JCE Consultancy, are supported by documents furnished to the summoning court. The aforesaid factual position has also been endorsed by Sky Impex Limited, before this Court. According to the learned counsel for the respondents, the culpability of the appellants before this Court, in a series of similar actions, clearly emerges even from documents placed on record of the instant case, by Sky Impex Limited. As such, it is submitted, that the respondents have per se repudiated all the submissions advanced on behalf of the appellant, obviously subject to the evidence which rival parties will be at liberty to adduce before the trial court.

26. We have given our thoughtful consideration to the last contention advanced at the hands of the learned counsel for

the appellants. We are of the considered view, that in offences of the nature contemplated under the summoning order, there can be civil liability coupled with criminal culpability. What a party has been deprived of by an act of cheating, can be claimed through a civil action. The same deprivation based on denial by way of deception, emerging from an act of cheating, would also attract criminal liability. In the course of criminal prosecution, a complainant cannot seek a reciprocal relief, for the actions of the accused. As in the instant case, the monetary consideration under the bill of exchange dated 1.2.2001, cannot be claimed in the criminal proceedings, for that relief the remedy would be only through a civil suit. It is therefore not possible for us to accept, that since a civil claim has been raised by the complainant-JCE Consultancy, based on the alleged breach of the agreement dated 1.12.2001, it can be prevented from initiating proceedings for penal consequences for the alleged offences committed by the accused under the Indian Penal Code. It would not be appropriate for us, to delve into the culpability of the appellants at the present juncture, on the basis of the factual position projected by the rival parties before us. The culpability (if at all) would emerge only after evidence is adduced by the rival parties before the trial court. The only conclusion that needs to be drawn, at the present juncture is, that even on the basis of the last submission canvassed on behalf of the appellants, it is not possible to quash the summoning order at this stage. In the aforesaid view of the matter, it is left open to the appellants to raise their objections, if they are so advised, before the trial court. The trial court shall, as it ought to, adjudicate upon the same in consonance with law, after allowing the rival parties to lead evidence to substantiate their respective positions.

27. For the reasons recorded hereinabove, we find no merit in the instant appeal. The same is accordingly dismissed.

N.J. Appeal dismissed.

ALAGUPANDI @ ALAGUPANDIAN
v.
STATE OF TAMIL NADU
(Criminal Appeal No. 1315 of 2009)

MAY 8, 2012

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

Penal Code, 1860:

s.302 – Accused committing murder of his step mother – Conviction and sentence of life imprisonment awarded by trial court, affirmed by High Court – Held: The prosecution case is to a very limited extent, based upon circumstantial evidence and largely there exists ocular and documentary evidence to support the prosecution case – The evidence of the brother of the deceased, whose presence in the house was natural, supported by evidence of the witnesses, medical evidence, the recovery weapon of crime made on disclosure statement of accused, the serological reports and the motive for the crime, lead to the irresistible conclusion that the accused had committed the crime – The concurrent findings of fact recorded by the courts below based on proper appreciation of evidence clearly prove the guilt of the accused – In the circumstances, there is no reason to interfere with the finding of guilt as well as the order of sentence – Circumstantial evidence.

Criminal Law:

Motive – Existence of a motive for committing a crime is not an absolute requirement of law but it is always a relevant factor, which will be taken into consideration by the courts as it will render assistance to the courts while analysing the prosecution evidence and determining the guilt of the accused.

Evidence Act, 1872:

s.27 – Disclosure statement of accused while in police custody leading to recovery of weapon of crime – Accused also stating that he stabbed her step mother – Held: Except the part of the disclosure statement of the accused which led to the recovery of the knife, the rest of the statement of the accused would be inadmissible in evidence as per s. 27.

Evidence:

Evidence of sole witness – Held: Court can record a finding of guilt while entirely or substantially relying upon the statement of the sole witness, provided his statement is trustworthy, reliable and finds corroboration from other prosecution evidence.

Witnesses:

Child witnesses – Stated to have seen their mother being murdered – Trial court after putting certain questions to them, did not permit recording of their statements – Held: It has not been claimed by either party that these two child witnesses should have been examined and that their non-examination has caused any prejudice to any of the parties in the appeal.

Related witness – Evidence of deceased's brother – Every witness, who is related to the deceased cannot be said to be an interested witness who will depose falsely to implicate the accused – In the instant case, the presence of the witness at the house of his sister is natural – His evidence is worthy of credence.

The appellant was prosecuted for committing the murder of his step-mother. The prosecution case was that the deceased, after the death of her husband and father of the accused, was enjoying the properties left by him and collecting the rent from the properties, and because of this there used to be quarrels between her

and the accused; that on the night of the incident, when the deceased was sleeping with her two sons, the accused entered the house with a knife and caused injuries to her which resulted in her death on the spot; that P.W.1, the brother of the deceased, who was sleeping outside the house, heard the screams of the victim and when he entered the house, he saw the accused coming out with a knife in his hand. He found his sister lying in a pool of blood. He went to the village headman and also to the Sarpanch. He was directed to go to the police station where he lodged the FIR. The accused also made a confessional statement on the basis of which the weapon of crime, viz., a blood stained knife and a blood stained shirt were recovered. The trial court convicted the accused u/s 302 IPC and sentenced him to imprisonment for life. The High Court upheld the conviction and the sentence.

In the instant appeal filed by the accused, it was contended for the appellant that P.W.1 being the interested witness and himself an accused in another murder case, his evidence should not have been relied upon by the courts below; and that there was no corroboration to the statement of PW1, a number of witnesses had turned hostile and there existed serious doubt as to the presence of PW1 at the place of occurrence.

Dismissing the appeal, the Court

HELD: 1.1. According to PW-1 and as per the case of the prosecution, the occurrence had taken place after 12 a.m./midnight on 13/14.1.2002. The FIR was registered at 0130 hrs. on 14.1.2002. The presence of PW1 at the house of his sister can hardly be doubted. He saw the accused running away after stabbing his sister and met the Sarpanch of the village and then the Police Officer within a short period of occurrence, which facts have

been proved from the evidence on record. Keeping in view the close relationship between the parties, there is no reason to disbelieve PW-1 in this regard. In fact any suggestion of this kind was not even put to him in the cross-examination on behalf of the accused. [para 9-10] [352-E-H; 353-C-D]

1.2. PW-1 also stated that on hearing the noise, the neighbors 'RM', 'R', 'M', 'P' and 'MT' also reached the place of occurrence. 'RM' and 'M' had not been examined while 'R', examined as PW-4, and 'MT' as PW-2, were declared hostile. 'P' was examined as PW-3 and he stated that he was living near the house of the deceased who had cried loudly and then he went and saw that some people had come there and the deceased was bleeding from her injuries. The police had come and they collected the earth from the spot and he signed Exts. P-4 and P-5. Nothing adverse came on record in the cross-examination of this witness. PW-3, thus, has not only supported the case of prosecution, but even provided due corroboration to the statement of PW-1. [para 11-13] [353-D-G]

1.3. When the accused was taken into custody, he made a statement on 17.1.2002 and narrated the complete history of his family and about his bitter relationship with the deceased. He stated that he had stabbed the deceased. He also made a disclosure statement upon which the weapon of crime, i.e. the knife, M.O.6, was recovered.Except the part of the disclosure statement of the accused which led to the recovery of the knife, the rest of the statement of the accused would be inadmissible in evidence as per s. 27 of the Evidence Act, 1872. The courts, relying upon the admissible part of the statement of the accused, held that the recovery of knife had been effected in accordance with law. [para 13,14 and 20] [353-G; 354-A-B-D; 362-F]

2.1. It is incorrect to say that PW1 is the sole and interested witness and, therefore, his statement cannot be relied upon by the court for returning the finding of conviction. It is a settled principle of law that the court can record a finding of guilt while entirely or substantially relying upon the statement of the sole witness, provided his statement is trustworthy, reliable and finds corroboration from other prosecution evidence. The statement of PW1 inspires confidence and is truthful and reliable. His statement does not suffer from any material contradictions. On the other hand, it gives a correct version of what this witness saw. He did not claim to have witnessed the scene of stabbing of the deceased by the accused. He only stated that the crime was witnessed by the two minor children of the deceased and he had merely seen the accused running out from the house of the deceased with a knife in his hand. Where a sole witness has stated exactly what he had actually seen and the said statement otherwise fits into the case of the prosecution and is trustworthy, the court normally would not be inclined to reject the statement of such witness. [para 16-17] [356-B-D; 358-B-D]

Govindaraju @ Govinda v. State of Sriramapuram P.S. & Anr., **2012 (4) SCC 722 – relied on.**

2.2. It also cannot be said that the statement of PW-1 cannot be relied upon for the ground that he is an interested witness. The presence of PW1 at the house of his sister is natural. He was working as a cleaner and was staying with his sister in the same village. He was sleeping outside the house of the deceased and went towards the house upon hearing her screams. Every witness, who is related to the deceased cannot be said to be an interested witness who will depose falsely to implicate the accused. In the instant case, the accused is also related to PW1 and there could be no reason for

PW1 to falsely implicate him. The statement of PW1 is worthy of credence. [para 17-18] [358-E-G]

Mano Dutt & Anr. v. State of U.P. **2012 (4) SCC 79 – relied on.**

3.1. Importantly, the injuries found on the person of the deceased have been recorded in the post-mortem report Ext. P.12 by PW-14, the doctor who conducted the post-mortem upon the body of the deceased. He opined that the deceased would have died due to shock and haemorrhage because of the injuries sustained by her. According to him, he had found multiple injuries on the person of the deceased and that too, at the vital parts as noted in the post-mortem report. This clearly shows that the accused had come to the house of the deceased with the definite intention to kill her, and by inflicting the multiple injuries on vital parts of her body, ensured that she died instantaneously. [para 4, 14 and 19] [351-B-C; 354-D; 361-F-G; 362-A-B]

3.2. There appears dual motive for the accused to commit the crime. Firstly, the deceased was his step-mother, whose behaviour towards him was not acceptable to the accused. Secondly, the entire properties left by the father of the accused and husband of the deceased, were being enjoyed by the deceased herself. Existence of a motive for committing a crime is not an absolute requirement of law but it is always a relevant factor, which will be taken into consideration by the courts as it will render assistance to the courts while analysing the prosecution evidence and determining the guilt of the accused. [para 19] [362-B-E]

3.3. Further, it has come in evidence in the statement of the Investigating Officer, PW-16, that the blood-stained earth was collected from the place of occurrence and was subsequently sent for chemical examination to the

Forensic Science Laboratory. According to PW-16, the accused took the police to the place where he got recovered the bloodstained knife M.O.6, and the bloodstained shirt worn by him, M.O.7, hidden in the bushes. They were sent to the Regional Forensic Science Laboratory. The serological report, Ext. P-9, with regard to MO-7 (the shirt) showed that it contained human blood of group 'A'. It has come in evidence that the blood group of the deceased was 'A'. The same blood group was also found on the saree, jacket and gunny bag which were seized by the Investigating Officer from the place of occurrence. This clearly connects the accused with the commission of crime. This is a very material and significant piece of evidence and was put to the accused during his statement u/s 313 CrPC, but except vague denial, he said nothing more. This is clinching evidence against the accused which fully supports the case of the prosecution. [para 22-23] [363-B-F]

3.4. The prosecution case is, to a very limited extent, based upon circumstantial evidence and largely there exists ocular and documentary evidence. The statement of PW1 supported by the statements of PW-11, PW 16, PW6, PW14 and the recovery of the weapon of crime as per Ext M.O. 6, upon disclosure statement of the accused, as well as the report of the chemical examination and the serology report, Exts.8 and 9, respectively, complete the chain of event and clearly establish the material facts that lead to the irresistible conclusion that the accused had committed the murder of his step-mother. The concurrent findings of fact recorded by the courts below, based upon proper appreciation of evidence clearly prove the guilt of the accused. In these circumstances, there is no reason to interfere with the finding of guilt as well as the order of sentence. [para 15, 20, 27 and 28] [355-H; 356-A; 362-F; 364-H; 365-A-B]

4. PW-7 and PW-8 are said to be child witnesses who had seen the occurrence. They are sons of the deceased. When they appeared before the trial court, it put certain questions to them to form an opinion whether they would be able to depose, and did not permit recording of their statements. Legality or correctness of this direction of the trial court was not questioned either by the State or by the accused in their appeal before the High Court and even before this Court. It has not been claimed by either party that these two child witnesses should have been examined and that their non-examination has caused any prejudice to any of the parties in the appeal. [para 23, 24 25-26] [363-F-G; 364-E-F]

Dattu Ramrao Sakhare v. State of Maharashtra **(1997) 5 SCC 341 and** *Panchhi v. State of U.P.* **1998 (1) Suppl. SCR 40 = (1998) 7 SCC 177 – referred to.**

Case Law Reference:

2012 (4) SCC 722	**relied on**	**Para 16**
2012 (4) SCC 79	**relied on**	**Para 18**
(1997) 5 SCC 341	**referred to**	**para 23**
1998 (1) Suppl. SCR 40	**referred to**	**para 23**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1315 of 2009.

From the Judgment & Order dated 28.02.2007 of the High Court of Madras, Madurai Bench in Criminal Appeal (MD) No. 47 of 2004.

B. Sridhar for the Appellant.

B. Balaji, M. Anbalagan for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The present appeal is directed against the judgment of the Madras High Court,

Madurai Bench dated 28th February, 2007, affirming the judgment of conviction and order of sentence dated 19th July, 2004 passed by the Principal Sessions Judge, Madurai holding the accused/appellant guilty of an offence under Section 302 IPC and awarding sentence of life imprisonment and also to pay a fine of Rs. 2,000/-, in default, to undergo rigorous imprisonment for one year.

2. The facts necessary for disposal of the appeal can be stated as follows:-

Tamilarasi, the deceased, was the second wife of one Karuppaiah. After the death of her husband, she was residing at Sikkandarchavadi and was enjoying the properties left by her deceased husband and collecting the rent from the properties. Accused Alagupandi is the son of Karuppaiah, from his first wife. Accused, after the death of his father, used to demand money from his step mother for which there used to be quarrel between them.

3. On the midnight of 13th / 14th January, 2002, when the deceased was sleeping with her two sons namely Prabakaran, PW7, and Vinothkumar, PW8, the accused entered into the house with a knife and caused injuries on her stomach, chest and thigh. Because of this assault, Tamilarasi died on the spot.

4. PW-1, P. Selvaraj, is the brother of the deceased and lived at Theni Village. He was staying with the deceased (his sister) and was working as a cleaner in the lorry. On the fateful day, he was sleeping on a rock stone outside the house when he heard the distressing cry of his sister. When he went inside the house, he saw the accused coming out of the house with a knife in his hand. The accused ran towards the western side. Thereupon, he went inside the house and saw his sister lying in a pool of blood. PW-1 then proceeded to the village headman and also to the village Panchayat President. Then, he was directed to go to the police station. He went to the police station, gave the complaint Ext. P-1 to Sub-Inspector of Police, PW-11. On the basis of this complaint, the Police

registered a case being Cr. No. 6/2002 under Section 448 and 302 IPC. The FIR Ext. P-10 was registered and sent to the Court. The Inspector of Police, PW-16 took up the investigation and proceeded to the scene of occurrence, made investigations in presence of the witnesses, prepared the Observation Mahazar Ext. P-4 and sketch, Ext. P-15. Thereafter, the dead body was sent for autopsy. Dr. Alavudeen, PW-14 attached to the Government Hospital, conducted the post mortem upon the body of the deceased and gave the post mortem report, Ext. P-12, wherein he opined that the deceased would have died due to shock and haemorrhage because of injuries sustained by her. Upon his arrest, the accused also made a confessional statement in presence of the witnesses vide Ext. P-17. On the basis of this statement, M.O.6., knife and M.O.7., blood stained shirt were also recovered vide Ext. P-18. All the material objects were sent for chemical examination by the forensic department which issued two certificates, Exts. P-8 and P-9, the chemical examination report and the Serological report, respectively.

5. It may be noticed at this stage itself that PW-7 and PW-8, the two minor children of the deceased had seen the incident, but their examination was not permitted by the trial court as is evident from the judgment of the trial court and the evidence produced before the Court.

6. The accused was committed to the Court of Sessions for trial under Sections 448 and 302 IPC and finally vide judgment dated 19th July, 2004, he was convicted and sentenced to life imprisonment and fine, as afore-noticed.

7. Upon appeal preferred by the accused, the High Court sustained the findings of the Trial Court and dismissed the appeal of the accused vide its judgment dated 28th February, 2007, giving rise to the present appeal.

8. The learned counsel appearing for the appellant has contended that :-

(a) PW-1 is the sole witness on whose statement the courts have returned the finding of conviction against the accused. PW-1 being an interested witness and himself being an accused in another murder case, it is not safe to rely upon the statement of such witness as, it is neither reliable nor truthful. Thus, the judgment of conviction is liable to be set aside.

(b) The courts below have failed to appreciate the evidence in its correct perspective. The prosecution has not been able to prove its case beyond reasonable doubt. A number of witnesses had turned hostile and there is no corroboration to the statement of PW-1. Even the confessional statement recorded by the police is inadmissible. There exists serious doubt as to the very presence of PW-1 at the place of occurrence. Resultantly, the appellant is entitled to the benefit of doubt.

9. First and foremost, we may deal with the contention as to the presence of PW-1 at the place of occurrence and whether the statement of the said witness is reliable and can form the basis of conviction of the accused. According to PW-1 and as per the case of the prosecution, the occurrence had taken place after 12 a.m./midnight on 13th/14th January, 2002. The FIR, Ext. P-10 was registered on the basis of the statement of PW-1. As per the details given in the said Exhibit, it was registered at 0130 hrs. on 14th January, 2002. Thus, at best, there is nearly one hour gap between the time of occurrence and registration of the FIR. The presence of PW1 at the house of his sister can hardly be doubted. If PW1 was not present there, then it could not have been possible for him to see the accused running away after stabbing his sister and also he could not have met the Sarpanch of the village and then the Police Officer within a short period of occurrence, which facts have been proved from the evidence placed on record. PW-1

stated the entire facts before PW-11, the Sub-Inspector, whereupon the FIR was registered. According to PW-1, he was staying at the house of his sister and was working as a cleaner in a lorry. Keeping in view the close relationship between the parties, we do not see any reason to disbelieve PW-1 in this regard. Firstly, there is no delay in lodging the FIR and even the delay of 1 and 1½ hour is fully explained by the conduct of PW-1.

10. As far as his presence at the place of occurrence is concerned, the learned counsel appearing for the appellant has not been able to refer to any evidence that could create even a reasonable doubt as to the presence of PW-1 at the place of occurrence. In fact when PW-1 was cross-examined by the accused, any suggestion of this kind was not even put to him in the cross-examination.

11. PW-1 also stated that on hearing the noise, he ran towards the house of his sister and thereupon the neighbors Rajammal, Radha, Murugan, Palanimuthu and Muthaiah had also come there. It is correct that Rajammal and Murugan had not been examined by the police, while Radha, PW-4 and Muthaiah, PW-2 did not speak favorably for the prosecution and were declared hostile with the leave of the court.

12. Palanimuthu, was examined as PW-3 and he stated that he was living near the house of Tamilarasi, the deceased. She had cried loudly and then he went and saw that some people had come there and the deceased was bleeding from her injuries. The police had come and they collected the earth from the spot and he signed Exts. P-4 and P-5.

13. Nothing adverse came on record in the cross-examination of this witness. PW-3, thus, has not only supported the case of prosecution, but even provided due corroboration to the statement of PW-1. When accused was taken into custody, he made a statement on 17th January, 2002 and stated that when he was five years old, there was a quarrel between

his mother and father and his father had brought him to Sikkandarchandi. When he was 10 years old, his father contracted a second marriage with the deceased. He stated the complete history of his family and about his bitter relationship with the deceased. He also stated that he had stabbed the deceased. Then, he proceeded to say that he had hidden the knife with which he had committed the offence on the side of the local tank situated at Sikkandarchavadi and he could get the same recovered. In furtherance to this statement, the knife, M.O.6, was recovered. Out of the witnesses to this confession statement, one attesting witness, P.Rajendran, was not examined, however, the other witness M. Solaimuthu, was examined as PW-15.

14. The courts, relying upon the admissible part of the statement of the accused, held that the recovery of knife had been effected in accordance with law. Importantly, we may notice the injuries found on the person of the deceased by Dr. Alavudeen PW-14, who conducted the post-mortem upon the body of the deceased. The injuries on the person of the deceased were described by the said witness as follows:-

> "1. An oblique stab wound on left breast 5 cm below and medical to the left nipple 3 cm x 1 cm. both ends pointed with regular margine. On dissection the wound passes obliquely backwards and upwards and inwards, piercing the underlying intercostals muscles, vessels and nerves and left ventricle 2 cm x 0.5 cm entering into cavity.
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> 2. An oblique stab wound on left hyppchondrium 5 cm below the left costal margin 4 cm x 1 cm x entering into abdominal cavity through which the loops of small bowel found protruding out. Both ends pointed with regular margin. On dissection the wound passes obliquely, backwards and inwards.
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> 3. An oblique stab wound 3 cm x 1 cm x entering into

abdominal cavity on the right side of upper abdomen 4 cm below the right costal margin through which loops of small bowel found protruding out, both ends pointed with regular margins. On dissection the wound passes obliquely downwards, backwards and medially.

4. A vertical oblique stab wound 3 cm x 1 cm on the outer aspect of the left thigh 13 cm from left anterior superior liiac spine. Both ends pointed, margins regular. On dissection the wound passes backwards, medially and upwards, piercing the underlying muscles, nerves and vessels and ends as a point.

5. An oblique stab wound on the back of left side of abdomen 3 cm above the left ilisc crest 3 cm x 1 cm. both ends pointed with regular margins. On dissection: the wound passes upwards, forwards and medially piercing the underlying tissues, entering the peritoneal cavity.

6. An oblique out injury on the back of left forearm 6 cm above the wrist 3 cm x 1 cm x bone deep cutting the underlying muscles, vessels, nerves and bones.

7. An oblique out injury on the front of left forearm 10 cm above the wrist 8 cm x 2 cm x bone deep cutting the underlying muscles, vessels, nerves and bones.

8. An oblique out injury on front of left forearm, 3 cm below injury No. 7 – 8 cm x 2 cm x bone deep cutting the underlying muscles, vessels and nerves."

15. The case of the prosecution clearly indicates that the present case is, to a very limited extent, based upon circumstantial evidence and largely there exists ocular and documentary evidence to support the case of the prosecution.

The statements of PW1, PW6, PW14 as well as the report of the chemical examination and the serology report, Exts.8 and 9, respectively, clearly establish the material facts that lead to the irresistible conclusion that the accused had committed the murder of his step-mother, Tamilarasi.

16. We are not impressed with the contention that PW1 is the sole and interested witness and, therefore, his statement cannot be relied upon by the Court for returning the finding of conviction. It is a settled principle of law that the Court can record a finding of guilt while, entirely or substantially, relying upon the statement of the sole witness, provided his statement is trustworthy, reliable and finds corroboration from other prosecution evidence. In the case of *Govindaraju @ Govinda v. State of Sriramapuram P.S. & Anr.,* [Crl. Appeal No. 984 of 2007 decided on March 15, 2012], this Court held as under:

"11. Now, we come to the second submission raised on behalf of the appellant that the material witness has not been examined and the reliance cannot be placed upon the sole testimony of the police witness (eye-witness). It is a settled proposition of law of evidence that it is not the number of witnesses that matters but it is the substance. It is also not necessary to examine a large number of witnesses if the prosecution can bring home the guilt of the accused even with a limited number of witnesses. In the case of *Lallu Manjhi and Anr. vs. State of Jharkhand* (2003) 2 SCC 401, this Court had classified the oral testimony of the witnesses into three categories:-

a. Wholly reliable;

b. Wholly unreliable; and

c. Neither wholly reliable nor wholly unreliable.

12. In the third category of witnesses, the Court has to be cautious and see if the statement of such witness is corroborated, either by the other witnesses or by other

documentary or expert evidence. Equally well settled is the proposition of law that where there is a sole witness to the incident, his evidence has to be accepted with caution and after testing it on the touchstone of evidence tendered by other witnesses or evidence otherwise recorded. The evidence of a sole witness should be cogent, reliable and must essentially fit into the chain of events that have been stated by the prosecution. When the prosecution relies upon the testimony of a sole eye-witness, then such evidence has to be wholly reliable and trustworthy. Presence of such witness at the occurrence should not be doubtful. If the evidence of the sole witness is in conflict with the other witnesses, it may not be safe to make such a statement as a foundation of the conviction of the accused. These are the few principles which the Court has stated consistently and with certainty. Reference in this regard can be made to the cases of *Joseph v. State of Kerala* (2003) 1 SCC 465 and *Tika Ram v. State of Madhya Pradesh* (2007) 15 SCC 760. Even in the case of *Jhapsa Kabari and Others v. State of Bihar* (2001) 10 SCC 94, this Court took the view that if the presence of a witness is doubtful, it becomes a case of conviction based on the testimony of a solitary witness. There is, however, no bar in basing the conviction on the testimony of a solitary witness so long as the said witness is reliable and trustworthy.

13. In the case of *Jhapsa Kabari* (supra), this Court noted the fact that simply because one of the witnesses (a 14 years old boy) did not name the wife of the deceased in the fardbayan, it would not in any way affect the testimony of the eye-witness i.e. the wife of the deceased, who had given graphic account of the attack on her husband and her brother-in-law by the accused persons. Where the statement of an eye-witness is found to be reliable, trustworthy and consistent with the course of events, the conviction can be based on her sole testimony. There is

no bar in basing the conviction of an accused on the testimony of a solitary witness as long as the said witness is reliable and trustworthy."

17. In view of the settled position of law, we find that the statement of PW1 inspires confidence and is truthful and reliable. His statement does not suffer from any material contradictions. On the other hand, it gives a correct eye-version of what this witness saw. If PW1 intended to lie, nothing prevented him from saying that he was also an eye-witness to the scene of stabbing of the deceased by the accused. He only stated that this crime was witnessed by the two minor children of the deceased and he had merely seen the accused running out from the house of the deceased with a knife in his hand. Where a sole witness has stated exactly what he had actually seen and the said statement otherwise fits into the case of the prosecution and is trustworthy, the Court normally would not be inclined to reject the statement of such sole witness. Furthermore, it is contended that the statement of PW-1 cannot be relied upon by the Court also for the ground that he is an interested witness. This argument is equally without merit. The presence of PW1 at the house of his sister is natural. He was working as a cleaner and was staying with his sister in the same village. He was sleeping outside the house of the deceased and went towards the house upon hearing her screams. Every witness, who is related to the deceased cannot be said to be an interested witness who will depose falsely to implicate the accused. In the present case, the accused is also related to PW1 and there could be no reason for PW1 to falsely implicate the accused.

18. We have already discussed that the statement of PW1 is worthy of credence. In the case of *Mano Dutt & Anr. v. State of U.P.* [Crl. Appeal No. 77 of 2007 decided on 29th February, 2012], a Bench of this Court held that it is not the quantity but the quality of the evidence which would bring success to the case of the prosecution or give benefit of doubt to the accused.

Statement of every related witness cannot, as a matter of rule, be rejected by the Courts. This court, in the aforesaid case, held as under:

> "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.
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> 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."

19. It will now be appropriate to refer to the statement of PW14, the doctor, who performed the autopsy upon the body of the deceased. According to this witness, he had found multiple injuries on the person of the deceased and that too, at the vital parts. We have already noticed the injuries caused, in some detail. The accused inflicted injury on the breast of the deceased wherein it pierced into the left ventricle of the heart. Another stab injury was caused by him on the left side of the rib through which the samall intestine had protruded out. Still, another injury was caused on the right side of the rib through

which also the small intestine had come out. This is besides the injuries he caused on the left hip, wrist and stomach of the deceased. This clearly shows that the deceased had come to the house of the deceased with the definite intention to kill her. The accused, by inflicting these multiple injuries on vital parts of her body, ensured that she died instantaneously. There appears dual motive for the accused to commit the crime. Firstly, the deceased was his step-mother, whose behaviour towards him was not acceptable to the accused. Secondly, the entire properties left by the father of the accused and husband of the deceased, were being enjoyed by the deceased herself. Furthermore, every time the accused had to ask for money from the deceased and more often than not, she refused to give him the money. These circumstances emerging from the record clearly show reason for some kind of animosity and ill-will on the part of the accused towards the deceased. Existence of a motive for committing a crime is not an absolute requirement of law but it is always a relevant factor, which will be taken into consideration by the courts as it will render assistance to the courts while analysing the prosecution evidence and determining the guilt of the accused.

20. Statement of PW1, supported by the statements of PW11, PW6, PW14 and the recovery of the weapon of crime vide Exhibit M.O. 6, upon disclosure statement of the accused, completes the chain of events as stated in the case of the prosecution. Except the part of the disclosure statement of the accused which led to the recovery of the said knife, the rest of the statement of the accused would be inadmissible in evidence as per Section 27 of the Indian Evidence Act, 1872.

21. Still, there is another very vital aspect of the case of the prosecution on which the discussion is necessary. It has come in evidence in the statement of the Investigating Officer, PW-16, the Sub-Inspector who recorded the complaint of PW-1, PW-11 and the witness to the recovery, PW-6 that blood-stained earth was collected from the place of occurrence and

was subsequently sent for chemical examination to the Forensic Science Laboratory.

22. According to PW-16, after the arrest of the accused, the accused had taken the police to Sikkandarchavadi where he got recovered the wooden-handled bloodstained knife M.O.6, and the bloodstained shirt worn by him, M.O.7, hidden in the bushes. They were taken into custody by the Investigating Officer in presence of the attesting witnesses. The recovered items, along with blood stained blue, green and white check shirt which the accused was wearing at the time of commission of offence, were sent to the Director, Regional Forensic Science Laboratory, Madurai for examination vide Ext. P-7. The serological report, Ext. P-9, was submitted to the Court by the laboratory. This report provided the result of MO-7 (the said shirt) at serial No.8 of the report. As per the report, it contained human blood of group 'A'. It has come in evidence that the blood group of the deceased was 'A'. The same blood group was also found on the saree, jacket and gunny bag which were seized by the Investigating Officer from the place of occurrence. This clearly connects the accused with the commission of crime. This is a very material and significant piece of evidence and was put to the accused during his statement under Section 313 CrPC, but except vague denial, the accused said nothing more.

23. This is clinching evidence against the accused which fully supports the case of the prosecution. PW-7 and PW-8 are said to be child witnesses who had seen the occurrence. They are sons of the deceased. When they appeared before the Court, the Court put certain questions to both these witnesses to form an opinion whether they would be able to depose. It granted the permission to PW-7, but his statement was not recorded. The Court declined permission for examining PW-8. As such, the statement of both these witnesses was not recorded. It is a settled principle of law that a child witness can be a competent witness provided statement of such witness is reliable, truthful and is corroborated by other prosecution

evidence. The Court in such circumstances can safely rely upon the statement of a child witness and it can form the basis for conviction as well. Further, the evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be reliable one and his/her demeanour must be like any other competent witness and that there exists no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated by other evidence before a conviction can be allowed to stand but as a rule of prudence the Court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. Further, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. (Ref. *Dattu Ramrao Sakhare v. State of Maharashtra* [(1997) 5 SCC 341] and *Panchhi v. State of U.P.* [(1998) 7 SCC 177].

24. This aspect of the case need not detain us any further, inasmuch as the Trial Court did not permit recording of statement of these witnesses being child witnesses. Legality or correctness of this direction of the Trial Court was not questioned either by the State or by the accused in their appeal before the High Court and even before this Court.

25. No arguments have been addressed even before us by either party that these two child witnesses should have been examined and that it has caused any prejudice to any of the parties in the present appeal.

26. According to PW-1, these children had seen the accused murdering their mother. Despite this statement if these witnesses have not been examined and parties have not raised any objection in that regard, we see no reason to record any findings on this aspect of the case.

27. The concurrent findings of fact recorded by the Courts below, based upon proper appreciation of evidence clearly

prove the guilt of the accused. The statement of PW-1 is fully corroborated by other witnesses, expert evidence and the medical evidence.

28. In these circumstances, we see no reason to interfere with the finding of guilt as the well as the order of sentence. Resultantly, the appeal is dismissed.

R.P. Appeal dismissed.

SAHADEVAN & ANR.
v.
STATE OF TAMIL NADU
(Criminal Appeal No. 1405 of 2008)

MAY 08, 2012

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

Penal Code, 1860 – s. 302 – Murder – Circumstantial evidence – Two witnesses had allegedly last seen the deceased with accused – Extra-judicial confession – Recovery of articles at the instance of accused – Conviction by courts below – Appeal by two of the three accused – Held: Prosecution failed to prove the case beyond reasonable doubt – There are contradictions in the statement of the witnesses – Confessional statements are not worth credence – Last seen theory not proved – Time of death of deceased not established – Motive not proved – Order of conviction is unsustainable – Benefit of the judgment extended to the non-appealing accused as he had been attributed the same role as the other two accused – Constitution of India, 1950 – Articles 136, 142 and 21 – Administration of Justice.

Evidence:

Extra-judicial Confession – Evidentiary value – Held: It is a weak piece of evidence – In circumstantial evidence when prosecution relies on extra-judicial confession, court should examine it with greater degree of care and caution – Principles which would make it an admissible piece of evidence capable of forming the basis of conviction – Explained.

Circumstantial Evidence – Theory of last seen together – Evidentiary value – Held: The theory can raise the suspicion, but independently, it is not sufficient to lead to a

finding of guilt – The theory should be applied taking the prosecution case into consideration in its entirety.

Evidence Act, 1872 – s. 27 – Recovery statement – Admissibility in evidence – Explained.

Administration of Criminal Justice – Criminal case – In appeal accused acquitted – Extention of benefit of acquittal order to non-appealing accused – Access to justice is essential feature of administration of justice – Concept of fair trial would take within its ambit, the right to be heard by appellate court – If accused is unable to file appeal, it would amount to denial of access to justice to such accused – Where the court disbelieves the entire occurrence or where role of the non-appealing accused is identical to that of the appealing accused or where the ends of justice demand, the court will be well within its jurisdiction to return the finding of acquittal and even suo moto extend the benefit to the non-appealing accused – Powers of Supreme Court under Articles 136, 142 and rights of the accused under article 21 are wide enough to do complete justice to the parties – Constitution of India, 1950 – Articles, 136, 142 and 21.

Appellants-accused Nos. 2 and 3 and accused No. 1 were prosecuted u/ss. 120B and 302 IPC for having caused death of a person. The prosecution case was that A-1 was the brother of PW2 (wife of deceased). He had grievance against with the deceased because, he used to torture PW2. In order to make life of PW-2 peaceful, he entered into a criminal conspiracy with A-2 and A-3 to commit murder of the deceased. PWs 4 and 5 had last seen the accused and the deceased together. Next day dead body of the deceased was found. After 4 days, the accused persons came to PW6 and made confession to him in the presence of one person to the effect that on account of the family problem, they murdered the deceased by strangulating him and after putting kerosene on him, set the body on fire. The confessional statement

was reduced into writing (Ex.P-4). Thereupon, the accused were arrested by the police. On the basis of the statement u/s. 27 of Evidence Act, Police recovered MO6 (TVS moped), MO7 (bottle smelling kerosene) and MO8 (matchbox). The accused in their statement u/s. 313 Cr.P.C. denied the incident and retracted from their extra-judicial confession. Trial court acquitted the accused u/s. 120B IPC, but convicted them u/s. 302 IPC. High Court upheld the order of the trial court. The present appeal was preferred by A-2 and A-3. A-1 did not prefer any appeal.

Allowing the appeal and extending the benefit of the judgment to the non-appealing accused, the Court

HELD: 1.1. The present case is a case based upon circumstantial evidence. In case of circumstantial evidence, the onus lies upon the prosecution to prove the complete chain of events which shall undoubtedly point towards the guilt of the accused. Furthermore, in case of circumstantial evidence, where the prosecution relies upon an extra-judicial confession, the court has to examine the same with a greater degree of care and caution. It is a settled principle of criminal jurisprudence that extra-judicial confession is a weak piece of evidence. Wherever the Court, upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra-judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, the extra-judicial confession suffers from material discrepancies or inherent improbabilities and does not appear to be cogent as per the prosecution version, it may be difficult for the court to base a conviction on such a confession. In such circumstances, the court would be fully justified in ruling such evidence out of consideration. [Para 12] [380-F-H; 381-A-B]

Balwinder Singh v. State of Punjab **1995 Supp. (4) SCC**

259; 1995 (5)Suppl. SCR 10; *Pakkirisamy v. State of T.N.* **(1997) 8 SCC 158;** *Kavita v. State of T.N.* **(1998) 6 SCC 108: 1998 (3) SCR 902;** *State of Rajasthan v. Raja Ram* **(2003) 8 SCC 180: 2003 (2) Suppl. SCR 445;** *Aloke Nath Dutta v. State of W.B.* **(2007) 12 SCC 230: 2006 (10) Suppl. SCR 662;** *Sansar Chand v. State of Rajasthan* **(2010) 10 SCC 604: 2010 (12) SCR 583;** *Rameshbhai Chandubhai Rathod v. State of Gujarat* **(2009) 5 SCC 740;** *Sk. Yusuf v. State of W.B.* **(2011) 11 SCC 754: 2011 (8) SCR 83;** *Pancho v. State of Haryana* **(2011) 10 SCC 165: 2011 (12) SCR 1173 – relied on.**

1.2. The principles which would make an extra-judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused are: (i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution. (ii) It should be made voluntarily and should be truthful. (iii) It should inspire confidence. (iv) An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence. (v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities. (vi) Such statement essentially has to be proved like any other fact and in accordance with law. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused. [Para 22] [384-B-G]

1.3. The various factors bring out serious deficiencies in the veracity, credence and evidentiary value of Exhibit P4 (confessional statement). The accused in their statement under Section 313 CrPC, have denied the very execution of Ext. P-4. Ext. P-4 is stated to have been made by the accused persons to PW-6, in the

presence of one person who has not been examined by the prosecution to prove the recording of Ext. P-4 and to provide greater credence to this document. In Ext. P-4, it is stated that the deceased ill-treated his wife, PW-2, and that was the motive and, in fact, essentially the cause for the accused to murder the deceased. The whole emphasis is upon the bitter relationship between the husband and wife. The very basis of Ext. P-4 falls to the ground when PW-2 in her statement, stated that her husband was employed in a rolling mill and that there was no dispute between them. Further, she has categorically stated that she had never stated anything with regard to dispute between her husband and accused No.1 to the police and that there was no property dispute amongst them. Upon this, PW-2 was declared hostile by the prosecution with the leave of the court. Even in her cross-examination, nothing could be brought out to establish the fact of alleged cruelties inflicted by the deceased upon her and there being any dispute between them. The statements of PW4 and PW5 is at variance with Exhibit P4 and hardly find corroboration from other prosecution evidence and also suffers from discrepancies. Thus, the contents of Exhibit P4 are belied by the prosecution evidences itself and, therefore, it is not safe for the court to rely upon such extra-judicial confession. Exhibit P4 has to be ruled out from the zone of consideration. [Paras 25, 26 and 29] [386-H; 387-A-E; 388-C-D]

1.4. Undoubtedly, the last seen theory is an important event in the chain of circumstances that would completely establish and/or could point to the guilt of the accused with some certainty. But this theory should be applied while taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen. With the development of law, the theory of

last seen has become a definite tool in the hands of the prosecution to establish the guilt of the accused. The court has taken the consistent view that where the only circumstantial evidence taken resort to by the prosecution is that the accused and deceased were last seen together, it may raise suspicion but it is not independently sufficient to lead to a finding of guilt. [Paras 31 and 34] [389-B-C; 390-B-C]

Arjun Marik v. State of Bihar **1994 Supp.(2) SCC 372: 1994 (2) SCR265;** *State of Karnataka v. M.V. Mahesh* **(2003) 3 SCC 353: 2003 (2) SCR 553;** *State of U.P. v. Satish* **(2005) 3 SCC 114: 2005 (2) SCR 1132 – relied on.**

1.5. The statement of PW5 does not indicate the time as to when he had seen the deceased and with which of the accused. He expressed inability to even identify them. PW4 though claims to have seen them but has given a time which itself is doubtful. Even this cannot be stated with certainty that at that particular time the deceased was alive or dead. Moreover, according to the doctor, PW7, the deceased had died about 27 to 28 hours before the autopsy. The autopsy, was admittedly, performed upon the deceased on 10th of July, at about 2 o'clock. That implies that the deceased would have died sometime during the morning of 9th July, while according to PW4, he had seen the deceased along with A-1 after 2 p.m. on 9th July, 2002. In light of the abovementioned contradictions and the uncertainty of evidence, the view taken by the High Court that on the theory of last seen, the accused can be convicted, cannot be sustained. This fact is uncorroborated and suffers from apparent contradictions and discrepancies as well. [Paras 30, 35 and 36] [388-G-H; 389-A; 390-D, E-F]

1.6. In the present case, the recoveries have been effected upon the statement of the accused ú/s. 27 of the Evidence Act, whereby the accused stated that he had

hidden kerosene bottle, a match box and TVS Moped bearing No.50 TN 38 7344 and could get them recovered. According to the post mortem report Ext.P-10 as well as the forensic report Ext.P-22, kerosene or its smell was neither found on the body nor the belongings of the deceased and, therefore, it creates a little doubt as to whether the recovered items were at all and actually used in the commission of crime. However, as far as TVS moped, MO-6 is concerned, there is sufficient evidence to show that it was used by the accused but the other contradictions and discrepancies overshadow this evidence and give advantage to the accused. The prosecution has not been able to establish even the time of death of the deceased. Absence of kerosene oil on the body of the deceased and articles taken into custody from the body of the deceased, the contradictions in the statement of the witnesses, the fact that PW2 has not supported the case of the prosecution and PW5 not being able to even identify the accused, lend support to the pleas raised on behalf of the accused and create a dent in the story of the prosecution. In view of the cumulative effect of all the aspects, the judgment of the High Court is unsustainable. The prosecution has failed to prove its case beyond reasonable doubt. [Paras 38 and 39] [391-F; 392-A-F]

State of Rajasthan v. Bhup Singh **(1997) 10 SCC 675: 1997 (1) SCR 190 – relied on.**

1.7. Where the court finds that the entire case of the prosecution suffers from material contradictions, the most crucial evidence is not reliable, there are definite and material flaws in the case of the prosecution and the Police has failed to discharge its duties at different steps, in that event, it will be difficult for the court to leave the non-appealing accused to his fate. Under the Indian criminal jurisprudence, an accused is presumed to be

innocent until proven guilty and his liberty can be curtailed by putting him under imprisonment by due process of law only. If the entire case of the prosecution has been found to be unreliable and the prosecution, as a whole, has not been able to prove its case beyond reasonable doubt, then the benefit should accrue to all the accused persons and not merely to the accused who have preferred an appeal against the judgment of conviction. [Para 40] [393-B-E]

Raja Ram v. State of Madhya Pradesh **(1994) 2 SCC 568: 1994 (2) SCR 114;** *Bijoy Singh v. State of Bihar* **(2002) 9 SCC 147: 2002 (3) SCR 179;** *Pawan Kumar v. State of Haryana* **(2003) 11 SCC 241: 2003 (1) Suppl. SCR 710;** *Madhu v. State of Kerala* **(2012) 2 SCC 399;** *Gurucharan Kumar v. State of Rajasthan* **(2003) 2 SCC 698: 2003 (1) SCR 60 – relied on.**

1.8. It is very difficult to set any universal principle which could be applied to all cases irrespective of the facts, circumstances and the findings returned by the court of competent jurisdiction. It will always depend upon the facts and circumstances of a given case. Where the court finds that the prosecution evidence suffers from serious contradictions, is unreliable, is *ex facie* neither cogent nor true and the prosecution has failed to discharge the established onus of proving the guilt of the accused beyond reasonable doubt, the court will be well within its jurisdiction to return the finding of acquittal and even *suo moto* extend the benefit to a non-appealing accused as well, more so, where the court even disbelieves the very occurrence of the crime itself. Of course, the role attributed to each of the accused and other attendant circumstances would be relevant considerations for the court to apply its discretion judiciously. [Para 41] [395-B-E]

2.1. There can be varied reasons for a non-appealing

accused in not approaching the appellate court. If, for compelling and inevitable reasons, like lack of finances, absence of any person to pursue his remedy and lack of proper assistance in the jail, an accused is unable to file appeal, then it would amount to denial of access to justice to such accused. The concept of fair trial would take within its ambit the right to be heard by the appellate court. It is hardly possible to believe that an accused would, out of choice, give up his right to appeal, especially in a crime where a sentence of imprisonment for life is prescribed and awarded. Fairness in the administration of justice system and access to justice would be the relevant considerations for Supreme Court to examine whether a non-appealing accused could or could not be extended the benefit of the judgment of acquittal. The access to justice is an essential feature of administration of justice. This is applicable with enhanced rigour to the criminal jurisprudence. Where the court disbelieves the entire incident of the occurrence or where the role of the accused who has not appealed is identical to that of the other appealing accused or where the ends of justice demand, the court would not hesitate and, in fact, is duty bound, to dispense justice in accordance with law. [Para 41] [395-F-H; 396-A-B]

2.2. The powers of Supreme Court, in terms of Articles 136 and 142 on the one hand and the rights of an accused under Article 21 of the Constitution on the other, are wide enough to deliver complete justice to the parties. These powers are incapable of being curtailed by such technical aspects which would not help in attainment of justice in the opinion of the Court. [Para 41] [396-B-C]

2.3. In the present case, accused No.1, had been attributed the same role as the other two accused. All the accused were stated to have murdered the deceased

and burnt his body. It was a case of circumstantial evidence where not only has the prosecution failed to prove all the facts and events to complete the chain of events pointing only towards the guilt of the accused but there are also definite discrepancies in the case of the prosecution, contradictions between the statements of the material witnesses and the most important piece of prosecution evidence, the extra-judicial confession (Exhibit P4), is found entirely unreliable, not worthy of credence as well as the facts recorded in Exhibit P4 stand disproved by another prosecution witness herself, i.e., PW-2, who, in fact, has lost her husband. [Para 42] [396-D-F]

Case Law Reference:

1995 (5) Suppl. SCR 10	**Relied on**	**Para 13**
(1997) 8 SCC 158	**Relied on**	**Para 15**
1998 (3) SCR 902	**Relied on**	**Para 16**
2003 (2) Suppl. SCR 445	**Relied on**	**Para 17**
2006 (10) Suppl. SCR 662	**Relied on**	**Para 18**
2010 (12) SCR 583	**Relied on**	**Para 19**
(2009) 5 SCC 740	**Relied on**	**Para 20**
2011 (8) SCR 83	**Relied on**	**Para 21**
2011 (12) SCR 1173	**Relied on**	**Para 21**
1994 (2) SCR 265	**Relied on**	**Para 31**
2003 (2) SCR 553	**Relied on**	**Para 32**
2005 (2) SCR 1132	**Relied on**	**Para 33**
1997 (1) SCR 190	**Relied on**	**Para 37**
1994 (2) SCR 114	**Relied on**	**Para 40**
2002 (3) SCR 179	**Relied on**	**Para 40**
2003 (1) Suppl. SCR 710	**Relied on**	**Para 40**
(2012) 2 SCC 399	**Relied on**	**Para 40**
2003 (1) SCR 60	**Relied on**	**Para 40**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1405 of 2008.

From the Judgment & Order dated 27.9.2006 of the High Court of Judicature at Madras in Criminal Appeal No. 160 of 2004.

K.V. Viswanathan, B. Ragunath, Jaishree Viswanthan, T. Sakthi Kumaran, Vijay Kumar, Abhishek Kaushik for the Appellants.

B. Balaji for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The present appeal is directed against the judgment of the High Court dated 27th September, 2006 vide which the High Court affirmed the judgment of conviction and order of sentence dated 31st December, 2003 passed by the Trial Court.

2. The prosecution case is that Smt. Kamalal, PW-2 was married to one Yoganandan @ Loganathan, the deceased. The accused No.1, Chandran is the brother of Kamalal (PW2). accused No.2, Sahadevan, and accused No. 3, Arul Murugan, were the friends of accused No.1. PW2 was being ill-treated by Loganathan, her husband. Being her brother, accused No.1 thought that if he murdered Loganathan, life of his sister would be peaceful. Thus, accused No.1 and his friends (the other two accused) entered into a criminal conspiracy to commit murder of Loganathan. According to PW-5, Karuppuswamy, when he was talking to one Chinnaswamy at a three star hotel near the Neruparichal bus stand at about 10 p.m. on 9th July, 2002, he

saw Sahadevan driving a TVS moped in Povmmanayakkampallayam road, while two other persons were sitting as pillion riders. The vehicle was proceeding towards west. After a while, one of them came back and again went in the same direction on the same vehicle. PW-4, then saw the deceased, Yoganandan and accused No.1 going in the same direction on the TVS moped at about 2 p.m. Again after some time, accused No.2 alone came back on the moped. On 10th July, 2002, at around 8.30 a.m., PW-3, Rajendran, saw a dead body in the Pommanayakkanpallam Road, whereupon he went to PW-1, the Administrative Officer and informed him of that fact. PW-1, upon receiving this information, went to the spot and saw the dead body. He then went to the Perumanallur Police Station and made a complaint, Ext.P-1, to the Sub-Inspector of Police, Ganesan, PW-8.

3. Upon receipt of the complaint, the police registered a case being Crime No.150 of 2002 for an offence under Section 302 of the Indian Penal Code, 1860 (for short "the IPC") against unknown accused. The Investigating Officer, PW-9, proceeded to the scene of occurrence. There he prepared observation Mahazar, Ext.P-2 and took photographs of the dead body.

4. Between 3 p.m. to 6 p.m., he conducted inquest over the dead body in the presence of Panchayatdars and witnesses and prepared the inquest report, Ext.P-13. The Senior Civil Assistant Surgeon, PW7, attached to the Thirupur Government Hospital, after receiving the requisite information and the body, performed autopsy on the body of the deceased. She noted the injuries on the body of the deceased and issued the post-mortem certificate, Ext. P-10, expressing the opinion that the deceased would have died 27 to 28 hours prior to autopsy.

5. It is further the case of the prosecution that on 14th July, 2002, when PW-6, Muthurathinam, President of Kanakampalayam Panchayat was in his office along with one Shanmugasundaram, all the above-named three accused came to his office and told him that deceased Loganathan was

the brother-in-law of accused No.1 and on account of family problem between accused No.1 and the deceased, they murdered Loganathan by strangulating him and after putting kerosene on him, set the body of the deceased afire. The statements made by the accused were reduced to writing by PW-6 and after obtaining their signatures and putting his own signature thereon he handed over the report, Ext. P-4, to the Police Station along with the custody of the accused whereupon PW-9, the Investigating Officer arrested all the accused persons.

6. PW9, on the basis of the confessional statements, Ext.P-5 to P-7, recovered MO-6 (TVS moped TN 38 7344), MO-7 (bottle smelling of kerosene) and MO-8 (matchbox). PW-9 then sent the MOs for forensic examination along with Ext. P-15, the requisition therefor. Subsequently, PW-9 was relieved of his duties and PW-10 completed the investigation of the case and filed the chargesheet against all the three accused under Section 120B and Section 302 IPC. All the accused were tried in accordance with law.

7. We may notice here that in their statement under Section 313 Cr.PC, the accused persons denied the incident, including the alleged extra-judicial confession made by them and also stated that they were falsely implicated in the case. However, all the three accused chose not to lead any defence. Finally, the prosecution examined as many as 10 witnesses and produced on record the documentary evidence. The trial Court vide its judgment dated 31st December, 2003 acquitted all the accused for an offence under Section 120B IPC, however, it convicted all the three accused under Section 302 IPC and awarded them sentence of imprisonment for life and fine of Rs. 5,000/-, in default thereof, to undergo rigorous imprisonment for six months.

8. Aggrieved from the judgment of the trial court, the accused preferred an appeal before the High Court which

came to be dismissed vide order dated 27th September, 2006 resulting in the filing of the present appeal.

9. Accused No.2, Sahadevan and accused No.3, Arul Murugan have preferred the present appeal. Accused No.1, Chandran has not filed any appeal.

10. The learned counsel appearing for these two appellants has advanced the following arguments while impugning the judgment under appeal :-

(i) The case of the prosecution is solely based upon the extra-judicial confession, which confession is neither reliable nor has been recorded in accordance with law. This extra-judicial confession cannot form the basis of conviction of the appellants since it has no corroboration and when examined in light of the settled principles of law, it is inconsequential, thus, the accused are entitled to the benefit of doubt.

(ii) In the present case, there is neither any eye-witness nor the prosecution has proved the complete chain of circumstances. The courts have erred in applying the theory of last seen together to return the finding of conviction against the accused. There being no direct evidence of involvement of the appellants in the commission of the crime, the theory of last seen together could not be of any assistance to the case of the prosecution.

(iii) The recoveries alleged to have been made in furtherance to the confessional statements of the accused are inadmissible in evidence and, in any case, the objects recovered have no link with the commission of the crime and as such, it would be impermissible in law to use these recoveries against the accused for sustaining their conviction.

(iv) The courts have failed to appreciate the medical and other evidence placed on record in its correct perspective. There are serious contradictions in the medical and ocular evidence, as regards the time of the death of the deceased. Once, the time of death of deceased is not established, the whole story of the prosecution falls to the ground.

(v) According to the learned counsel for the appellants, an extra-judicial confession, besides being inadmissible, is also a very weak piece of evidence and in a case of circumstantial evidence like the present, one cannot form a valid basis for returning the finding of guilt against the accused.

11. To the contra, the learned counsel appearing for the State argued that the extra-judicial confession in the present case is admissible as it is duly corroborated by other prosecution evidence, and thus, the courts are fully justified in convicting the accused. It is also contended that the present case is of circumstantial evidence and the prosecution has succeeded in establishing every circumstance of the chain of events that would fully support the view that the accused is guilty of the offence. The court while dealing with the judgment under appeal, upon proper appreciation of evidence, thus, has come to the right conclusion.

12. There is no doubt that in the present case, there is no eye-witness. It is a case based upon circumstantial evidence. In case of circumstantial evidence, the onus lies upon the prosecution to prove the complete chain of events which shall undoubtedly point towards the guilt of the accused. Furthermore, in case of circumstantial evidence, where the prosecution relies upon an extra-judicial confession, the court has to examine the same with a greater degree of care and caution. It is a settled principle of criminal jurisprudence that extra-judicial confession is a weak piece of evidence. Wherever the Court, upon due appreciation of the entire prosecution

evidence, intends to base a conviction on an extra-judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, the extra-judicial confession suffers from material discrepancies or inherent improbabilities and does not appear to be cogent as per the prosecution version, it may be difficult for the court to base a conviction on such a confession. In such circumstances, the court would be fully justified in ruling such evidence out of consideration.

13. Now, we may examine some judgments of this Court dealing with this aspect.

14. In *Balwinder Singh v. State of Punjab* [1995 Supp. (4) SCC 259], this Court stated the principle that an extra-judicial confession, by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extrajudicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance.

15. In *Pakkirisamy v. State of T.N.* [(1997) 8 SCC 158], the Court held that it is well settled that it is a rule of caution where the court would generally look for an independent reliable corroboration before placing any reliance upon such extra-judicial confession.

16. Again in *Kavita v. State of T.N.* [(1998) 6 SCC 108], the Court stated the dictum that there is no doubt that conviction can be based on extrajudicial confession, but it is well settled that in the very nature of things, it is a weak piece of evidence. It is to be proved just like any other fact and the value thereof depends upon veracity of the witnesses to whom it is made.

17. While explaining the dimensions of the principles governing the admissibility and evidentiary value of an extra-judicial confession, this Court in the case of *State of Rajasthan v. Raja Ram* [(2003) 8 SCC 180] stated the principle that an

extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The Court, further expressed the view that such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused.

18. In the case of *Aloke Nath Dutta v. State of W.B.* [(2007) 12 SCC 230], the Court, while holding the placing of reliance on extra-judicial confession by the lower courts in absence of other corroborating material, as unjustified, observed:

> "87. Confession ordinarily is admissible in evidence. It is a relevant fact. It can be acted upon. Confession may under certain circumstances and subject to law laid down by the superior judiciary from time to time form the basis for conviction. It is, however, trite that for the said purpose the court has to satisfy itself in regard to: (i) voluntariness of the confession; (ii) truthfulness of the confession; (iii) corroboration.
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> XXX XXX XXX
>
> 89. A detailed confession which would otherwise be within the special knowledge of the accused may itself be not sufficient to raise a presumption that confession is a truthful one. Main features of a confession are required to be verified. If it is not done, no conviction can be based only on the sole basis thereof."

19. Accepting the admissibility of the extra-judicial confession, the Court in the case of *Sansar Chand v. State of Rajasthan* [(2010) 10 SCC 604] held that:-

"29. There is no absolute rule that an extra-judicial confession can never be the basis of a conviction, although ordinarily an extra-judicial confession should be corroborated by some other material. [Vide *Thimma and Thimma Raju v. State of Mysore, Mulk Raj v. State of U.P., Sivakumar v. State* (SCC paras 40 and 41 : AIR paras 41 & 42), Shiva Karam Payaswami Tewari v. State of Maharashtra and Mohd. Azad v. State of W.B.]

30. In the present case, the extra-judicial confession by Balwan has been referred to in the judgments of the learned Magistrate and the Special Judge, and it has been corroborated by the other material on record. We are satisfied that the confession was voluntary and was not the result of inducement, threat or promise as contemplated by Section 24 of the Evidence Act, 1872."

20. Dealing with the situation of retraction from the extra-judicial confession made by an accused, the Court in the case of *Rameshbhai Chandubhai Rathod v. State of Gujarat* [(2009) 5 SCC 740], held as under :

"It appears therefore, that the appellant has retracted his confession. When an extra-judicial confession is retracted by an accused, there is no inflexible rule that the court must invariably accept the retraction. But at the same time it is unsafe for the court to rely on the retracted confession, unless, the court on a consideration of the entire evidence comes to a definite conclusion that the retracted confession is true."

21. Extra-judicial confession must be established to be true and made voluntarily and in a fit state of mind. The words of the witnesses must be clear, unambiguous and should clearly convey that the accused is the perpetrator of the crime. The extra-judicial confession can be accepted and can be the basis of conviction, if it passes the test of credibility. The extra-judicial confession should inspire confidence and the court should find

out whether there are other cogent circumstances on record to support it. [Ref. *Sk. Yusuf v. State of W.B.* [(2011) 11 SCC 754] and *Pancho v. State of Haryana* [(2011) 10 SCC 165].

22. Upon a proper analysis of the above-referred judgments of this Court, it will be appropriate to state the principles which would make an extra-judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused.

The Principles

(i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.

(ii) It should be made voluntarily and should be truthful.

(iii) It should inspire confidence.

(iv) An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

(v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

(vi) Such statement essentially has to be proved like any other fact and in accordance with law.

23. Having stated the principles which may be kept in mind by the court while examining the acceptability and evidentiary value of the extra-judicial confession, we may now refer to the extra-judicial confession, Ext. P-4, in the case before us. This

extra-judicial confession is alleged to have been made by all the three accused to one Muthurathinam, PW-6. The said Ext. P-4 reads as under:-

"I am the president of Kanakampalayam today the 14.7.2002 at 9.30 in the morning, when I was at my office along with loclite Shanmugasundaram, a person named Chandran aged 36 son of Muthu and resident of Navakarai, Pooluvapatti along with Sahadevan aged 27 s/o Pannerselvam having a furniture by name Sri Priya agencies at Boyampalayam Sri Nagar and one Arul Murugan aged 23 s/o Krishnan, belonging to Dindugal and going to printing work by staying at pandian nagar came to my office saying that he along with his friends Sahadevan and Arulmurugan, on 08-07-02 his sisters husband Yoganathan @ Logananthan who was without going to work and nor looking after the family and was loitering hereunder an no way to look after his sister Kamalal and her children and more tortures from her husband and confessed to her that her husband without going any work, he is simply loitering hereunder and tried to him to separate her from her husband. Hence elimination is better than separation and said his sisters life would be, peaceful, he along with his friends Sahadevan and Arulmurugan executed a friendly call to him and told him that they would promised him a job at Tirupur. After 10 p.m. in the night, when there was no traunt on the Neruperchial Bommanaichenpalayam mud road Sahadevan in his moped with Loganathan sit and also made Arul Murugan to sit along with and asked to halt at certain place and again Sahadevan came in moped and he along with kerosene and match box and went there and parked the moped and were all 4 of them talking enticing Loganathan with getting him a job at Tirupur he with the towel which was kept ready put around Loganathan's neck and he strangled by holding one end of the towel and Arulmurugan strangling by the other end of the towel. Mean

while Sahadevan bought how Loganathan's face and hand and started face and since due to strangulation Loganathan fainted and fell into the east side of the ditch and suddenly and Chandran took kerosene and matchbox from moped cover which was kept ready, in order to avoid identity burnt him and killed him and after that they all 3 took the moped and they went to Sahadevan house and parked the vehicle and the same night they went out of station and a return to Tirupur only yesterday. They came to know that the police are after then they came to my house today and told me what happened Shanmugasundram recorded the above averments of Chandran after that bringing all 3 to you and present them before you."

24. As per the case of the prosecution, the deceased was murdered on 9th – 10th July, 2002. The body of the deceased was taken into custody by the police on 10th July, 2002 itself. The accused persons were residents of the same village and there is nothing on record to show that the Police made any serious attempt to search and arrest them. The Investigating Officers, PW-9 and PW-10, have not stated in their statements that the accused persons were absconding. Four days later, on 14th July, 2002, the accused persons are alleged to have gone to the office of PW-6 to make the confession of having murdered the brother-in-law of accused No.1. Ext. P-4 is addressed to the police inspector. If the accused were to make such a statement to the police itself, then what was the need for them to first go to PW-6. However, an explanation is advanced on behalf of the State that the accused only signed the statement and it was PW-6 who then handed over Ext. P-4 to the police, along with the custody of the accused persons.

25. Further, Ext. P-4 is stated to have been made by the accused persons to PW-6, in the presence of Shanmugasundaram. The said person, for reasons best known to the prosecution, has not been examined by the prosecution

to prove the recording of Ext. P-4 and to provide greater credence to this document.

26. Moreover, in their statement under Section 313 CrPC, the accused have denied the very execution of Ext. P-4. In order to examine the veracity of this document, the court essentially has to find out the correctness and corroboration of the facts stated in Ext. P-4 by other prosecution evidence. In Ext. P-4, it is stated that the deceased ill-treated his wife, PW-2, Kamalal and that was the motive and, in fact, essentially the cause for the accused to murder the deceased. The whole emphasis is upon the bitter relationship between the husband and wife. The very basis of Ext. P-4 falls to the ground when one peruses the statement of Kamalal, PW-2. In her statement, she has stated that her husband was employed in a rolling mill and that there was no dispute between them. Further, she has categorically stated that she had never stated anything with regard to dispute between her husband and accused No.1 to the police and that there was no property dispute amongst them. Upon this, this witness was declared hostile by the prosecution with the leave of the court. Even in her cross-examination, nothing could be brought out to establish the fact of alleged cruelties inflicted by the deceased upon her and there being any dispute between them.

27. An attempt has been made on behalf of the prosecution to support its case by the statements of PW-4 and PW-5. PW-4 stated that he had seen Loganathan, who used to live opposite his house, going on a moped along with his wife's brother Chandran at about 2 O'clock in the afternoon. After knowing that there was a corpse lying at Nereuperichel, he went and saw the dead body. It was that of Loganathan.

28. PW5 also deposed that on 9th July, 2002, at about 10.00 p.m., he had seen three persons going in a moped towards Bommanaickanpalayam road. After sometime, only one person returned on the moped and again went towards west. Thereafter, those three persons returned. He stated that

he could not identify those three persons, if he saw them. Out of the three, he knew only one person who drove the moped and that was accused No.2, Sahadevan. Next day, upon hearing the news that there was a corpse lying, he went and saw it. Since the face of the corpse was burnt, he could not identify him.

29. The statement of these two witnesses is at variance with Exhibit P4 and hardly finds corroboration from other prosecution evidence and also suffers from discrepancies. Thus, the contents of Exhibit P4 are belied by the prosecution evidences itself and, therefore, it is not safe for the Court to rely upon such extra-judicial confession. The various factors mentioned above bring out serious deficiencies in the veracity, credence and evidentiary value of Exhibit P4. For the afore-recorded reasoning, we must disturb the finding of guilt recorded by the Trial Court while substantially relying upon Exhibit P4 as, in our opinion, Exhibit P4 has to be ruled out from the zone of consideration, which we hereby do.

30. The courts below, the Trial Court in particular, have laid some emphasis on the theory of last seen, while finding the accused guilty of the offence. As far as PW5 is concerned, he says that he only saw three persons going on the moped and he could not identify these persons. PW4 stated that he had seen the deceased going on a moped with Chandran at about 2.00 o'clock in the afternoon. The time lag between the time at which this witness saw the accused and the deceased together and when the body of the deceased was found on the next day is considerably long. According to PW4, he could identify Loganathan while, according to PW5, the face of the deceased was burnt and, therefore, he could not identify him. Moreover, according to the doctor, PW7, the deceased had died about 27 to 28 hours before the autopsy. The autopsy, was admittedly, performed upon the deceased on 10th of July, at about 2 o'clock. That implies that the deceased would have died sometime during the morning of 9th July, while according to

PW4, he had seen the deceased along with Chandran after 2 p.m. on 9th July, 2002.

31. With the development of law, the theory of last seen has become a definite tool in the hands of the prosecution to establish the guilt of the accused. This concept is also accepted in various judgments of this Court. The Court has taken the consistent view that where the only circumstantial evidence taken resort to by the prosecution is that the accused and deceased were last seen together, it may raise suspicion but it is not independently sufficient to lead to a finding of guilt. In *Arjun Marik v. State of Bihar* [1994 Supp.(2) SCC 372], this Court took the view that the where the appellant was alleged to have gone to the house of one Sitaram in the evening of 19th July, 1985 and had stayed in the night at the house of deceased Sitaram, the evidence was very shaky and inconclusive. Even if it was accepted that they were there, it would, at best, amount to be the evidence of the appellants having been last seen together with the deceased. The Court further observed that it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record a finding that it is consistent only with the hypothesis of guilt of the accused and, therefore, no conviction, on that basis alone, can be founded.

32. Even in the case of *State of Karnataka v. M.V. Mahesh* [(2003) 3 SCC 353], this Court held that merely being last seen together is not enough. What has to be established in a case of this nature is definite evidence to indicate that the deceased had been done to death of which the respondent is or must be aware as also proximate to the time of being last seen together. No such clinching evidence is put forth. It is no doubt true that even in the absence corpus delicti it is possible to establish in an appropriate case commission of murder on appropriate material being made available to the Court.

33. In the case of *State of U.P. v. Satish* [(2005) 3SCC 114], this Court had stated that the principle of last seen comes

into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible.

34. Undoubtedly, the last seen theory is an important event in the chain of circumstances that would completely establish and/or could point to the guilt of the accused with some certainty. But this theory should be applied while taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.

35. The statement of PW5 does not indicate the time as to when he had seen the deceased and with which of the accused. He expressed inability to even identify them. PW4 though claims to have seen them but has given a time which itself is doubtful. Even this cannot be stated with certainty that at that particular time the deceased was alive or dead.

36. In light of the abovementioned contradictions and the uncertainty of evidence, we are unable to sustain the view taken by the High Court that on the theory of last seen, the accused can be convicted. This fact is uncorroborated and suffers from apparent contradictions and discrepancies as well.

RECOVERY

37. PW9, the Investigating Officer, after arresting accused No.2, Sahadevan, recorded his statement. The accused stated that he had hidden kerosene bottle, a match box and TVS Moped bearing No.50 TN 38 7344 and could get them recovered. He also stated that Chandran had taken him on that moped. In furtherance to this statement of this accused and in presence of the witnesses at about 2.45 hours, the Investigating Officer recovered and seized MO6, the TVS moped, MO7, bottle with kerosene odour and MO8, match box. In his entire

deposition, this witness had not stated that these were the articles which were used by the accused persons in the commission of the crime. It was expected of the prosecution to establish a connection between the articles recovered and the incident or the crime, as alleged to have been committed. According to the prosecution, kerosene oil was poured over the deceased and he was set on fire. No kerosene was found on the body of the deceased or on the belongings, i.e., clothing, chappal etc. of the deceased. The witness to the confession statement, Shanmugasundram, was not examined. PW6 admitted before the Court that he did not see the house of the accused, Sahadevan. In the case of *State of Rajasthan v. Bhup Singh* [(1997) 10 SCC 675], this Court observed the following as the conditions prescribed in Section 27 of the Indian Evidence Act, 1872 for unwrapping the cover of ban against admissibility of statement of accused to police (1) a fact should have been discovered in consequence of the information received from the accused; (2) he should have been accused of an offence; (3) he should have been in the custody of a police officer when he supplied the information; (4) the fact so discovered should have been deposed to by the witness. The Court observed that if these conditions are satisfied, that part of the information given by the accused which led to such recovery gets denuded of the wrapper of prohibition and it becomes admissible in evidence.

38. In the present case, the recoveries have been effected upon the statement of the accused under Section 27 of the Evidence Act. These recoveries, in our view, were made in furtherance to the statement of the accused who were in police custody and in presence of independent witnesses. It may be that one of them had not been examined but that, by itself, shall not vitiate the recovery or make the articles inadmissible in evidence. The aspect which the Court has to consider in the present case is whether these recoveries have been made in accordance with law and whether they are admissible in evidence or not and most importantly the link with and effect of

the same vis-a-vis the commission of the crime. According to the post mortem report Ext.P-10 as well as the forensic report Ext.P-22, kerosene or its smell was neither found on the body nor the belongings of the deceased and, therefore, it creates a little doubt as to whether the recovered items were at all and actually used in the commission of crime. However, as far as TVS moped, MO-6 is concerned, there is sufficient evidence to show that it was used by the accused but the other contradictions and discrepancies noted above overshadow this evidence and give advantage to the accused.

39. Now, we would deal with the contention of the appellant that the prosecution has not been able to establish even the time of death of the deceased. According to the prosecution, the deceased had been murdered on 9th July, 2002 at about 11 p.m. but according to the post mortem report Exhibit P10, the deceased was murdered on 10th July, 2002, i.e. between 10 and 11 a.m. The post mortem report was recorded on 11th July, 2002 at 2.00 p.m. stating that the deceased was murdered before 27 to 28 hours. Absence of kerosene oil on the body of the deceased and articles taken into custody from the body of the deceased, the contradictions in the statement of the witnesses, the fact that PW2 has not supported the case of the prosecution and PW5 not being able to even identify the accused, lend support to the arguments raised on behalf of the accused and create a dent in the story of the prosecution. Not on any single ground, as discussed above, but in view of the cumulative effect of the above discussion on all the aspects, we are unable to sustain the judgment of the High Court. In our opinion, the prosecution has failed to prove its case beyond reasonable doubt.

40. In view of our above discussion, the last question for consideration of the Court is as to what order, if any, is required to be made against the non-appealing accused, i.e., accused No.1, Chandran. From the prosecution evidence, it is clear that some role had been specifically assigned to the accused

Chandran. He is the brother-in-law of the deceased and is stated to have been last seen taking the deceased on the moped whereafter the deceased never returned. In normal circumstances, the obvious result would be to leave the non-appealing accused to undergo the punishment awarded to him in accordance with law. But, where the Court finds that the entire case of the prosecution suffers from material contradictions, the most crucial evidence is not reliable, there are definite and material flaws in the case of the prosecution and the Police has failed to discharge its duties at different steps, in that event, it will be difficult for this Court to leave the non-appealing accused to his fate. Under the Indian criminal jurisprudence, an accused is presumed to be innocent until proven guilty and his liberty can be curtailed by putting him under imprisonment by due process of law only. If the entire case of the prosecution has been found to be unreliable and the prosecution, as a whole, has not been able to prove its case beyond reasonable doubt, then the benefit should accrue to all the accused persons and not merely to the accused who have preferred an appeal against the judgment of conviction. In the case of *Raja Ram v. State of Madhya Pradesh* [(1994) 2 SCC 568], this Court extended the benefit of conversion of sentence to all the accused, from that under Section 302 IPC to one under Section 304 IPC, including the non-appealing accused. The Court held that in its opinion, the case of the non-appealing accused was not really distinguisbable from other accused persons and it was appropriate that benefit of the judgment should also be extended to the non-appealing accused, Ram Sahai, in that case. Again, in the case of *Bijoy Singh v. State of Bihar* [(2002) 9 SCC 147], this Court clearly stated the principle that it has set up a judicial precedent that where on evaluation of the case, the Court reaches the conclusion that no conviction of any accused is possible the benefit of that decision must be extended to the co-accused, similarly situated, though he has not challenged the order by way of an appeal. In the case of *Pawan Kumar v. State of Haryana* [(2003) 11 SCC 241], while referring to the myth of the salutary powers exercisable by the

Court under Article 142 of the Constitution for doing complete justice to the parties, the Court opined that powers under Article 136 of the Constitution can be exercised by it even suo motu and that the right to personal liberty guaranteed to the citizens, as enshrined under Article 21 of the Constitution, would be a factor which can be considered by the Court in granting such reliefs. The Court held as under :

> "17. Apart from the salutary powers exercisable by this Court under Article 142 of the Constitution for doing complete justice to the parties, the powers under Article 136 of the Constitution can be exercised by it in favour of a party even suo motu when the Court is satisfied that compelling grounds for its exercise exist but it should be used very sparingly with caution and circumspection inasmuch as only the rarest of rare cases. One of such grounds may be, as it exists like in the present case, where this Court while considering appeal of one of the accused comes to the conclusion that conviction of appealing as well as non-appealing accused both was unwarranted. Upon the aforesaid conclusion arrived at by the Apex Court of the land, further detention of the non-appealing accused, by virtue of the judgment rendered by the High Court upholding his conviction, being without any authority of law, infringes upon the right to personal liberty guaranteed to the citizen as enshrined under Article 21 of the Constitution. In our view, in cases akin to the present one, where there is either a flagrant violation of mandatory provision of any statute or any provision of the Constitution, it is not that this Court has a discretion to exercise its suo motu power but a duty is enjoined upon it to exercise the same by setting right the illegality in the judgment of the High Court as it is well settled that illegality should not be allowed to be perpetuated and failure by this Court to interfere with the same would amount to allowing the illegality to be perpetuated. In view of the foregoing discussion, we are of the opinion that accused Balwinder Singh alias Binder

is also entitled to be extended the same benefit which we are granting in favour of the appellant."

Similar view has also been expressed by this Court in the cases of *Madhu v. State of Kerala* [(2012) 2 SCC 399] and Gurucharan Kumar v. State of Rajasthan [(2003) 2 SCC 698].

41. It is very difficult to set any universal principle which could be applied to all cases irrespective of the facts, circumstances and the findings returned by the Court of competent jurisdiction. It will always depend upon the facts and circumstances of a given case. Where the Court finds that the prosecution evidence suffers from serious contradictions, is unreliable, is ex facie neither cogent nor true and the prosecution has failed to discharge the established onus of proving the guilt of the accused beyond reasonable doubt, the Court will be well within its jurisdiction to return the finding of acquittal and even suo moto extend the benefit to a non-appealing accused as well, more so, where the Court even disbelieves the very occurrence of the crime itself. Of course, the role attributed to each of the accused and other attendant circumstances would be relevant considerations for the Court to apply its discretion judiciously. There can be varied reasons for a non-appealing accused in not approaching the appellate Court. If, for compelling and inevitable reasons, like lack of finances, absence of any person to pursue his remedy and lack of proper assistance in the jail, an accused is unable to file appeal, then it would amount to denial of access to justice to such accused. The concept of fair trial would take within its ambit the right to be heard by the appellate Court. It is hardly possible to believe that an accused would, out of choice, give up his right to appeal, especially in a crime where a sentence of imprisonment for life is prescribed and awarded. Fairness in the administration of justice system and access to justice would be the relevant considerations for this Court to examine whether a non-appealing accused could or could not be extended the benefit of the judgment of acquittal. The access to justice is an essential feature of administration of justice. This

is applicable with enhanced rigour to the criminal jurisprudence. Where the court disbelieves the entire incident of the occurrence or where the role of the accused who has not appealed is identical to that of the other appealing accused or where the ends of justice demand, the Court would not hesitate and, in fact, is duty bound, to dispense justice in accordance with law. The powers of this Court, in terms of Articles 136 and 142 on the one hand and the rights of an accused under Article 21 of the Constitution on the other, are wide enough to deliver complete justice to the parties. These powers are incapable of being curtailed by such technical aspects which would not help in attainment of justice in the opinion of the Court. In light of the above principles, this Court is required to consider the effect of these judgments on the case of the non-appealing accused in the present case.

42. In the present case, accused No.1, Chandran had been attributed the same role as the other two accused. All the accused were stated to have murdered the deceased and burnt his body. It was a case of circumstantial evidence where not only has the prosecution failed to prove all the facts and events to complete the chain of events pointing only towards the guilt of the accused but there are also definite discrepancies in the case of the prosecution, contradictions between the statements of the material witnesses and the most important piece of prosecution evidence, the extra-judicial confession, Exhibit P4, is found entirely unreliable, not worthy of credence as well as the facts recorded in Exhibit P4 stand disproved by another prosecution witness herself, i.e., PW-2, who, in fact, has lost her husband.

43. For the reasons afore-recorded, while accepting the appeal of the accused-appellants, we also direct that the benefit of this judgment shall also stand extended to accused No.1, Chandran, who is in jail. All the accused are acquitted of the charge under Section 302 IPC. They be set at liberty forthwith.

K.K.T. Appeal allowed.

AL JAZEERA STEEL PRODUCTS COMPANY SAOG
v.
MID INDIA POWER & STEEL LTD.
(Arbitration Petition No. 6 of 2009)

MAY 08, 2012

[SURINDER SINGH NIJJAR, J.]

Arbitration and Conciliation Act, 1996:

ss.11(5) and (9) – Appointment of arbitrator – Sale-purchase contract – Goods supplied found defective and of poor quality – Held: The applicant has raised bona fide disputes arising out of or relative to the construction of the contract which contains the arbitration clause – The petition can not be said to be belated – Sole Arbitrator appointed and all the disputes and differences that have arisen between the parties referred to arbitration.

The applicant company, having its registered office in Sohar, Sultanate of Oman and the respondent, and Indian Company, entered into a sale purchase contract dated 18.6.2008 whereunder the respondent was to supply to the applicant 2000 metric ton Prime Alloy Steel Billets of specific chemical composition and physical specifications as described in Article 3 of the contract. The respondent encashed the Letter of Credit opened by the applicant. The goods supplied by the respondent were found defective. Since the disputes raised by the purchaser-company were not resolved, it filed the instant application for appointment of an arbitrator. The respondent claimed that the application was not maintainable in view of the fact that the dispute sought to be referred to arbitration was "not a dispute arising out of contract" but rather a dispute which was deliberately planted post the completion of the contract; that the

dispute about the defective goods was a belated attempt by the applicant to evade its liability under the contract; and that the applicant did not raise a proper claim which could be referred to arbitration.

Allowing the petition, the Court

HELD: 1.1. The applicant has clearly raised *bona fide* disputes arising out of or relative to the construction of the contract which contains the arbitration clause. Article 10 of the contract contemplates resolution of disputes between the applicant and the respondent through arbitration, as per the procedure laid down under the Arbitration and Conciliation Act, 1996. [para 12] [405-F-G]

1.2. The applicant through its e-mail dated 31.8.2008 had informed the respondent about defective material. In the second e-mail on the same date, the applicant had set out the defects in the Billets and informed the respondent that it had stopped de-stuffing of containers. The respondent was called upon to take back the rejected goods urgently and arrange to refund the amount paid at the earliest. In response to the said e-mail, the respondent on 1.9.2008 indicated its concern and deeply regretted the inconvenience caused to the applicant. The applicant was also assured that the problem would be sorted out to the entire satisfaction of the applicant. Thereafter, the respondents proposed a joint inspection, which according to the applicant was never arranged. On the other hand, the respondent claims that the applicant had rebuffed all the efforts made by the respondents to resolve the issue. The applicant was intent on claiming the refund. These facts and circumstances are sufficient to show that the *bona fide* disputes have arisen between the parties, which are within the scope and ambit of the arbitration clause and need to be resolved through arbitration. [para 15-16] [406-G-H; 407-A-D]

2. The disputes having arisen in September, 2008 and the application having been filed on 4.2. 2009, the petition can not be said to be belated. [para 16] [407-D]

3.1. A bare perusal of the arbitration clause (Clause 10 of the contract) is sufficient to indicate that it covers all disputes and differences of any kind arising between the parties. The applicant has clearly raised a number of issues, which can be summarized as: (a) failure of the respondent to remove the defective Billets supplied by the respondent and lying at applicant's premises; (b) failure to remit the amount drawn by respondent against the Letter of Credit; (c) failure to pay interests and costs incurred by the applicant; (d) failure to pay warehousing charges @ USD 20 per Metric Ton per day on and from 1.10.2009 till the actual removal of defective Billets from the premises of the applicant. In such circumstances, it can not be said that the applicant has failed to raise *bona fide* dispute which cannot be referred to arbitration. [para 13] [406-C-F]

3.2. The Sole Arbitrator is appointed and all the disputes that have arisen between the parties are referred to arbitration for adjudication on such terms and conditions as the Arbitrator deems fit and proper. [para 17] [407-F]

SBP & Co. Vs. Patel Engineering Ltd. & Anr. **2005 (4) Suppl. SCR 688 = 2005 (8) SCC 618;** *National Insurance Company Limited Vs. Boghara Polyfab Private Limited* **2008 (13) SCR 638 =2009 (1) SCC 267;** *Nandan Biomatrix Limited Vs. D 1 Oils Limited* **2009 (3) SCR 115 = 2009 (4) SCC 495;** *Visa International Limited Vs. Continental Resources (USA) Limited* **2008 (16) SCR 1043 = 2009 (2) SCC 55; and** *Reva Electric Car Company Private Limited Vs. Green Mobil* **2011 (13) SCR 359 = 2012 (2) SCC 93 – cited.**

Case Law Reference:

2005 (4) Suppl. SCR 688	**cited**	**para 9**
2008 (13) SCR 638	**cited**	**para 9**
2009 (3) SCR 115	**cited**	**para 10**
2008 (16) SCR 1043	**cited**	**para 10**
2011 (13) SCR 359	**cited**	**para 10**

CIVIL ORIGINAL JURISDICTION : Arbitration Petition No. 6 of 2009.

Under Section 11(6) of the Arbitration and Conciliation Act, 1996.

K.V. Vishwanathan, Shabyashachi Patra, Sanjeev Kumar (Khaitan & Co.) for the Petitioner.

G.L. Rawal, Sanjay Kapur, Ashmi Mohan for the Respondent.

The Order of the Court was delivered by

O R D E R

SURINDER SINGH NIJJAR, J. 1. This petition under Sections 11(5) and (9) of the Arbitration and Conciliation Act, 1996 read with paragraphs 2 and 3 of the appointment of the Arbitrators by the Chief Justice of India Scheme, 1996 seeks appointment of an independent and impartial person as an Arbitrator.

2. The applicant is a Company incorporated in Oman having Registration No.1550438 and having its registered office at Sohar Industrial Estate, PO Box 40, PC 327, Sohar, Sultanate of Oman. The respondent is an Indian Company incorporated under the provisions of the Companies Act, 1956 and having its registered office at Shanti Heights, 32/2, South

Tukoganj, 2nd Floor, Above Cosmos Bank, Indore 452001 (Madhya Pradesh).

3. The applicant entered into a Sale Purchase Contract dated 18th June, 2008 bearing No.MIPSL/BILLET/EXP/08-09/003 (hereinafter referred to as the 'Contract') with the respondent for supply of 2000 metric ton Prime Alloy Steel Billets of specific chemical composition and physical specifications more particularly described in Article 3 of the Contract. In accordance with the terms and conditions of the Contract, the applicant had opened a Letter of Credit bearing No. DC BAF 080939 through HSBC Bank Middle East Limited Muscat. The Letter of Credit was encashed by the respondent on 21st August, 2008 through its bankers, State Bank of Travancore. On 23rd August, 2008, the applicant took delivery of first shipment of 243.2 Metric Ton of Billets at Sohar Port. Upon unloading the containers, the applicant noticed that far from complying with the specifications mentioned in the Contract, the Billets supplied by the respondents were of a very poor quality. The Billets had cracks which were visible to naked eyes. Even then, to confirm the defects, the applicant chose some random Billets and sent the same to two independent laboratories for testing. Both the laboratories, after conducting the requisite tests, confirmed that the Billets supplied by the respondent did not comply with the specifications mentioned in the Contract. The applicant sent an e-mail dated 31st August, 2008, informed the respondent about the non-conformity and made it clear that the same were not acceptable. On the same day, i.e., 31st August, 2008, another e-mail was sent setting out in detail the defects in the Billets. It was also mentioned that the applicant had done random cross verifications on chemical composition, and the respondents will be intimated after getting results. It is further stated that the applicant has stopped de-stuffing of containers, the respondent was requested to kindly arrange to take back the rejected goods urgently and arrange for the refund of the amount paid at the earliest. The applicant informed the respondent that all unloading, loading and

demurrage at Port and with the shipping company will be to your account.

4. The respondent by its letter dated 1st September, 2008 stated that the complaint has been noted and they were equally and greatly concerned. The applicant was informed that the complaint was being accorded highest priority by the respondent that they were investigating at their end the reasons for the same. The letter states that it was never the intention of the respondent to send substandard material to any of their esteemed customers. It notes that "we understand your concern and deeply regret the inconvenience caused to you. However, we would like to assure you that we will sort out this problem to your entire satisfaction. We wish to assure that we believe in ethical business practices and strive hard for customer satisfaction." The applicant was further informed that "in order to ascertain the intensity of the problem and discuss the various issues involved for an amicable resolution of the same, it is planned to send a high level delegation to your site within the next few days". In the meanwhile, the applicant was requested to carry out de-stuffing of the containers and take delivery of lot 2, 3 and 4 as the same will unnecessarily incur charges on account of detention and demurrage. The applicant was once again re-assured that the issue would be resolved to their entire satisfaction. Pursuant to the aforesaid assurances, the respondent cleared the remaining 1234.63 MT of the Billets which, according to the applicant, were defective. On 10th September, 2008, there was a meeting between the representatives of the applicant and the respondent. It was decided that the joint inspection would be undertaken to have the sample analyzed from independent recognized laboratories in Dubai on 13th September, 2008. The joint inspection was not arranged. The applicant issued several reminders informing the respondent that the defective Billets stood rejected, and they were requested to remove the same. Since the joint inspection was not carried out, the applicant got an inspection conducted through one of the reputed firms in Dubai on 9th October, 2008.

The Expert, known as SGS Dubai, in its report dated 16th October, 2008 concluding that "the lot is having lot of serious visual defects" and that "all the analyzed samples were not complying with provided contractual specification". All efforts and settlements having failed, the applicant invoked the arbitration clause in terms of Article 10 of the Contract, through its notice dated 17th December, 2008.

5. No reply was received from the respondent. The applicant, therefore, nominated the Sole Arbitrator (Hon.Mr.Justice S.N.Variava, a former Judge of this Court). Since the respondent did not reply to the aforesaid letter, the applicant was left with no alternative but to move the present petition.

6. In the reply, the respondent claimed that it was issued inspection certificates dated 28th July, 2008 and 31st July, 2008 of quality and quantity by Inspectorate Griffith India Pvt. Ltd., an independent third party inspection agency of international repute, with respect to the goods that were to be dispatched to the applicant as per the said Contract. The goods were duly accepted by the applicant. The Letter of Credit had been opened by the applicant in accordance with Article 5 of the Contract. The applicant took delivery of the first shipment on 27th August, 2008. It accepts that applicant had sent e-mail dated 31st August, 2008 to the representative of the respondent alleging that the Billets were defective and making the demands, as noticed earlier. The respondent gave another version as to why the joint inspection was not carried out. According to the respondents, all efforts to persuade the applicant had failed. They had a cursory meeting with the CEO of the applicant which lasted two minutes. The applicant insisted that the respondent lift the material and refund the money. The applicant, according to the respondent, is arbitrarily calling upon the respondent to pay warehousing charges @ US $ 20 per metric ton per day after 30th September, 2008. The respondent claimed that the application is not maintainable in

view of the fact that the dispute sought to be referred to arbitration is "not a dispute arising out of contract" but rather a dispute which has been deliberately planted post the completion of the Contract to escape a liability that the applicant has already incurred, i.e., payment of price for the goods supplied. According to the respondents, it is not a dispute in real sense but a "moon shine dispute". Further it is a dispute that has been raised after the Contract has been validly completed. The dispute about the defective goods is a belated attempt by the applicant to evade its liability under the Contract. The real reason for trying to avoid the Contract is the downfall of the price in the international market of steel Billets.

7. The applicant in its rejoinder has reiterated the averments made in the application. It is stated that the inspection notes mentioned by the respondent had come to the knowledge of the applicant only from the reply filed by the respondent to the application. The applicant denies that the material supplied by the respondent was in accordance with the specifications given in the Contract. It is stated that the applicant has not tried to evade the liability under the Contract. It is also denied that the Contract has become commercially unviable. The applicant also denied that the respondent has made attempts to resolve the issues raised by the applicant. The further details given by the applicant need not be noticed at this stage.

8. I have heard the learned counsel for the parties.

9. Mr. Viswanathan, learned senior counsel appearing for the applicant submits that the matter herein is specifically covered by the judgment of this Court in *SBP & Co. Vs. Patel Engineering Ltd. & Anr.*[1] and *National Insurance Company Limited Vs. Boghara Polyfab Private Limited*[2] In reference to the arbitration clause, Mr. Viswanathan submits that the disputes have arisen between the parties. The disputes relate

1 (2005) 8 SCC 618

2 (2009) 1 SCC 267

to live claims which are not belated. The disputes fall within the scope and ambit of the arbitration clause which are worded very widely. The arbitration clause clearly states that "all disputes and differences whatsoever arising between the buyer and seller out of or relative to the construction meaning and operation of effect of this Contract or any breach thereof shall be settled by the arbitration."

10. Learned counsel also relied on *Nandan Biomatrix Limited Vs. D 1 Oils Limited*[3] and *Visa International Limited Vs. Continental Resources (USA) Limited*[4] and *Reva Electric Car Company Private Limited Vs. Green Mobil*[5].

11. On the other hand, counsel for the respondent submits that the petition is not maintainable as the condition precedent for invoking arbitration, as agreed in the agreement, has not been satisfied. Since there has been no joint inspection of the material, no reliance can be placed on the expert reports submitted by the applicant. In this case, it was agreed that the parties shall try to settle the dispute amicably, which was a condition precedent for invoking the arbitration. According to the learned counsel, in the present case, the applicant has not even raised a proper claim, which can be referred to arbitration.

12. I have considered the submission made by the learned counsel for the parties. I am of the considered opinion that the applicant has clearly raised bonafide disputes arising out of or relative to the construction of the contract which contains the arbitration clause. Article 10 of the contract contemplates resolution of disputes between the applicant and respondent through arbitration, as per the procedure laid down under the Arbitration and Conciliation Act, 1996. The clause reads as under:-

"All disputes and differences whatsoever arising between buyer and seller out of or relative to the construction meaning and operation of effect of this contract or any breach thereof, shall be settled amicably, failing which it shall be settled as per the Indian Arbitration and Conciliation Act, 1996.

The place of arbitration would be Mumbai, India the decision made by the arbitration organization shall be taken as final and binding upon both parties. The arbitration expenses shall be borne by the loosing party unless otherwise awarded by the arbitration organizations."

13. A bare perusal of the aforesaid clause is sufficient to indicate that it covers all disputes and differences of any kind arising between the parties. The applicant has clearly raised a number of issues, which can be summarized as follows:-

(a) Failure of the respondent to remove the defective Billets supplied by the respondent and lying at applicant's premises

(b) Failure to remit the amount drawn by respondent against the Letter of Credit

(c) Failure to pay interests and costs incurred by the applicant

(d) Failure to pay warehousing charges @ USD 20 per Metric Ton per day on and from 1st October, 2009 till the actual removal of defective Billets from the premises of the applicant.

14. In such circumstances, it can not be said that the applicant has failed to raise bonafide dispute which cannot be referred to arbitration.

15. As noticed earlier, the applicant through its e-mail dated 31st August, 2008 had informed the respondent about defective material. In the second e-mail on the same date, the applicant had set out the details in the Billets and informed the respondent that it has stopped de-stuffing of containers. The respondent was called upon to take back the rejected goods urgently and arrange to refund the amount paid at the earliest. In response to the aforesaid e-mail, the respondent on 1st

3 (2009) 4 SCC 495

4 (2009) 2 SCC 55

5 (2012) 2 SCC 93

September, 2008 had indicated its concern and the inconvenience caused to the applicant was deeply regretted. The applicant was also assured that the problem would be sorted out to the entire satisfaction of the applicant. Thereafter, the respondents have proposed a joint inspection, which according to the applicant was never arranged. On the other hand, the respondent claims that the applicant had rebuffed all the efforts made by the respondents to resolve the issue. The applicant was intent on claiming the refund.

16. In my opinion, the aforesaid facts and circumstances are sufficient to show that the bonafide disputes have arisen between the parties, which are within the scope and ambit of the arbitration clause and need to be resolved through arbitration. I do not find any substance in the submission of the learned counsel for the respondent that the disputes are either belated or raised only to avoid liability under the contract. The disputes having arisen in September, 2008 and the present application having been filed on 4th February, 2009, the petition can not be said to be belated.

17. Keeping in view the facts and circumstances narrated above, the application is allowed. All the disputes that have arisen between the parties are hereby referred to arbitration. I hereby appoint Hon. Mr. Justice S.N. Variava, Former Judge of this Court, as the Sole Arbitrator to adjudicate upon all the disputes and differences that have arisen between the parties, on such terms and conditions as the learned Sole Arbitrator deems fit and proper. Undoubtedly, the learned Sole Arbitrator shall decide all the disputes arising between the parties without being influenced by any prima facie opinion expressed in this order, with regard to the respective claims of the parties.

18. The registry is directed to communicate this order to the Sole Arbitrator to enable him to enter upon the reference and decide the matter as expeditiously as possible.

19. The Arbitration Petition is accordingly disposed of.

R.P. Arbitration petition allowed.

JITENDER KUMAR

v.

STATE OF HARYANA

(Criminal Appeal No. 1763 of 2008)

MAY 8, 2012

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

Penal Code, 1860:

ss. 120-B and 302/34 IPC – Murder – Victim strangulated to death by father-in-law, brother-in-law and others – Evidence of the brother and the husband of the victim – Disclosure statement of one of the accused – Out of 5 accused, 4 convicted and sentenced by trial court u/ss 120-B and 302/34 and the fifth convicted u/s 120B and also sentenced to imprisonment for life – Held: The prosecution has been able to establish its case beyond reasonable doubt by ocular, documentary and medical evidence – The judgment of the High Court under appeal does not call for any interference – Once the court finds an accused guilty of s.120B, where the accused had conspired to commit an offence and actually committed the offence with other accused with whom he conspired, they all shall individually be punished for the offence for which such conspiracy was hatched – Thus, there is no error in the judgment of the trial court in convicting the accused u/s 120B read with s.302.

Evidence Act, 1872:

s.27 – Disclosure statement – Admissibility of – Held: The part of the disclosure statement cannot be taken to be confession of the accused in relation to commission of the crime, but the other part by which the motor cycle which was used by the accused in facilitating the crime was recovered, would be the portion admissible in evidence.

Criminal Law:

Accused not named in FIR – Conviction of – Held: An accused who has not been named in the FIR, but to whom a definite role is attributed in the commission of the crime and when such role is established by cogent and reliable evidence and the prosecution is also able to prove its case beyond reasonable doubt, such an accused can be punished in accordance with law, if found guilty – In the instant case, a definite role has been attributed to the accused concerned by two prosecution witnesses and it was on his disclosure statement that the motorcycle used by him to facilitate the crime was recovered.

Medical Jurisprudence:

Time of death and contents of stomach – Held: Judging the time of death from the contents of the stomach, may not always be the determinative test – It will require due corroboration from other evidence – If the prosecution is able to prove its case, including the time of death, beyond reasonable doubt and the same points towards the guilt of the accused, then it may not be appropriate for the court to wholly reject the case of the prosecution and to determine the time of death with reference to the stomach contents of the deceased.

Delay/Laches:

Delay in filing FIR – Held: Cannot be a ground by itself for throwing away the entire prosecution case – The court has to seek an explanation for delay and check the truthfulness of the version put forward – In the instant case, keeping in view the circumstances in which the witnesses informed police, some delay in registering the FIR was inevitable and it is not such inordinate delay which could be construed as a ground for acquittal of the accused, as the prosecution has been able to prove its case beyond reasonable doubt.

Code of Criminal Procedure, 1973:

s.313 – Statement of the accused who died during pendency of proceedings – Held: The part of the statement that supports the case of the prosecution as well as statements of other witnesses can be relied upon by the prosecution to a limited extent – The statement may not be used against the other accused as such, but the fact that the statement supports the case of the prosecution cannot be wiped out from the record and would have its consequences in law.

The three appellants along with two others were prosecuted for the murder of the sister of PW-11. The prosecution case was that 'RR' (father-in-law of the deceased) was more inclined towards the children of his sister-in-law (Sali) than his own children and was helping them financially as also by parting with the household articles. This was objected to by the deceased and her husband (PW 10). Having come to know of this protest, 'SK' and 'S' (the accused appellants, in criminal appeal no. 1092 of 2009) and 'PK', the brother-in-law of the deceased threatened to kill her. On 9.2.1999, PW-11 went to the house of his sister. At about 1.00 – 1.30 a.m. in the night, PW11 heard loud voices coming from the *'chobara'*. When he went upto the *'chobara'*, he saw that 'RR' and his son 'PK' had caught hold of the hands of the deceased while 'SK' and 'S' were pulling the rope that had been put around her neck. The deceased was struggling for life and was trying to free herself from their grip. PW11 tried to intervene, but when threatened by the accused, he went to his house and informed his family members. Thereafter, he, along with some persons reached the house of the deceased and found her lying dead. On the statement of PW-11, the police registered an FIR. The trial court convicted accused 'JK' u/s 120-B IPC and sentenced him to imprisonment for life. The other four

accused were convicted u/ss 120-B and 302/34 IPC and sentenced to life imprisonment. The appeal filed by the accused was dismissed by the High Court. Accused 'RR' died during the pendency of the proceedings. SLP filed by accused 'PK' was dismissed by the Supreme Court.

Dismissing the appeals, the Court

HELD: 1.1. It is correct that the name of accused 'JK' (appellant in Crl. A. N0. 1763 of 2008) was not mentioned by PW-11 in the FIR. However, an accused who has not been named in the FIR, but to whom a definite role is attributed in the commission of the crime and when such role is established by cogent and reliable evidence and the prosecution is also able to prove its case beyond reasonable doubt, such an accused can be punished in accordance with law, if found guilty. [para 11] [427-C-E]

State of U.P. Vs. Krishna Master and Ors. **2010 (9) SCR 563 = (2010) 12 SCC 324;** *Ranjit Singh and Ors. Vs. State of Madhya Pradesh* **2010 (14) SCR 133 = (2011) 4 SCC 336 – relied on.**

1.2. In the instant case, a definite role has been attributed to accused 'JK' by PW-10. Further, it was on his disclosure statement that the motor cycle, Ext. P44, has been recovered. PW-10 has specifically stated in his statement before the court that after midnight at about 12.30 a.m., accused 'S' and 'JK' (his brother-in-law) while driving a motorcycle, had come to him in the fields. They gave him beating and insisted that he should ask his wife to open the door of the '*chobara*'. He was taken to his residence in the village and out of fear, he asked his wife to open the door which she did as earlier she had bolted the shutters from inside. After the door was opened, accused 'RR', 'PK', 'S' and 'SK' entered the *'chobara'*. 'JK' thereafter, is stated to have taken out a synthetic rope from the dicky of the motorcycle and handed over the same to 'S'. After handing over the rope, 'JK' declared that he would take PW-10 back to the fields and exhorted that the deceased be killed to solve all problems in the future. According to this witness, he was forced by 'JK' to drive the motorcycle back to the fields. Further, 'JK' is stated to have been a party to illegally confining PW-10 after the commission of the crime. Moreover, in the cross-examination of this witness, not even a suggestion was put to him that 'JK' was not present and/or had not accompanied him on the motor cycle to the fields. [para 12] [428-D-H; 429-A-B]

1.3. The fact that PW11 did not name accused 'JK' in the FIR adds to the credibility of this witness rather than creating a doubt in the case of the prosecution. PW-11 in his statement clearly stated that all the accused except 'JK' were present in the *'chobara'* and had murdered his sister. This reflects the truthfulness of PW-11. When PW-11 came to the *'chobara'* and noticed the other accused persons trying to kill the deceased, 'JK' had already left along with PW-10 and as such, there was no occasion for PW-11 to see 'JK' at the place of occurrence in the '*chobara'*. Therefore, he rightly did not name 'JK' in the FIR as one of the persons present in the '*chobara'* who committed the murder of his sister. [para 13] [429-C-F]

1.4. The High Court also believed PW-10, although it observed that he behaved like a husband under fear and exhibited his paramount interest in the property. These observations do not in any way affect the case of the prosecution because the incident, as narrated by the prosecution witnesses and particularly by PW-10 and PW-11, is also corroborated by other expert evidence on record. [para 14] [430-A-B]

Tika Ram v. State of Madhya Pradesh **(2007) 15 SCC 760 – relied on**

1.5. The part of the disclosure statement of accused 'JK', Ext. P43, cannot be taken to be confession of the accused in relation to commission of the crime, but the other part by which the motor cycle was recovered, would be the portion admissible in evidence. The admissible part can very safely be segregated from the inadmissible part in this statement. There is no such infirmity which would vitiate the very recovery of the motor cycle in terms of s.27 of the Evidence Act, 1872. The fact that the motorcycle was used by accused 'JK' for the purpose of bringing PW-10 from the fields to his residence and after getting the door opened by the victim was again used for dropping PW-10 to the fields is fully corroborated. The recovery of motorcycle, Ext. P44, is a fact which provides a link between recovery of motorcycle and its use by the accused in commission of the crime. This fact is also proved by the statement of PW10. [para 17-18 and 21] [430-G; 431-A-B, H; 432-A-C]

Aloke Nath Dutta & Ors. V. State of West Bengal **2006 (10) Suppl. SCR 662 = (2007) 12 SCC 230;** *Anter Singh v. State of Rajasthan* **2004 (2) SCR 123 = (2004) 10 SCC 657 – referred to**

2. Accused 'JK' was charged with an offence punishable u/s 120B IPC for he and other co-accused had conspired to do an illegal act and commit the murder of the deceased. A bare reading of s.120B provides that whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in the IPC for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence. Once the court finds an accused guilty of s.120B, where the accused had conspired to commit an offence and actually committed the offence with other accused with whom he conspired, they all shall individually be

punishable for the offence for which such conspiracy was hatched. Thus, there is no error in the judgment of the trial court in convicting the accused u/s 120B read with s.302 IPC. [para 23, 24 and 25] [432-F-G; 433-C-E]

3.1. It is a settled principle of criminal jurisprudence that mere delay in lodging the FIR may not prove fatal in all cases, but in the given circumstances of a case, delay in lodging the FIR can be one of the factors which corrode the credibility of the prosecution version. Delay in lodging the FIR cannot be a ground by itself for throwing away the entire prosecution case. The court has to seek an explanation for delay and check the truthfulness of the version put forward. If the court is satisfied, then the case of the prosecution cannot fail on this ground alone. [para 30] [435-E-G]

Yakub Ismailbhai Patel v. State of Gujarat **2004 (3) Suppl. SCR 978 = (2004) 12 SCC 229;** *State of Rajasthan v. Shubh Shanti Services Ltd. V. Manjula S. Agarwalla & Ors.* **2000 (2) SCR 818 = (2000) 5 SCC 30 – relied on.**

3.2. Undoubtedly, it has come in the statement of PW-1 that the house in which the occurrence took place, was situated at a distance of 150 metres, from the police station. This piece of evidence does not advance the case of the accused favourably. According to the prosecution, the victim was killed by the family of her in-laws. Most unfortunately, her husband, PW10, partly because of fear and partly out of greed for property, became a mere spectator to the crime. PW11, lodged the FIR and PW10 corroborated the version given in the FIR about the murder of his wife. He claimed that he was illegally confined by accused 'JK' and 'SK' and, therefore, after the murder, he was unable to approach the police station. In these circumstances, of course, the conduct of PW-10 and PW-11 is somewhat strange, but their statements cannot be falsified on this ground. [para 28] [434-G-H; 435-A-B]

3.3. PW-11, who was the eye-witness to the occurrence, clearly stated in his statement that after having the dinner, deceased along with her child had gone to '*chobara'* to sleep and all of them were sleeping on the ground floor. At about 1.00 or 1.30 a.m., he heard voices from the '*chobara*'. He went upstairs and saw that accused 'RR' and 'PK' had caught hold of the deceased and accused 'SK' and 'S' were strangulating her with the help of a rope. Despite her struggle, she was not able to free herself from the grip of the accused persons and when he tried to intervene, he was also threatened with dire consequences. As a result, he went away to his village to inform his family members about the incident. At that time, PW-11 was not aware of the fact that the deceased had already died. It is only when he came back to the house of 'RR' along with his co-villagers that they all saw the victim lying dead. That is how they came to know that deceased had been strangulated and murdered by the accused. It was thereafter that PW11 went to the Police Station to report the incident and met ASI on the way, who recorded his statement and after making endorsement, sent it to the Police Station for registration of the case. Accordingly, the FIR Ext. P-2 was recorded at 4.40 p.m. on 10th February, 1999, in which the time of occurrence was recorded as 1.00 to 1.30 a.m. of the same date. In these circumstances, some delay in registering the FIR was inevitable and it is not such inordinate delay which could be construed as a ground for acquittal of the accused, as the prosecution has been able to prove its case beyond reasonable doubt. [para 27 and 29] [433-H; 434-A-F; 435-D]

4.1. Judging the time of death from the contents of the stomach, may not always be the determinative test. It will require due corroboration from other evidence. If the prosecution is able to prove its case beyond reasonable doubt and cumulatively, the evidence of the

prosecution, including the time of death, is proved beyond reasonable doubt and the same points towards the guilt of the accused, then it may not be appropriate for the court to wholly reject the case of the prosecution and to determine the time of death with reference to the stomach contents of the deceased. There is no absolute and definite standard that every human being would empty his stomach within two to three hours of taking the meals, irrespective of what kind of meals had been taken by the person concerned. [para 41, 42] [441-D-G]

Jabbar Singh v. State of Rajasthan **(1994) SCC (Cr.) 1745 – relied on.**

Shivappa v. State of Karnataka **1994 (6) Suppl. SCR 171 = (1995) 2 SCC 76 – referred to.**

Modi's Medical Jurisprudence and Taxicology (23rd) Edn.) **– referred to.**

4.2. Neither PW-10 nor PW-11 has stated as to the exact time at which the victim had her dinner. It is a matter of common knowledge that in the villages, ladies normally provide food to the guests and the other members of the family first and are last to have the food themselves. None of the witnesses have given the time when all the persons had their dinner. But, according to both these witnesses, after having the dinner they had gone to sleep except PW-10 who had gone to the fields for irrigation purposes. This obviously means that they would have had dinner after 8 or 9 p.m., whereafter they went to sleep. The victim presumably had dinner thereafter and went to sleep later. She was murdered between 1.00 to 1.30 a.m. which means between 4 to 5 hours of having her dinner. The evidence of PW-3 categorically states that it was possible that the deceased was murdered between 1.00 to 1.30 a.m. This was duly corroborated by PW-11. The investigation conducted by

PW6, PW12 and PW13 also indicates that she was murdered during that period. It is significant to notice that after PW-3 stated in his further examination that the deceased might have been murdered between 1.00 to 1.30 a.m., no suggestion was put to this witness that the said witness was stating incorrectly or that it was not possible to reconcile the statement of PW-3 i.e. the expert evidence, with the version of the prosecution. Once, this statement of PW-3 remained unchallenged and there exists other prosecution evidence to support the said version, the Court would not be inclined to treat it as a significant doubt in the case of the prosecution. The time of death given by PW-3, thus, cannot be falsified only on the ground of an argument that there was some undigested food found in the stomach of the deceased. [para 35-36] [436-G-H; 437-A-F]

Shambhoo Missir & Anr. v. State of Bihar **(1990) 4 SCC 17 - distinguished**

Textbook of Gastroenterology, (Volume One), by Tadataka Yamada, David H. Alpers, Chung Owyang, Don W. Powell and Fred E. Silverstein **– referred to.**

5.1. In the instant case, both the trial court and the High Court have believed PW10 and PW11 and have returned a finding of guilt against the accused. The Courts have adversely commented upon the conduct of these witnesses but not with regard to the material events of the prosecution case. PW10 was under threat and confinement of his own family members as well as friends of the accused, who had conspired to kill his wife, that is how he obeyed the command of accused 'JK' and others in coming from the fields on the motorcycle and getting the door of *'chobara'* opened by his wife where she was sleeping with her child. He claims to have been under continuous threat and illegal confinement of accused 'JK' and the other accused. It was PW10's own

house where the murder has taken place and, therefore, his presence in the house cannot be doubted in the normal course. PW11 is the brother of the deceased and he had come late in the evening to meet his sister and sort out the issues with regard to the return of the properties which 'RR' had given to appellants 'S' and 'SK'. [para 49] [44-A-E]

5.2. The doctor (PW3) has stated that besides ligature marks on neck, the face of the deceased was swollen and congested. Six other injuries were found on the body of the deceased. The post mortem report, Ext. P4 to P5, states the cause of the death, as per opinion of the Board, as asphyxia due to strangulation, which was ante mortem in nature and sufficient to cause death in the ordinary course of nature. It is a case where the ocular evidence of PW11 is fully corroborated by medical evidence and is also partially supported by the statement of PW10, the husband of the deceased. Thus, in the considered view of this Court, the statements of PW10 and PW11 cannot be said to be doubtful. Their presence at the place of occurrence was natural and what they have stated is not only plausible but completes the chain of events in the case of the prosecution. [para 50] [444-F-H; 445-A-C]

6.1. The plea of *alibi* taken in addition to the defence that the accused 'SK' and 'S' were living in a village far away from the place of occurrence, was found to be without any substance by the trial court and was further concurrently found to be without any merit by the High Court also. In order to establish the plea of alibi these accused had examined various witnesses. The trial court has held that none of the documents adduced by the defence in evidence reflected the presence of either of the two accused at the stated place. On the contrary the entire plea of alibi falls to the ground in view of the statements of PW-10 and PW-11. The statements of these witnesses have been accepted by the courts below and

also the fact that they have no reason to falsely implicate the accused persons. Once, PW-10 and PW-11 are believed and their statements are found to be trustworthy, as rightly dealt with by the courts below, then the plea of abili raised by the accused loses its significance. The burden of establishing the plea of alibi lay upon the appellants and they have failed to bring on record any such evidence which would, even by reasonable probability, establish their plea of alibi. [para 51] [445-D-H]

Shaikh Sattar v. State of Maharashtra **2010 (10) SCR 503 = (2010) 8 SCC 430 – relied on**

Rupchand Chindu Kathewar v. State of Maharashtra **(2009) 17 SCC 37 – held inapplicable.**

S.P. Bhatnagar v. State of Maharashtra **1979 (2) SCR 875 = (1979) 1 SCC 535**

6.2. Accused 'RR', in his statement u/s 313 CrPC, had admitted material parts of the prosecution case including that he had parted away with a buffalo, some household articles and cash amount of Rs.50,000/- in favour of the family of accused 'S' and that his son PW-10 and the deceased had objected to it. He also admitted that the door was opened by deceased on the asking of PW-10 whom accused 'JK' had brought on motor cycle from the fields. However, he denied having committed the murder. The fact of the matter remains that the statement of accused 'RR' u/s 313 CrPC is part of the judicial record and could be used against him for convicting him, if the prosecution had proved its case in accordance with law. 'RR', however, died during the pendency of the proceedings. The part of his statement that supports the case of the prosecution as well as the statement of PW-10 and PW-11 can be relied upon by the prosecution to a limited extent. This statement may not be used against

the other accused as such, but the fact that the statement of accused 'RR' u/s 313 CrPC supports the case of the prosecution cannot be wiped out from the record and would have its consequences in law. Without using the statement of 'RR' against the accused, the courts below have correctly relied upon the statements of PW-10 and PW-11 and the medical evidence. This finding recorded by the courts below cannot, therefore, be faulted with. [para 52-53] [446-C-H]

Nachhatar Singh v. State of Punjab **(1976) 1 SCC 750 – held inapplicable.**

7.1. The special leave petition filed by accused 'PK' was dismissed by this Court on the ground of delay as well as on merits by its order dated 14.10.2011. Of course, dismissal of the SLP at the admission stage itself would not adversely affect the case of the appellants. [para 55] [447-C-D]

Jalpat Rai and Ors. v. State of Haryana **2011 SCR 1037 = JT 2011 8 SC 55 – relied on.**

7.2. The prosecution has been able to establish its case beyond reasonable doubt by ocular, documentary and medical evidence. The judgment of the High Court under appeal does not call for any interference. [para 54 and 56] [447-F]

Case Law Reference:

2010 (9) SCR 563	**relied on**	**para 11**
2010 (14) SCR 133	**relied on**	**para 11**
2007 (15) SCC 760	**referred to**	**para 15**
2006 (10) Suppl. SCR 662	**referred to**	**para 16**
2004 (2) SCR 123	**referred to**	**para 20**

2004 (3) Suppl. SCR 978	**relied on**	**para 30**
2000 (2) SCR 818	**relied on**	**para 30**
1990 (4) SCC 17	**distinguished**	**para 37**
1994 (6) Suppl. SCR 171	**referred to**	**para 45**
(1994) SCC (Cr.) 1745	**relied on**	**para 46**
2009 (17) SCC 37	**held inapplicable**	**para 48**
2010 (10) SCR 503	**relied on**	**para 51**
1979 (2) SCR 875	**para 52**	
(1976) 1 SCC 750	**held inapplicable**	**para 54**
2011 SCR 1037	**relied on**	**para 55**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1763 of 2007 etc.

From the Judgment & Order dated 30.05.2008 of the High Court Punjab & Haryana at Chandigarh in Criminal Appeal No. 930-DB of 2003.

WITH

Crl. Appeal No. 1092 of 2009.

Sushil Kumar, Sanjay Jain, Aditya Kumar for the Appellant.

Kamal Mohan Gupta, Gaurav Teotia, Sanjeev Kumar for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The Trial Court, vide its judgment of conviction dated 5th November, 2003 and order of sentence dated 10th November, 2003, held all the five accused, namely, Sunil Kumar, Satish, Pawan Kumar, Jitender Kumar and Ratti Ram guilty of the offence under Section 120-B of the Indian Penal Code, 1860 (IPC). The Trial Court further

held that except Jitender, remaining four accused were also guilty of the offence under Section 302 read with Section 34 IPC. The Trial Court acquitted all the four accused for the offence under Section 323 read with Sections 34 and 342 IPC and convicted them as follows:

> "Taking into consideration all the aspects of the case, I take a lenient view and sentence Sunil, Satish, Pawan and Ratti Ram accused to imprisonment for life under Section 302 read with Section 34 IPC and Section 120B IPC. Each of the accused is sentenced to a fine of Rs.1000/- under the said sections. In default of payment of fine, the defaulting accused shall suffer further rigorous imprisonment for six months.
>
> Jitender accused has been found guilty under Section 120-B IPC for conspiracy of murder with the other four-five persons and when we read the provisions of Section 120B and 109 IPC, Jitender is also punishable for the offence of murder as the act of murder has been committed in consequence of the conspiracy. I, therefore, sentence Jitender accused to imprisonment for life under Section 120-B IPC. He is also sentenced to a fine of Rs.1000/- under the said section. In default of payment of fine Jitender accused shall suffer further rigorous imprisonment for six months.
>
> As regards, the role of Surender @ Sunder son of Ratti Ram, the husband of Indra deceased, a copy of this judgment be sent to the Superintendent of Police, Hisar for taking appropriate action against him in view of the observations made by me in this judgment."

2. This judgment of the Trial Court was challenged by the accused persons in appeal before the High Court being Criminal Appeal No.930-DB of 2003. Surender @ Sunder, husband of the deceased, had also filed a criminal miscellaneous petition being Criminal Miscellaneous No.3337-M of 2004 against the judgment of the Trial Court wherein it had

directed action to be taken against him by the Superintendent of Police in view of the observations made by the Trial Court therein. Both the criminal appeal as well as the criminal miscellaneous petition were heard together and disposed of by a common judgment of the High Court dated 30th May, 2008 wherein the High Court upheld the judgment of the Trial Court in its entirety and dismissed the criminal appeal and the criminal miscellaneous petition.

3. Against this judgment of the High Court, two separate appeals have been filed before this Court, one by Jitender Kumar being Criminal Appeal No.1763 of 2008 and the other by Sunil Kumar and Satish Kumar being Criminal Appeal No.1092 of 2009. Surender has not challenged the judgment of the High Court.

4. At this stage itself, we may notice that accused Pawan Kumar had also filed a special leave petition against the judgment of the High Court being SLP (Crl.) No.7881 of 2011 which came to be dismissed by a Bench of this Court on 14th October, 2011 on the ground of delay as well as on merit. Ratti Ram died during the pendency of the proceedings. Thus, by this common judgment, we would dispose of both these criminal appeals preferred by the three accused persons.

5. The First Information Report (FIR) pertaining to the case in hand was registered by ASI Hans Raj of Police Station Narnaund on 10th February, 1999 on the statement of Ishwar Singh (PW11), brother of the deceased. Chadan Singh, resident of Bhartana had eight children, two sons and six daughters. The youngest of the daughters was Indra who was married to Surender @ Sunder, son of Ratti Ram of village Narnaund. Indra, the deceased, was having a son aged about two years from this marriage. Mother-in-law of Indra had died even before the marriage of Indra with Surender. Surender had two brothers, namely, Pawan Kumar and Anup. Allegedly, Ratti Ram, father-in-law of Indra, was interested in the children of his sister-in-law (sali) more than his own children. Ratti Ram had

obtained a loan on his own land and purchased a tractor for the children of his sister-in-law. Due to this, there was annoyance in the family and particularly, Indra and Surender had raised protest. Having come to know of this protest, Satish and Sunil son of Shamsher Singh resident of Jamni and Pawan son of Ratti Ram had threatened Indra that they would kill her. Satish and Sunil, along with Pawan, had also taken the cattle and other household articles from the house of Ratti Ram with his permission. Ratti Ram had even started living in the house of Sunil and Satish. After being pressurized by his family members, Ratti Ram, along with his son, had come back to his house in Narnaund but the cattle and other household articles that he had taken while going to the house of Sunil were not brought back by Ratti Ram to his own house. Indra had protested against Ratti Ram not bringing the cattle and household articles to their house. This further annoyed Sunil, Satish, etc.

6. On 9th February, 1999, Ishwar Singh, PW-11 had gone to the house of his sister Indra. Satish, Sunil and Pawan had also come to Narnaund and all of them stayed in the house of Ratti Ram on that day. At night, after taking meals, all these guests slept on the ground floor, Surender went to irrigate the fields while Indra along with her son, went to sleep in the chobara. It is stated that at about 1.00 – 1.30 a.m. in the night, PW11 heard loud voices coming from the chobara as well as the indication of somebody falling down and rising. When he went up to the chobara, he saw that Ratti Ram and his son Pawan Kumar had caught hold of the hands of Indra while Satish and Sunil were pulling the rope that had been put around her neck. Indra was struggling for life and was trying to free herself from their grip. When PW11 tried to intervene and get Indra freed, they gave a lalkara that Ishwar Singh should first be taught a lesson for intervening in their affairs. For the fear of death and love for life, he left the place of occurrence and went to his house and told the story to his family members. Thereafter, Balwan, Rajender, Jagdish and Sultan, all residents

of Bhartana, came to the house of Indra and found her lying dead on the ground floor. There were marks of injuries on her neck and body. She had been strangulated and murdered.

7. Having received the information and registered the FIR (Ex.P2), ASI Hans Raj proceeded to the place of occurrence along with PW11. The Investigating Officer conducted the spot inspection, got the place of occurrence photographed and collected pieces of bangles, which were lying in the chobara of the premises. After conclusion of the inquest proceedings, the body of the deceased was sent for post mortem on 11th February, 1999. The site plan of the place of occurrence was also prepared. Accused Satish was arrested on 17th February, 1999 from the bus stand at Rajthal. During the course of investigation, he made disclosure statement to the effect that the rope used in the crime had been kept concealed in the fields of wheat crop of accused Ratti Ram. Upon his disclosure statement, the said rope was recovered, made into parcel and sealed. On 8th March, 1999, the investigation was taken over by SI Jagir Singh. Accused Sunil and Pawan Kumar were arrested by him. During investigation, they got recovered the salwar, jhumper and chunni of Indra from the kotha of Turi. Similarly, Jitender was taken into custody on 12th March, 1999 and upon his disclosure statement, the motorcycle was recovered from the mechanic shop vide Exhibit P44.

8. After completion of investigation, a charge sheet was filed under Section 173 of the Code of Criminal Procedure, 1973 (CrPC) charging all the five accused persons for the offences under Sections 302, 342, 506, 120-B and 34 IPC in the Court of the Magistrate who committed the case to the Court of Sessions. The prosecution examined as many as 13 witnesses in support of its case and also produced documentary evidence including the report from the Forensic Science Laboratory (FSL). After putting up the evidence against the accused, their statements were recorded under Section 313 CrPC and then, as already noticed, they were convicted by the Trial Court and their conviction has been

upheld by the High Court also.

9. In the backdrop of the above prosecution case and the fact that the learned counsel appearing for the appellant in the respective appeals have addressed distinct arguments and referred to different evidence, we consider it appropriate to deal with both these appeals separately.

Criminal Appeal No.1763 of 2008

10. While raising a challenge to the judgment of the High Court as well as that of the Trial Court, it is, inter alia, contended on behalf of accused Jitender Kumar that :

(i) He has not been named in the FIR (Exhibit P2), which fact itself shows that he has been falsely implicated in the crime.

(ii) The occurrence is alleged to have taken place between 1.00 to 1.30 a.m. on 10th February, 1999 but the FIR has been registered after undue and unexplained delay, i.e., at 4.30 p.m. on 10th February, 1999. The delay in lodging the FIR is fatal to the case of the prosecution in the facts and circumstances of the present case.

(iii) The learned Trial Court as well as the High Court have misread and failed to appreciate the evidence in accordance with law.

(iv) The alleged recovery of the motorcycle Exhibit P44 is in furtherance to the statement of Jitender (Exhibit P43). This statement, having been made to the police, is inadmissible in evidence and could not be relied upon by the Court for convicting the accused.

(v) Accused Jitender had no motive to be involved in the crime and no role has been attributed to him so as to warrant his conviction for an offence under

Section 302 IPC.

(vi) Jitender has not been convicted independently for an offence under Section 302/34 IPC as recorded by the learned Trial Court. Consequently, he could not have been held guilty of the same offence with the aid of Section 120B IPC.

11. As already noticed, the FIR (Ext. P2) had been registered by ASI Hans Raj, PW-13 on the statement of Ishwar Singh, PW-11. It is correct that the name of accused Jitender, son of Sajjan Singh, was not mentioned by PW-11 in the FIR. However, the law is well-settled that merely because an accused has not been named in the FIR would not necessarily result in his acquittal. An accused who has not been named in the FIR, but to whom a definite role has been is attributed in the commission of the crime and when such role is established by cogent and reliable evidence and the prosecution is also able to prove its case beyond reasonable doubt, such an accused can be punished in accordance with law, if found guilty. Every omission in the FIR may not be so material so as to unexceptionally be fatal to the case of the prosecution. Various factors are required to be examined by the Court, including the physical and mental condition of the informant, the normal behavior of a man of reasonable prudence and possibility of an attempt on the part of the informant to falsely implicate an accused. The Court has to examine these aspects with caution. Further, the Court is required to examine such challenges in light of the settled principles while keeping in mind as to whether the name of the accused was brought to light as an afterthought or on the very first possible opportunity. The Court shall also examine the role that has been attributed to an accused by the prosecution. The informant might not have named a particular accused in the FIR, but such name might have been revealed at the earliest opportunity by some other witnesses and if the role of such an accused is established, then the balance may not tilt in favour of the accused owing to such omission in the FIR. The Court has also to consider the

fact that the main purpose of the FIR is to satisfy the police officer as to the commission of a cognizable offence for him to conduct further investigation in accordance with law. The primary object is to set the criminal law into motion and it may not be possible to give every minute detail with unmistakable precision in the FIR. The FIR itself is not the proof of a case, but is a piece of evidence which could be used for corroborating the case of the prosecution. The FIR need not be an encyclopedia of all the facts and circumstances on which the prosecution relies. It only has to state the basic case. The attending circumstances of each case would further have considerable bearing on application of such principles to a given situation. Reference in this regard can be made to *State of U.P. Vs. Krishna Master and Ors.* [(2010) 12 SCC 324] and *Ranjit Singh and Ors. Vs. State of Madhya Pradesh* [(2011) 4 SCC 336].

12. In the present case, despite the fact that the accused Jitender has not been named in the FIR, a definite role has been attributed to this accused by PW-10. Further, it was on his disclosure statement that the motor cycle, Ext. P44, has been recovered. PW-10, Surender has specifically stated in his statement before the Court that Jitender was his brother-in-law. According to this witness, after midnight at about 12.30 a.m., accused Satish and Jitender, while driving a motorcycle, had come to him in the fields. They gave him beating and insisted that he should ask his wife to open the door of the chobara. He was taken to his residence in the village and out of fear, he asked his wife to open the door which she did as earlier she had bolted the shutters from inside. After the door was opened, Ratti Ram, Pawan, Satish and Sunil entered the chobara. Jitender thereafter, is stated to have taken out a synthetic rope from the dicky of the motorcycle and handed over the same to Satish. After handing over the rope, Jitender declared that he would take Sunder back to the fields and exhorted that Indra be killed to solve all problems in the future. According to this witness, he was forced by Jitender to drive the motorcycle back

to the fields. Further, Jitender is stated to have been a party to illegally confining PW-10 after the commission of the crime. Moreover, in the cross-examination of this witness, not even a suggestion was put to him that Jitender was not present and/or had not accompanied him on the motor cycle to the fields. On the contrary, the matters in relation to the property, for which protest was raised by Indra have clearly been stated therein.

13. We must also notice that the fact that PW11 did not name the accused Jitender in the FIR adds to the credibility of this witness rather than creating a doubt in the case of the prosecution. PW-11 in his statement clearly stated that all the accused except Jitender were present in the Chobara and had murdered his sister Indra. This reflects the truthfulness of PW-11. The occurrence of the events as per the case projected by the prosecution is that PW-11 had not met Jitender in the Chobara because Jitender had gone to the fields to bring PW-10 forcibly and under threat to his house and after getting the door opened by Indra and handing over the rope to the other accused, Jitender had taken PW-10 back to the fields. When PW-11 came to the Chobara and noticed the other accused persons killing Indra, Jitender had already left along with PW-10 and as such, there was no occasion for PW-11 to see Jitender at the place of occurrence in the Chobara. Therefore, he rightly did not name Jitender in the FIR as one of the persons present in the chobara who committed the murder of his sister. There was no occasion or reason for PW-10 to implicate Jitender falsesly as Jitender was also known and related to him. This accused was duly identified in the Court by this witnesses. PW-10 and PW-11 both cannot be stated to be planted witnesses. They are natural and reliable witnesses. Of course, the learned Trial Court has expressed certain observations about the immature behavior of PW-10 and even directed action against him with regard to inflicting injury and illegal confinement, but the Trial Court did not cast any doubt on the material aspects of the occurrence in the crime committed by the accused.

14. The High Court also believed PW-10, although it observed that he behaved like a husband under fear and exhibited his paramount interest in the property. These observations do not in any way affect the case of the prosecution because the incident, as narrated by the prosecution witnesses and particularly by PW-10 and PW-11, is also corroborated by other expert evidence on record.

15. In the case of *Tika Ram v. State of Madhya Pradesh* [(2007) 15 SCC 760], the Court was concerned with an argument that the name of the accused was not mentioned by the witnesses in the FIR and it would not, by itself, be sufficient to reject the case of the prosecution against the accused. Rejecting such a contention, the Court noticed that brother of the deceased having come to know of the incident came to the place of occurrence and having seen only a part of the incident informed the police. Therefore, in that process, if he failed to mention the name of the appellant, it was not a circumstance which would be sufficient to discard the evidence of such witness and non-mentioning of the name of the accused would not be a material lapse.

16. The learned counsel appearing for these accused/appellant while relying upon the judgment of this Court in the case of *Aloke Nath Dutta & Ors. V. State of West Bengal* [(2007) 12 SCC 230], argued that the confessions in the present case have not been recorded in the manner contemplated by law and the confession cannot be taken on record where it incorporates both admissible and inadmissible parts thereof together.

17. In the disclosure statement of accused Jitender, Ext. P43, it has been recorded, “after conspiring for murdering Indra, wife of Sunder, we had used Hero Honda Motor Cycle bearing registration No. CHI/2088 of Satish in that murder, for going and coming. I have kept that motor cycle now in the shop of Sat Pal Mistry, r/o Jind. After pointing out, I can get the same recovered”. On this disclosure, memo of recovery was prepared and signed.

18. This contention of the learned counsel for the appellant need not detain us any further as the law in this regard has been settled by various pronouncements of this Court. What has been recorded in Ext.P43 cannot be taken to be confession of the accused in relation to commission of the crime, but the other part by which the motor cycle was recovered, would be the portion admissible in evidence. The admissible part can very safely be segregated from the inadmissible part in this statement.

19. It may be noted that in the very judgment of *Aloke Nath Dutta* (supra) relied upon by the counsel for the appellant, this Court has clearly stated as follows :

> "… We intend to point out that only that part of confession is admissible, which would be leading to the recovery of the dead body and/or recovery of the articles of Biswanath; the purported confession proceeded to state even the mode and manner in which Biswanath was allegedly killed. It should not have been done. It may influence the mind of the court."

20. In the case of *Anter Singh v. State of Rajasthan* [(2004) 10 SCC 657], this Court clearly stated the principle, "it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered."

21. Neither the trial Court nor the High Court has relied upon Ext. P43 for the purpose of holding the accused guilty of the offence. Both these authorities have only noticed the fact of recovery of the motor cycle in furtherance to the disclosure statement made by this accused. In our considered opinion, there is no such infirmity pointed out by the counsel appearing

for the appellant which would vitiate the very recovery of the motor cycle in terms of Section 27 of the Indian Evidence Act, 1872 (hereafter the "Evidence Act"). The fact that motorcycle was used by the accused Jitender for the purpose of bringing PW-10 from the fields to his residence and after getting the door opened by Indra, was again used for dropping PW-10 to the fields is fully corroborated. The recovery of motorcycle, Exhibit P44, is a fact which provides a link between recovery of motorcycle and its use by the accused in commission of the crime. This fact is also proved by the statement of PW10. This statement of the accused has not been treated as a confession of the accused by the courts and rightly so because, it could not have been treated as a confession of the accused, firstly, because it was made to the police and secondly, such a statement would not be admissible in terms of Section 27 of the Evidence Act.

22. We shall shortly proceed to discuss the argument of the learned counsel for the appellant that there was unexplained and inordinate delay in lodging the FIR and the courts have failed to appreciate the evidence in this prospective, when we deal with the appeal of Satish, Sunil and the other two co-accused.

23. Coming to the last argument on behalf of accused Jitender that he had been acquitted by the trial court for an offence under Section 302 read with Section 120B IPC, this argument is again devoid of any merit. The accused Jitender was charged with an offence punishable under Section 120B IPC for he and other co-accused had conspired to do an illegal act and commit the murder of Indra. It is thereby correct that no separate charge under Section 302 read with Section 34 IPC had been framed against the accused Jitender. However, he was charged with an offence punishable under Section 323 read with Section 34 IPC for which he was acquitted. It is also correct that the learned trial Court has specifically noticed in its judgment that accused Jitender Kumar had not been charged separately for an offence under Section 302 read with

Section 34 IPC and if he was also present, then the provisions of Section 149 IPC would be applicable and in the event, the charge ought to be framed under that provision. We are unable to find any error in this approach of the trial Court. But, equally true is that the trial Court, for valid reasoning and upon proper appreciation of evidence, convicted this accused for an offence under Section 120B of the IPC and, thus, for an offence under Section 302 IPC as well.

24. A bare reading of Section 120B provides that whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in the IPC for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

25. In other words, once the Court finds an accused guilty of Section 120B, where the accused had conspired to commit an offence and actually committed the offence with other accused with whom he conspired, they all shall individually be punishable for the offence for which such conspiracy was hatched. Thus, we do not find any error in the judgment of the trial court in convicting the accused for an offence under Section 120B read with Section 302 IPC.

Criminal Appeal No. 1092

26. In this appeal, the challenge to the findings recorded in the impugned judgment is on the ground that firstly there has been inordinate and unexplained delay in lodging the FIR, even though the police station was quite near to the place of occurrence and secondly, that the time of occurrence cannot be validly related to the expert medical evidence and on this count itself, the accused would be entitled to the benefit of doubt. This question, in fact, arises in both these appeals, and therefore, can conveniently be dealt with at this stage.

27. The FIR Ext. P-2 was recorded at 4.40 p.m. on 10th

February, 1999, in which the time of occurrence was recorded as 1.00 to 1.30 a.m. of the same date. This FIR had been registered on the basis of the statement of Ishwar Singh, PW-11 who, as already noticed, was the eye-witness to the occurrence. He clearly stated in his statement that after having the dinner, Indra along with her child had gone to chobara to sleep and all of them were sleeping on the ground floor. At about 1.00 or 1.30 a.m., he heard voices from the chobara. He went upstairs and saw that the accused Ratti Ram and Pawan Kumar had caught hold of the deceased Indra and the accused Satish and Sunil were strangulating her with the help of a rope. Despite her struggle, she was not able to free herself from the grip of the accused persons and when he tried to intervene, he was also threatened with dire consequences. As a result, he went away to his village Bhartana to inform his family members about the incident. At that time, PW-11 was not aware of the fact that Indra had already died. It is only when he came back to the house of Ratti Ram along with Mange Ram, Rajender, Jagdish and Sultan Singh, all resident of village Bhartana, that they all saw the deceased Indra lying dead. That is how they came to know that Indra had been strangulated and murdered by the accused. It was thereafter that Ishwar Singh, PW11) went to the Police Station to report the incident and met ASI Hans Raj near Aasan Chowk, Narnaund who recorded his statement and after making endorsement, sent it to the Police Station for registration of the case.

28. Undoubtedly, it has come in the statement of PW-1 that the house depicted in Ext. P-1 i.e. the place of occurrence, was situated in the township of Narnaund and was at a distance of 150 metres, from the police station. This piece of evidence does not advance the case of the accused favourably. According to the prosecution, Indra was killed by the family of her in-laws. Most unfortunately, her husband, PW10, partly because of fear and partly out of greed for property, became a mere spectator to the crime. PW11, lodged the FIR and PW10 corroborated the version given in the FIR about the

murder of his wife. He claimed that he was illegally confined by the accused Jitender and Sunil and therefore, after the murder, he was unable to approach the police station. In these circumstances, of course, the conduct of PW-10 and PW-11 is somewhat strange, but their statements cannot be falsified on this ground.

29. PW-11 could have gone to the police station straight away, but he instead preferred to go to his village first and came back with the others. His behavior at the time of occurrence might have been abnormal as he had been threatened with dire consequences by the accused persons. Thus, he went to his village and brought his relations and friends to see if the matter could be resolved. But by the time he reached the house of Ratti Ram, Indra had already been murdered. In these circumstances, some delay in registering the FIR was inevitable and it is not such inordinate delay which could be construed as a ground for acquittal of the accused, as the prosecution has been able to prove its case beyond reasonable doubt.

30. It is a settled principle of criminal jurisprudence that mere delay in lodging the FIR may not prove fatal in all cases, but in the given circumstances of a case, delay in lodging the FIR can be one of the factors which corrode the credibility of the prosecution version. Delay in lodging the FIR cannot be a ground by itself for throwing away the entire prosecution case. The Court has to seek an explanation for delay and check the truthfulness of the version put forward. If the Court is satisfied, then the case of the prosecution cannot fail on this ground alone. [Ref. *Yakub Ismailbhai Patel v. State of Gujarat* [(2004) 12 SCC 229], *State of Rajasthan v. Shubh Shanti Services Ltd. V. Manjula S. Agarwalla & Ors.* [(2000) 5 SCC 30].

31. Now, we shall deal with the other aspect of the argument advanced on behalf of the appellants, i.e. in relation to uncertainty in the time of occurrence as well as death of the deceased, with reference to expert evidence. The contention is that as per the statement of PW-10 and PW-11, they all had

their dinner together whereafter, PW-10 had gone to the fields for irrigating the fields and others had slept at the ground floor, except Indra and her child, who had gone to chobara to sleep. The occurrence is stated to have taken place between 1.00 to 1.30 a.m. However, according to the medical evidence, there was semi-digested food found in the stomach of the deceased. Therefore, it was not possible to state that she was murdered, as alleged, between 1.00 to 1.30 a.m. as by that time more than four hours would have elapsed and undigested food could not have been found in the stomach of the deceased.

32. The body of the deceased was subjected to post mortem conducted by Dr. L.L. Bundela, PW-3, who, after describing the seven injuries on the body of the deceased, had stated, "the stomach contained semi-digested food small intestines contained chyme and the large intestines contained faecal matter. The uterous was non-gravid."

33. In his further examination-in-chief, PW-3 had clearly stated, "it is possible that the death of Smt. Indra might have been caused at 1.30 a.m. on 10.2.99". In cross-examination, he stated, "It takes 2 to 3 hours for the digested or undigested food to leave the stomach".

34. According to the accused, this causes a serious doubt in the very basis of the prosecution story. This argument appears to be of some significance at the first brush, but when examined in depth in light of the entire evidence, it clearly lacks merit.

35. Neither PW-10 nor PW-11 has stated as to the exact time at which Indra had her dinner. It is a matter of common knowledge that in the villages, ladies normally provide food to the guests and the other members of the family first and are last to have the food themselves. None of the witnesses have given the time when all the persons had their dinner. But, according to both these witnesses, after having the dinner they had gone to sleep except PW-10 who had gone to the fields

for irrigation purposes. This obviously means that they would have had dinner after 8 or 9 p.m., whereafter they went to sleep. Indra presumably had dinner thereafter and went to sleep later. She was murdered between 1.00 to 1.30 a.m. which means between 4 to 5 hours of having her dinner. The evidence of PW-3 categorically states that it was possible that Indra was murdered between 1.00 to 1.30 a.m. This was duly corroborated by PW-11. The investigation conducted by PW6, PW12 and PW13 also indicates that she was murdered during that period. It is significant to notice that after PW-3 stated in his further examination that Indra might have been murdered between 1.00 to 1.30 a.m., no suggestion was put to this witness that the said witness was stating incorrectly or that it was not possible to reconcile the statement of PW-3 i.e. the expert evidence, with the version of the prosecution. Once, this statement of PW-3 remained unchallenged and there exist other prosecution evidence to support the said version, the Court would not be inclined to treat it as a significant doubt in the case of the prosecution.

36. According to PW-11, he had gone to the house of his sister Indra, at about 7 p.m. and had found the accused present there. This time given by the witness also indicates that all the accused as well as the informant had their dinner after 8 p.m. or so. The time of death given by PW-3, thus, cannot be falsified only on the ground of an argument that there was some undigested food found in the stomach of the deceased.

37. Further, it is contended on behalf of the accused that the time of death of the deceased cannot be stated with certainty with reference to the evidence on record and this being a very important factor, would lead to the acquittal of the accused. Reliance in this regard has been placed upon the judgment of this Court in the case of *Shambhoo Missir & Anr. v. State of Bihar* [(1990) 4 SCC 17]. In that case, this Court found that the allegations of the prosecution were that the death had occurred at 3.00 p.m. No such undigested food could have been found at that hour when the food was taken by the

deceased at 8.00 a.m. and if this be so, then the whole case of the prosecution could crumble. It may be noticed that in that case, it had been established by definite and cogent evidence that the deceased had taken the meals before 8.00 a.m. and the death had occurred at 3.00 p.m. and the undigested food particles were found in the stomach of the deceased. This observation of the Court cannot be treated as a statement of law but is a finding recorded with reference to the facts of that case.

38. The entire basis for this submission is the statement of PW3, Dr. L.L. Bundela, who stated that the stomach of the deceased contained some semi-digested food. It is worthwhile to note that the statement of this very witness that the death of Indra could have taken place between 1.00 to 1.30 a.m. remained unchallenged. Furthermore, it cannot be stated as a rule of universal application that after a lapse of two to three hours stomach of every individual, without exception, would become empty. It would depend upon a number of other factors like the caloric content and character of the solid food. Further, addition of fats, triglycerides and carbohydrates such as glucose, fructose and xylose to a solid meal can delay its emptying from the stomach, presumably because of their effect on the initial lag phase of digestion of solids. Furthermore, the presence of liquids in the stomach prolongs this initial lag phase of solid emptying. In fact, ingestion of a liquid bolus 90 minutes after a solid meal can induce a second lag phase of solid emptying from the stomach. Foods high in fat content are handled duly by the stomach and their emptying pattern should be considered separately from those of other liquids and solids. Many foods are solid or semi-solid prior to their ingestion. However, after they are consumed and warmed to the body temperature in the stomach, they are converted into a liquid. Despite this, the liquid foods are emptied from the stomach much more slowly than are the aqueous liquids. This aspect has been dealt with by prominent authors on the subject with definite emphasis on emptying of stomach. The gastric emptying of

indigestible solids have been appropriately dealt with in the Textbook of Gastroenterology, Volume One, by Tadataka Yamada, David H. Alpers, Chung Owyang, Don W. Powell and Fred E. Silverstein, as follows:

"Gastric Emptying of Indigestible Solids

The final class of consumed components of a meal to be discussed are the indigestible solids, that nonnutritive fibrous debris remaining from a meal that is not emptied with the dispersible, calorie-containing digestible solids. In general, indigestible solids exist the stomach with initiation of the gastric phase III activity of the MMC after completion of the fed motor pattern. The main characteristic that distinguishes the phase III motor pattern from fed motor activity is the presence of an open pylorus during fasting, which permits intestinal delivery of large particles.

The major factor in determining when an indigestible solid is emptied from the stomach is its size. Indigestible spheres smaller than 1mm in diameter freely pass into the intestine during the fed period, often at rates faster than solid nutritive food. Larger spheres pass more slowly, usually after an initial lag period, with spheres up to 2.4 mm in diameter passing with the calorie-containing components of a solid meal. Spheres as large as 7 mm do not empty with solid food at all and are retained until gastric phase III activity resumes in the interdigestive period. It has been reported that undigested materials as large as 2 cm in diameter can pass into the intestine during the fasting period under normal conditions.

Other physical factors play a role in determining the gastric emptying of indigestible solid material….."

39. Besides the above, with regard to the external regulation of gastric emptying, it has been stated that in addition to being controlled by various characteristics of the ingested

bolus within the stomach, there is extensive modulation of gastric emptying by external influences. Gastric motility and emptying is also subject to extensive modulation by the central nervous system. The nutritional properties of an ingested liquid modify the speed at which it exits the stomach. Because of this, carbohydrate, protein or fat containing liquids can be digested and absorbed completely prior to reaching the distal small intestine. Certain physical characteristics of the ingested meal may alter the function of the stomach to selectively retain or expel the large particles. If the viscosity of the meal is increased sufficiently, the ability of the stomach to discriminate between large and small particles is abolished and much larger particles may be delivered into the duodenum.

40. The above findings are based on medical studies and are well-established in the field of gastroenterology.

41. It may be useful at this stage to refer to Modi's 'Medical Jurisprudence and Toxicology', Twenty Third Edition, which has specifically concluded that there is no absolute and definite standard that every human being would empty his stomach within two to three hours of taking the meals, irrespective of what kind of meal had been taken by the concerned person.

42. Judging the time of death from the contents of the stomach, may not always be the determinative test. It will require due corroboration from other evidence. If the prosecution is able to prove its case beyond reasonable doubt and cumulatively, the evidence of the prosecution, including the time of death, is proved beyond reasonable doubt and the same points towards the guilt of the accused, then it may not be appropriate for the Court to wholly reject the case of the prosecution and to determine the time of death with reference to the stomach contents of the deceased.

43. While discussing various judgments of this Court, Modi in the aforesaid book at page 543 has recorded as under: -

"….The state of the contents of the stomach found at the time of medical examination is not a safe guide for determining the time of the occurrence because that would be a matter of speculation, in the absence of reliable evidence on the question as to when the deceased had his last meal and what that meal consisted of [*Masjit Tato Rawool v. State of Maharashtra,* (1971) SCC (Cr.) 732; *Gopal Singh v. State of Uttar Pradesh,* AIR 1979 SC 1932; *Sheo Darshan v. State of Uttar Pradesh,* (1972) SCC (Cr) 394]. The presence of faecal matter in the intestines is not conclusive, as the deceased might be suffering from constipation. Where there is positive direct evidence about the time of occurrence, it is not open to the court to speculate about the time of occurrence by the presence of faecal matter in the intestines [*Sheo Dershan v. State of Uttar Pradesh* (1972) SCC (Cr.) 394]. The question of time of death of the victim should not be decided only by taking into consideration the state of food in the stomach. That may be a factor which should be considered along with other evidence, but that fact alone cannot be decisive[*R. Prakash v. State of Uttar Pradesh* (1969) 1 SCC 48, 50]

44. Such an approach would even otherwise be justifiable as in some cases the evidence may not be sufficient to establish as to what the last meal was and what article of food, if any, was taken by the deceased. So also, the 'sluggish chronometric sense of the countryside community of India is notorious' and even urban folk make mistakes about time, when there is no particular reason to observe and remember a minor event like taking of a morning meal. In such circumstances where semi-digested food was found in the stomach, the contention, that it must be inferred from it that the occurrence must have taken place after the deceased had taken his evening meal may not be accepted.

45. This Court in the case of *Shivappa v. State of*

Karnataka [(1995) 2 SCC 76] stated the dictum that medical opinion is admissible in evidence like all other types of evidence and there is no hard-and-fast rule with regard to appreciation of medical evidence. It is not to be treated as sacrosanct in its absolute terms. Agreeing with the view expressed in Modi's book on Medical Jurisprudence and Toxicology, this Court recorded that so far as the food contents are concerned, they remain for long hours in the stomach and the duration thereof depends upon various other factors. Indisputably, a large number of factors are responsible for drawing an inference with regard to the digestion of food. It may be difficult, if not impossible, to state exactly the time which would be taken for the purpose of digestion.

46. Similarly, in the case of *Jabbar Singh v. State of Rajasthan* [(1994) SCC (Cr.) 1745], the Court while dealing with the evidence of DW-1 who had opined that since there was some semi-digested food, the occurrence must have taken place earlier and not at 3.00 a.m. The Court reiterated the principle that this was an opinion evidence and the possibility of the deceased having eaten late in the night could not be ruled out.

47. In view of the above medical references, the view expressed in *Modi's book* (supra) and the principles stated in the judgments of this Court, it can safely be predicated that determination of the time of death solely with reference to the stomach contents is not a very certain and determinative factor. It is one of the relevant considerations. The medical evidence has to be examined in light of the entire evidence produced by the parties. It is certainly a relevant factor and can be used as a significant tool by the Court for coming to the conclusion as to the time of death of the deceased but other factors and circumstances cannot be ignored. The Court should examine the collective or cumulative effect of the prosecution evidence along with the medical evidence to arrive at the correct conclusion. There is no evidence in the present case which

establishes, with exactitude, the time at which the accused, the deceased and the eye-witness (PW11)had their dinner. The only evidence is that they had dinner and after having dinner they had gone to sleep. This necessarily would apply that they had dinner late and not in the early hours of the evening. As already noticed, according to PW11, he had come to his sister's house at about 7.00 p.m., whereafter all the events occurred. The evidence of PW3 also remained unchallenged that the death of Indra had taken place between 1.00 a.m. to 1.30 a.m. on 10th February, 1999. Therefore, we find no reason to accept this contention on behalf of the appellant.

48. The next contention raised on behalf of the appellant is that both the accused persons, Sunil and Satish, were residents of a village which was far away from the place of occurrence and they were not present at the place of occurrence. Furthermore, they also questioned the very presence of the eye-witness, PW11, on the fateful day at the scene of occurrence. The statement of the sole witness is not trustworthy, particularly when the said witness himself has not partially been believed by the trial Court. The mere fact that the accused were residents of a village at some distance would be inconsequential. As per the statement of the witnesses, both these accused were seen by them in the house of Ratti Ram where the deceased was murdered. We are also unable to accept the contention that presence of PW10 and PW11 at the place of occurrence was doubtful and the statements of these witnesses are not trustworthy. Reliance on behalf of the accused has been placed on the judgment of this Court in the case of *Rupchand Chindu Kathewar v. State of Maharashtra* [(2009) 17 SCC 37]. In that case the Court, as a matter of fact, found that the statement of PW2 was not qualitatively unimpeachable. Having disbelieved the sole witness, the Court had given benefit of doubt to the accused. However, the Court had found that the prosecution case was not even supported by medical evidence and the conduct of the said witness was very unnatural.

49. We are unable to understand as to what assistance the learned counsel for the appellant wishes to derive from the facts of this case. We are to deal with the present case on its own facts. Both the trial court and the High Court have believed PW10 and PW11 and have returned a finding of guilt against the accused. The Courts have adversely commented upon the conduct of these witnesses but not with regard to the material events of the prosecution case. PW10 was under threat and confinement of his own family members as well as friends of the accused, who had conspired to kill Indra, that is how he obeyed the command of Jitender and others in coming from the fields on the motorcycle and getting the door of Chobara opened by Indra where she was sleeping with her child. He claims to have been under continuous threat and illegal confinement of Jitender and the other accused. It was PW10's own house where the murder has taken place and, therefore, his presence in the house cannot be doubted in the normal course. PW11 is the brother of the deceased and he had come late in the evening to meet his sister and sort out the issues with regard to the return of the properties which Ratti Ram had given to the appellants herein, Satish and Sunil.

50. The statement of PW11 also finds corroboration from the medical evidence. PW3, Dr. L.L. Bundela, has stated that besides ligature marks on her neck, the face of the deceased was swollen and congested. Six other injuries were found on the body of the deceased. There were abrasions on elbow and wrist of the deceased. She had also suffered abrasion injury on her left eyebrow and on dissection, infiltration of blood was found present in the subcutaneous tissues. The post mortem report, Ex.P4 to P5, states the cause of the death, as per opinion of the Board, as asphyxia due to strangulation, which was ante mortem in nature and sufficient to cause death in the ordinary course of nature. This medical evidence fully corroborates what had been testified by PW11. According to that witness, Ratti Ram and Pawan had held the hands of Indra while Sunil and Satish were strangulating her by putting put a

rope around her neck. She struggled to free herself from the grip of these persons but in vain. Later, it was found that she had been killed. It is a case where the ocular evidence of PW11 is corroborated by medical evidence and is also partially supported by the statement of PW10, the husband of the deceased. Thus, in our considered view, the statements of PW10 and PW11 cannot be said to be doubtful or which cannot be believed by the Court. Their presence at the place of occurrence was natural and what they have stated is not only plausible but completes the chain of events in the case of the prosecution.

51. The accused in the present appeal had also taken the plea of alibi in addition to the defence that they were living in a village far away from the place of occurrence. This plea of alibi was found to be without any substance by the Trial Court and was further concurrently found to be without any merit by the High Court also. In order to establish the plea of alibi these accused had examined various witnesses. Some documents had also been adduced to show that the accused Pawan Kumar and Sunil Kumar had gone to New Subzi Mandi near the booth of DW-1 and they had taken mushroom for sale and had paid the charges to the market committee, etc. Referring to all these documents, the trial court held that none of these documents reflected the presence of either of these accused at that place. On the contrary the entire plea of alibi falls to the ground in view of the statements of PW-10 and PW-11. The statements of these witnesses have been accepted by the Courts below and also the fact that they have no reason to falsely implicate the accused persons. Once, PW-10 and PW-11 are believed and their statements are found to be trustworthy, as rightly dealt with by the Courts below, then the plea of abili raised by the accused loses its significance. The burden of establishing the plea of alibi lay upon the appellants and the appellants have failed to bring on record any such evidence which would, even by reasonable probability, establish their plea of alibi. The plea of alibi in fact is required to be proved with certainty so as to

completely exclude the possibility of the presence of the accused at the place of occurrence and in the house which was the home of their relatives. {Ref. *Shaikh Sattar v. State of Maharashtra* [(2010) 8 SCC 430]}.

52. It has been correctly contended on behalf of the appellants while relying upon the judgment of this Court in the case of *S.P. Bhatnagar v. State of Maharashtra* [(1979) 1 SCC 535], that statement of the co-accused recorded under Section 313 Cr.PC cannot be used against the other co-accused. Ratti Ram, in his statement under Section 313 CrPC, had admitted material parts of the prosecution case including that he had parted away with a buffalo, some household articles and cash amount of Rs.50,000/- in favour of the family of Satish and Sunder and that Indra had objected to it. He also admitted that the door was opened by Indra on the asking of Surender, whom Jitender had brought on motor cycle from the fields. However, he denied having committed the murder of Indra.

53. The proposition of law advanced by the counsel for the appellants cannot be disputed. The fact of the matter remains that statement of Ratti Ram under Section 313 CrPC is part of the judicial record and could be used against Ratti Ram for convicting him, if the prosecution had proved its case in accordance with law. Ratti Ram, unfortunately, died during the pendency of the proceedings. The part of his statement that supports the case of the prosecution as well as the statement of PW-10 and PW-11 can be relied upon by the prosecution to a limited extent. This statement may not be used against the present accused as such, but the fact that the statement of Ratti Ram under Section 313 CrPC supports the case of the prosecution cannot be wiped out from the record and would have its consequences in law. Without using the statement of Ratti Ram against these accused, the courts below have correctly relied upon the statement of PW-10 and PW-11 and the medical evidence. This finding recorded by the Courts cannot, therefore, be faulted with.

54. The present accused have not been convicted on the basis of a mere suspicion. The prosecution has been able to establish its case beyond reasonable doubt by ocular, documentary and medical evidence. The bangles which were recovered from the place of occurrence and the injuries that were inflicted upon the body of the deceased clearly show that she struggled for life and was murdered at the hands of accused. Thus, it is not a case of mere suspicion and the reliance placed by the counsel upon the judgment of this Court in *Nachhatar Singh v. State of Punjab* [(1976) 1 SCC 750], is entirely misplaced.

55. We have already noticed that Pawan Kumar had preferred a separate appeal which came to be dismissed by this Court on the ground of delay as well as on merits vide its order dated 14th October, 2011. Of course, dismissal of the SLP at the admission stage itself may not adversely affect the case of the present appellants. In the case of *Jalpat Rai and Ors. v. State of Haryana* [JT 2011 8 SC 55], this principle has been enunciated by stating that dismissal of SLP summarily does not mean affirmation of the judgment of the High Court on merits and does not even amount to acceptance of the correctness of the High Court decision. We do not intend to dwell on this issue any further.

56. We also do not propose to rely upon the dismissal of the SLP filed by Pawan Kumar since we have come to an independent conclusion on merits that the prosecution in the present case has been able to bring home the guilt of the appellants-accused and the judgment of the High Court under appeal does not call for any interference.

57. For the reasons afore-mentioned, both the above appeals are dismissed.

R.P. Appeals dismissed.

STATE OF KERALA & ORS.
V.
M/S. MAR APPRAEM KURI CO. LTD. & ANR.
(Civil Appeal No. 6660 of 2005)

MAY 08, 2012

[S.H.KAPADIA, CJI., D.K. JAIN, SURINDER SINGH NIJJAR, RANJANA PRAKASH DESAI AND JAGDISH SINGH KHEHAR, JJ.]

Constitution of India, 1950 – Article 254 (1) and Seventh Schedule List III, Entry 7 – Central Law and State Law – Repugnancy of State Law – Whether from the date the Central Law was made i.e. assent given by the President of India or from the date the Central Act was enforced in that State – Held: Repugnancy arises on the making of the law i.e. when the Central Act received the assent of the President and not on its commencement/enforcement – The Central Law though not brought in force in that State, is still a law made, which is alive as an existing Law – In the present case the enactment of Central Act covered the entire area of 'chits' under entry 7 of List III of VII Schedule and hence the State Act on account of repugnancy became void and stood impliedly repealed – On making of the Central Act, the State Act ceased to operate except to the extent of s. 6 of General Clauses Act, 1897 – State Legislature could not have amended the State Act after enactment of the Central Act save and except under Article 254(2) – Central Chit Funds Act, 1988 – Kerala Chitties Act, 1975 – General Clauses Act, 1897 – s. 6.

In order to bring the private chitty firms (who remained out of the regulatory mechanism prescribed in Kerala Chitties Act, 1975, by registering themselves outside the State of Kerala but continued to operate in the State of Kerala) within the ambit of the 1975 Act, the

Act was amended by inserting sub-section (1a) in Section 4. Thereby the chitties registered outside the State, having 20% or more of its subscribers normally residing in the State were brought within the ambit of the 1975 Act. Aggrieved by the said amendment, the private chitty firms challenged the vires of s. 4(1a) of the 1975 Act as repugnant, under Article 254(1) of the Constitution of India to the Central Chit Funds Act, 1982. Single Judge of the High Court held that as there was no notification u/s. 1(3) of the Central Chit Funds Act, 1982, bringing the Central Act into force in the State and since no rules were framed u/s. 89 of the Central Act, it cannot be said that the State Act stood repealed on the enactment of the Central Act. Division Bench of the High Court declared s. 4(1a) of the State Act as extra-territorial and unconstitutional.

In appeal to this Court, while deciding the question whether making of the law or its commencement brings about repugnancy or inconsistency as envisaged in Article 254 (1) of the Constitution, the 3 Judges Bench doubted the correctness of the view taken by a 3-Judges Bench of Supreme Court in *Pt. Rishikesh and Anr. v. Salma Begum (Smt.)* **(1995) 4 SCC 718, whereby it was held that as soon as the assent is given by the President to the law passed by the Parliament, it becomes law. The Court, therefore, referred the matter to the Constitution Bench.**

The question to be answered by the Constitution Bench was whether the Kerala Chitties Act, 1975 became repugnant to the Central Chit Funds Act, 1982 u/Art. 254(1) of the Constitution upon making of the Central Act (i.e. when the President gave his assent) or whether the State Act would become repugnant to the Central Act as and when notification u/s. 1(3) of the Central Act is issued bringing the Central Act into force in the State; and that what is the effect in law of a repeal.

Answering the reference, the Court

HELD: 1.1. Repugnancy arises on the making and not commencement of the law. The Constitution framers have deliberately used the word "made" or "make" in Articles 245, 246, 250 and 251 of the Constitution. Constitution of India gives supremacy to the Parliament in the matter of making of the laws or legislating with respect to matters delineated in the three Lists of the Seventh Schedule. The principle of supremacy of the Parliament, the distribution of legislative powers, the principle of exhaustive enumeration of matters in the three Lists are all to be seen in the context of making of laws and not in the context of commencement of the laws. [Paras 16 and 28] [488-A-B; 512-A; 511-H]

Pt. Rishikesh and Anr. v. Salma Begum (Smt) **(1995) 4 SCC 718 – affirmed.**

A.L.S.P.P.L. Subrahmanyan Chettiar v. Muttuswami Goundan **AIR 1941 F.C. 47;** *Indu Bhusan Bose vs. Rama Sundari Devi and Anr.* **(1970) 1 SCR 443;** *Amalgamated Electricity Co. (Belgaum) Ltd. vs. Municipal Committee, Ajmer* **(1969) 1 SCR 430 – relied on.**

Constitutional Law of India by H.M. Seervai**, Fourth Edition Para22.6 of Vol.3 at Page 2305 – referred to.**

1.2. Throughout Article 254, the emphasis is on law-making by the respective Legislatures. Broadly speaking, law-making is exclusively the function of the Legislatures. The President and the Governor are a part of the Union or the Legislatures of the States. As far as the Parliament is concerned, the legislative process is complete as soon as the procedure prescribed by Article 107 of the Constitution and connected provisions are followed and the Bill passed by both the Houses of Parliament has received the assent of the President under Article 111.

Similarly, a State legislation becomes an Act as soon as a Bill has been passed by the State Legislature and it has received the assent of the Governor in accordance with Article 200. It is only in the situation contemplated by Article 254(2) that a State Legislation is required to be reserved for consideration and assent by the President. Thus, irrespective of the date of enforcement of a Parliamentary or State enactment, a Bill becomes an Act and comes on the Statute Book immediately on receiving the assent of the President or the Governor, as the case may be, which assent has got to be published in the official gazette. The Legislature, in exercise of its legislative power, may either enforce an Act, which has been passed and which has received the assent of the President or the Governor, as the case may be, from a specified date or leave it to some designated authority to fix a date for its enforcement. Such legislations are conditional legislations as in such cases no part of the legislative function is left unexercised. In such legislations, merely because the Legislature has postponed the enforcement of the Act, it does not mean that the law has not been made. [Para 17] [489-E-H; 490-A-C]

1.3. The word "made" in the proviso to Article 254 (2) has to be read in the context of law-making process and, if so read, it is clear that to test repugnancy one has to go by the making of law and not by its commencement. [Para 17] [493-A-B]

1.4. In the present case, after enactment of the Chit Funds Act, 1982 on 19.08.1982, the said Act has been applied to 17 States by notifications issued from time to time under Section 1(3). If the entire Act including Section 1(3) was not in operation on 19.08.1982, the Central Government cannot issue any notification under that very Section in respect of 17 States. There must be a law

authorizing the Government to bring the Act into force. Thus, Section 1(3) came into force immediately on passing of the Act. Thus, the material dates, are the dates when the two enactments received the assent of the President which in the case of Central Act is 19.08.1982 while in the case of the Kerala Chitties Act, 1975, it is 18.07.1975. [Para 17] [490-F-H; 491-A-C]

A. Thangal Kunju Musaliar v. M. Venkatachalam Potti **AIR 1956 SC246: 1955 SCR 1196 – referred to.**

1.5. Articles 246(1), (2) and 254(1) provide that to the extent to which a State law is in conflict with or repugnant to the Central law, which Parliament is competent to make, the Central law shall prevail and the State law shall be void to the extent of its repugnancy. This general rule of repugnancy is subject to Article 254(2) which *inter alia* provides that if a law made by a State legislature in respect of matters in the Concurrent List is reserved for consideration by the President and receives his/ her assent, then the State law shall prevail in that State over an existing law or a law made by the Parliament, notwithstanding its repugnancy. The proviso to Article 254(2) provides that a law made by the State with the President's assent shall not prevent Parliament from making at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by a State legislature. Thus, Parliament need not wait for the law made by the State with the President's assent to be brought into force as it can repeal, amend, vary or add to the assented State law no sooner it is made or enacted. There is no justification for inhibiting Parliament from repealing, amending or varying any State Legislation, which has received the President's assent, overriding within the State's territory, an earlier Parliamentary enactment in the concurrent sphere, before it is brought into force . Parliament can

repeal, amend, or vary such State law no sooner it is assented to by the President and that it need not wait till such assented to State law is brought into force. [Para 19] [503-C-H]

1.6. The enactment of the Central Chit Funds Act, 1982, on 19.08.1982, which covered the entire field of "chits" under entry 7 of List III Seventh Schedule of the Constitution, the Kerala Chitties Act, 1975, on account of repugnancy as enshrined in Article 254(1), became void and stood impliedly repealed. That, on the occupation of the entire field of "chits", the Kerala Legislature could not have enacted the State Finance Act No. 7 of 2002, inserting Section 4(1a) into the Kerala Chitties Act, 1975, particularly on the failure of the State in obtaining Presidential assent under Article 254(2). [Para 28] [512-B-C]

1.7. Article 254(1) also gives supremacy to the law made by Parliament, which Parliament is competent to enact. In case of repugnancy, the State Legislation would be void only to the extent of repugnancy. If there is no repugnancy between the two laws, there is no question of application of Article 254(1) and both the Acts would prevail. Thus, Article 254 is attracted only when Legislations covering the same matter in List III of Seventh Schedule made by the Centre and by the State operate on that subject; both of them (Parliament and the State Legislatures) being competent to enact laws with respect to the subject in List III. [Para 17] [488-E-G]

1.8. In the present case, Entry 7 of List III in the Seventh Schedule deals with the subject of "Contracts". It also covers special contracts. Chitties are special contracts. Thus, the Parliament and the State Legislatures are competent to enact a law with respect to such contracts. The question of repugnancy between the Parliamentary Legislation and State Legislation arises

in two ways. First, where the Legislations, though enacted with respect to matters in their allotted spheres, overlap and conflict. Second, where the two Legislations are with respect to matters in the Concurrent List and there is a conflict. In both the situations, the Parliamentary Legislation will predominate, in the first, by virtue of non-obstante clause in Article 246(1); in the second, by reason of Article 254(1). Article 254(2) deals with a situation where the State Legislation having been reserved and having obtained President's assent, prevails in that State; this again is subject to the proviso that Parliament can again bring a legislation to override even such State Legislation. [Para 17] [488-G-H; 489-A-C]

1.9. The intention of the Parliament was clearly to occupy the entire field falling in Entry 7 of List III of Seventh Schedule. The 1982 Act was enacted as a Central Legislation to "ensure uniformity in the provisions applicable to chit fund institutions throughout the country as such a Central Legislation would prevent such institutions from taking advantage either of the absence of any law governing chit funds in a State or exploit the benefit of any lacuna or relaxation in any State law by extending their activities in such States". The clear intention of enacting the Central Act, therefore, was to make the Central Act a complete code with regard to the business of conducting chit funds and to occupy the legislative field relating to such chit funds. Moreover, the intention to override the State laws is clearly manifested in the Central Act, especially Section 3 which makes it clear that the provisions of the Central Act shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force. Similarly, Section 90 of the Central Act providing for the repeal of State legislations also manifests the intention on the part of the Parliament to occupy the field hitherto occupied by State Legislation. Each and every aspect relating to the

conduct of the chits as is covered by the State Act has been touched upon by the Central Act in a more comprehensive manner. Thus, on 19.08.1982, the Parliament in enacting the Central law has manifested its intention not only to override the existing State Laws, but to occupy the entire field relating to Chits, which is a special contract, coming under Entry 7 of List III of Seventh Schedule. Consequently, the State Legislature was divested of its legislative power/ authority to enact Section 4(1a) vide Finance Act No. 7 of 2002 on 29.07.2002, save and except under Article 254(2) of the Constitution. Thus, Section 4(1a) became void for want of assent of the President under Article 254(2). [Para 17] [491-C-H; 492-A-C]

Shriram Chits and Investment (P) Ltd. v. Union of India **(1993) Supp 4 SCC 226: 1993 (1) Suppl. SCR 54 – relied on.**

1.10. On the enactment of the Central Chit Funds Act 1982 on 19.08.1982, intending to occupy the entire field of Chits under Entry 7 of List III of Seventh schedule the State Legislature was denuded of its power to enact the Finance Act No. 7 of 2002. However, a law enacted by the State legislature on a topic in the Concurrent List which is inconsistent with and repugnant to the law made by the Parliament can be protected by obtaining the assent of the President under Article 254(2) and that the said assent would enable the State law to prevail in the State and override the provisions of the Central Act in its applicability to that State only. Thus, when the State of Kerala intended to amend the State Act in 2002, it was bound to keep in mind the fact that there is already a Central law on the same subject, made by Parliament in 1982, though not in force in Kerala, whereunder there is a *pro tanto* repeal of the State Act. Therefore, the State legislature ought to have followed the procedure in Article

254(2) and ought to have obtained the assent of the President. [Para 18] [498-B-E]

Hingir-Rampur Coal Co. v. State of Orissa **(1961) 2 SCR 537;** *Stateof Orissa v. M.A. Tulloch and Co.* **(1964) 4 SCR 461 – relied on.**

Tika Ramji v. State of U.P. **1956 SCR 393;** *T. Barai v. Henry Ah Hoe***(1983) 1 SCC 177: 1983 (1) SCR 905;** *I.T.C. Limited v. State ofKarnataka* **1985 Supp. SCC 476;** *M. Karunanidhi v. Union of India* **(1979) 3 SCC 431: 1979 (3) SCR 254 – referred to.**

1.11. The definition of the expressions "laws in force" in Article 13(3)(b) and Article 372(3), Explanation I and "existing law" in Article 366(10) show that the laws in force include laws passed or made by a legislature before the commencement of the Constitution and not repealed, notwithstanding that any such law may not be in operation at all. Thus, the definition of the expression "laws in force" in Article 13(3)(b) and Article 372(3), Explanation I and the definition of the expression "existing law" in Article 366(10) demolish the plea of the State of Kerala that a law has not been made for the purposes of Article 254, unless it is enforced. The expression "existing law" finds place in Article 254. There is no difference between an "existing law" and a "law in force". The Kerala Chitties Act, 1975 became void on the making of the Chit Funds Act, 1982 on 19.08.1982, [when it received the assent of the President and got published in the Official Gazette] as the Central Act intended to cover the entire field with regard to the conduct of the Chits and further that the State Finance Act No. 7 of 2002, introducing Section 4(1a) into the State 1975 Act, was void as the State legislature was denuded of its authority to enact the said Finance Act No. 7 of 2002, except under Article 254(2), after the Central Chit Funds Act, 1982 occupied the entire field as envisaged in Article 254(1) of

the Constitution. Thus, repugnancy arises on the making and not commencement of the Central Chit Funds Act, 1982. On 19.08.1982, the Kerala Chitties Act, 1975 ceased to operate except to the extent of Section 6 of the General Clauses Act, 1897. [Para 19] [504-A-G]

Edward Mills Co. Ltd. Beawar v. State of Ajmer **AIR 1955 SC 25: 1955 SCR 735 – relied on.**

Deep Chand v. State of U.P. **1959 Suppl. (2) SCR 8 – referred to.**

2.1. The Central Chit Funds Act, 1982 though not brought in force in the State of Kerala is still a law made, which is alive as an existing law. By reason of Article 367 of the Constitution, the General Clauses Act, 1897 applies to the repeal. Section 6 of the General Clauses Act, 1897 is, therefore, relevant, particularly Sections 6(b) and 6(c) and consequently, the previous operation of the Kerala Chitties Act, 1975 is not affected nor any right, privilege, obligation or liability acquired or incurred under that repealed State Act. Thus, after 19.08.1982, the Kerala Chitties Act, 1975 stands repealed except for the limited purposes of Section 6 of General Clauses Act, 1897. If and when the Central Government brings into force the Chit Funds Act, 1982 by a notification in State of Kerala, under Section 1(3), Section 90(2) will come into play and thereby the Kerala Chitties Act, 1975 shall continue to apply only to chits in operation on the date of commencement of the Central Chit Funds Act, 1982 in the same manner as the Kerala Chitties Act, 1975 applied to chits before such commencement. [Para 28] [512-D-G]

2.2. When a State law is repealed expressly or by implication by a Union law, Section 6 of the General Clauses Act 1897 applies as to things done under the State law which are so repealed, so that transactions under the State law before the repeal are saved as also

any rights and liabilities arising under the State Act, prior to the enactment of the Central Act. Repeal of an enactment is a matter of substance. It depends on the intention of the Legislature. If by reason of the subsequent enactment, the Legislature intended to abrogate or wipe off the former enactment, wholly or in part, then, it would be a case of pro tanto repeal. [Para 24] [509-D-E]

State of Orissa v. M.A. Tulloch and Co. **(1964) 4 SCR 461;** *A.Thangal Kunju Mussaliar v. M. Venkitachalam Potti and Anr.* **(1955) SCR 1196 ;** *T.S. Baliah v. T.S. Rengachari* **(1969) 3 SCR 65;** *State of Punjab vs. Mohar Singh* **(1955) 1 SCR 893 – relied on.**

2.3. In the present case, repugnancy is established by both the tests firstly on comparison of the provisions of the Kerala Chitties Act, 1975, being the State Act, and the Chit Funds Act, 1982, being the Central Act, inconsistencies actually exist directly, and secondly the intention of the Parliament in enacting the Central Act is to cover the entire field relating to or with respect to Chits. Hence, on both counts the two Acts cannot stand together. In consequence of this repugnancy, the Kerala Chitties Act, 1975 became void under Article 254(1) on the enactment of the Central Chit Funds Act, 1982 on 19.08.1982 and the Kerala Chitties Act, 1975 thus stood impliedly repealed. By reason of Article 367 of the Constitution, the General Clauses Act, however, applies to the said repeal. Under Sections 6(b) and (c) of the General Clauses Act the previous operation of the Kerala Chitties Act, 1975 is not affected nor any right, privilege, obligation or liability acquired or incurred under the Kerala repealed Act. This is the Constitutional position which would prevail if Section 90(1) of the Central Chit Funds Act, 1982 would not have been there. In other words, Section 90(1) of the Central Chit Funds Act, 1982

is stated out of abundant caution. Thus, after 19.08.1982 the Kerala Chitties Act, 1975 stood repealed except for the limited purposes of Section 6 of the General Clauses Act. Likewise, the other existing six State laws on Chits, referred to in Section 90 of the Chit Funds Act, 1982, existing on 19.08.1982 also stood repealed subject to the saving under Section 6 of the General Clauses Act. [Para 25] [509-F-H; 510-A-D]

2.4. To bring the Central Chit Funds Act, 1982 into operation in any State, the Central Government has to issue a notification in the Official Gazette under Section 1(3). This has been done for some States but it has not been done for others like Kerala. It is for the Central Government to issue a notification bringing into force the Chit Funds Act, 1982 in Kerala when it deems appropriate as it has done in some States. Until such notification is issued neither the Kerala Chitties Act, 1975 prevails in the State of Kerala as it has become void and has been repealed under Article 254(1), nor the Central Chit Funds Act, 1982 as it is not notified till date. If and when the Central Government brings into force the Chit Funds Act, 1982 by a notification in the State of Kerala, under Section 1(3), Section 90(2) will come into play and thereby the Kerala Chitties Act, 1975 shall continue to apply only to chits in operation in State of Kerala on the date of the commencement of the Central Chit Funds Act, 1982 in the same manner as the Kerala Chitties Act, 1975 applied to such chits before such commencement. Moreover, Sections 85(a) and 90(2) of the Central Chit Funds Act, 1982 provide for continuance of the application of the provisions of the Kerala Chitties Act, 1975 till the commencement of the Central Chit Funds Act, 1982. Such commencement is dependent upon notification under Section 1(3). Thus, on such commencement of the Central Chit Funds Act, 1982, the transactions (chits) between 19.08.1982 and the date of commencement of the Central Act will stand protected

under Section 90(2). Hence, there would be no legislative vacuum. [Para 26] [510-E-H; 511-A-B]

3. Section 4(1a) was inserted in Kerala Chitties Act vide State Finance Act No. 7 of 2002. Under Section 4(1a), in cases where a chitty is registered outside the State, say in Jammu & Kashmir, but having 20% or more of the subscribers normally residing in State of Kerala, the Foreman (who has got registration outside the State of Kerala) has to open a branch in the State of Kerala and obtain registration under the Kerala Chitties Act, 1975. This sub-section was inserted to plug a loophole. In many cases, chitties were registered outside the State of Kerala even when large number of subscribers were residing in State of Kerala. It is true that on the making of the Central Chit Funds Act, 1982, the State legislature could not have enacted the Finance Act No. 7 of 2002 inserting Section 4(1a) into the State Act as the entire field stood occupied by the Central Chit Funds Act, 1982 without the assent of the President as envisaged under Article 254(2), however, Section 4(1) of the Central Chit Funds Act, 1982 is much wider and more stringent than Section 4(1a) of the Kerala Chitties Act, 1975, as amended by Finance Act No. 7 of 2002, inasmuch as under Section 4(1) of the Central Chit Funds Act, 1982, no chit shall be commenced or conducted without obtaining sanction of the State Government within whose jurisdiction the chit is to be commenced or conducted and unless such chit is registered in that State in accordance with the provisions of the Central Chit Funds Act 1982. [Para 27] [511-C-G]

Case Law Reference:

AIR 1941 F.C. 47	**relied on**	**Para 16**
(1970) 1 SCR 443	**relied on**	**Para 16**
(1969) 1 SCR 430	**relied on**	**Para 16**

1955 SCR 1196	**referred to**	**Para 17**
	relied on.	**Para 21**
1993 (1) Suppl. SCR 54	**relied on**	**Para 17**
1983 (1) SCR 905	**referred to**	**Para 18 (i)**
1985 Supp. SCC 476	**referred to**	**Para 18 (ii)**
1979 (3) SCR 254	**referred to**	**Para 18 (iii)**
1956 SCR 393	**referred to**	**Para 18 (iv)**
(1964) 4 SCR 461	**referred to**	**Para 18 (v)**
	relied on.	**Para 20**
(1961) 2 SCR 537	**relied on**	**Para 18 (v)**
1955 SCR 735	**relied on**	**Para 19**
(1969) 3 SCR 65	**relied on**	**Para 22**
(1955) 1 SCR 893	**relied on**	**Para 23**
(1995) 4 SCC 718	**affirmed**	**Para 28**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6660 of 2005 etc.

From the Judgment & Order dated 31.05.2005 of the High Court of Kerala at Ernakulam in W.A. No. 551 of 2004.

WITH

C.A. Nos. 6661, 6662, 6663, 6664, 6665, 6666, 6667, 6668, 6669, 6670, 6671, 6672, 6673, 6674, 6675, 6676, 6677, 6678, 6679, 6680, 6681 of 2005, 7204, 7329, 7330, 7333, 7334 of 2008 with SLP (C) Nos. 25822 & 25823 of 2009, C.A. Nos. 7008, 7009, 7010, 7011, 7012, 7013, 7014, 7164, 7165, 7166, 7167, 7537, 7538 of 2005, 494, 495, 5031 & 5032 of 2006, 7332 & 7572 of 2008.

K.K. Venugopal, T.R. Andhyarujina, V. Giri, Chander Uday Singh, Mathai M. Paikeday, V. Shekhar, Shyam Divan, Lis Mathew, Ankur Talwar, Shyam Mohan, Ashwathy Balraj, Rohit Bhat, Salman Hashmi (for P.V. Dinesh), Romy Chacko, Satya Mitra, Dhaval Mehrotra, A. Raghunath, K.S. Bharathan, Mohammed Sadique, Parameshwaran, C. Mukund, Ashok Kumar Jain, Pankaj Jain, P.V. Sarvanaraja, Bijoy Kumar Jain, P.I. Jose, Anupam Mishra, James P. Thomas, Robson Paul, Shishir Pinaki, Sanjay Jain, A. Raghunath, Rajith Davis Attathara, Vijendra Kumar, Shaikh Chand Saheb, Harikumar G., A. Venayagam Balan, oshy Jacob, Tara Chandra Sharma, S.W.A. Qadri, Sunita Sharma, Zaid Ali, Abhigya, Jatin Rajput, Deepaskhi Jain, Vishal Saxena, Shaveta Chaudhary, B.K. Prasad, Sushma Suri, Nirman Sharma, Sajith P. Warrier, R. Chandrachud for the appearing parties.

The Judgment of the Court was delivered by

S.H. KAPADIA, CJI.

Introduction

1. By order dated 18.02.2009 in Civil Appeal No. 6660 of 2005 in the case of State of Kerala v. M/s. Mar Appraem Kuri Co. Ltd., the referring Bench of 3-judges of this Court doubted the correctness of the view taken by a 3-judges Bench of this Court in *Pt. Rishikesh and Another v. Salma Begum (Smt)* [(1995) 4 SCC 718]. Accordingly, the matter has come to the Constitution Bench to decide with certitude the following core issues of constitutional importance under Article 254(1) of the Constitution.

Scope of the Reference – when does repugnancy arise?

2. In the present case, the question to be answered is whether the Kerala Chitties Act 23 of 1975 became repugnant to the Central Chit Funds Act 40 of 1982 under Article 254(1) upon making of the Central Chit Funds Act 40 of 1982 (i.e. on 19.08.1982 when the President gave his assent) or whether the

Kerala Chitties Act 23 of 1975 would become repugnant to the Central Chit Funds Act 40 of 1982 as and when notification under Section 1(3) of the Central Chit Funds Act 40 of 1982 bringing the Central Act into force in the State of Kerala is issued?

3. The question arose before the Full Bench of the Allahabad High Court in the case of *Smt. Chandra Rani and others v. Vikram Singh and others* [1979 All. L.J. 401] in the following circumstances:-The U.P. Civil Laws (Reforms and Amendment) Act 57 of 1976 being the State Act stood enacted on 13.12.1976; it received the assent of the President on 30.12.1976; it was published in the Gazette on 31.12.1976 and brought into force w.e.f. 1.01.1977 whereas the Civil Procedure Code (Amendment) Act 104 of 1976, being the Central Act, was enacted on 9.09.1976; it received the assent of the President on the same day; it got published in the Central Gazette on 10.09.1976; and brought into force w.e.f. 1.02.1977 (i.e. after the State Act came into force). The Full Bench of the Allahabad High Court in *Chandra Rani* (supra) held that the U.P. Act No. 57 of 1976 was a later Act than the Central Act No. 104 of 1976. The crucial date in the case of the said two enactments would be the dates when they received the assent of the President, which in the case of the Central Act was 9.09.1976 while in the case of the U.P. Act was 30.12.1976. This decision of the Full Bench of the Allahabad High Court in the case of *Chandra Rani* (supra) came for consideration before this Court in *Pt. Rishikesh* (supra).

4. The statement of law laid down in *Pt. Rishikesh* (supra) was as under:

"17... As soon as assent is given by the President to the law passed by the Parliament it becomes law. Commencement of the Act may be expressed in the Act itself, namely, from the moment the assent was given by the President and published in the Gazette, it becomes operative. The operation may be postponed giving power

to the executive or delegated legislation to bring the Act into force at a particular time unless otherwise provided. The Central Act came into operation on the date it received the assent of the president and shall be published in the Gazette and immediately on the expiration of the day preceding its commencement it became operative. Therefore, from the mid-night on the day on which the Central Act was published in the Gazette of India, it became the law. Admittedly, the Central Act was assented to by the President on 9-91976 and was published in the Gazette of India on 10-9-1976. This would be clear when we see the legislative procedure envisaged in Articles 107 to 109 and assent of the President under Article 111 which says that when a Bill has been passed by the House of the People, it shall be presented to the President and the President shall either give his assent to the Bill or withhold his assent therefrom. The proviso is not material for the purpose of this case. Once the President gives assent it becomes law and becomes effective when it is published in the Gazette. The making of the law is thus complete unless it is amended in accordance with the procedure prescribed in Articles 107 to 109 of the Constitution. Equally is the procedure of the State Legislature. Inconsistency or incompatibility in the law on concurrent subject, by operation of Article 254, clauses (1) and (2) does not depend upon the commencement of the respective Acts made by the Parliament and the State legislature. Therefore, the emphasis on commencement of the Act and inconsistency in the operation thereafter does not become relevant when its voidness is required to be decided on the anvil of Article 254(1). Moreover the legislative business of making law entailing with valuable public time and enormous expenditure would not be made to depend on the volition of the executive to notify the commencement of the Act. Incompatibility or repugnancy would be apparent when the effect of the operation is visualised by comparative study."

5. The above statement of law in *Pt. Rishikesh* (supra) created a doubt in the minds of the referring judges and, accordingly, the said statement of law has come before the Constitution Bench of this Court for its authoritative decision.

Facts in the present case

6. The lis in the present case arose under the following circumstances. Many of the private chitty firms remained out of the regulatory mechanism prescribed in the Kerala Chitties Act, 1975 by registering themselves outside the State but continued to operate in Kerala. Because of this, investor protection became difficult. Consequently, Section 4 of the said 1975 Act was amended vide Finance Act 7 of 2002. By the said amendment, sub-section (1a) was inserted in Section

4. This amendment intended to bring in chitties registered outside the State having 20% or more of its subscribers normally residing in the State within the ambit of the said 1975 Act. Being aggrieved by the said Amendment, the private chitty firms challenged the vires of Section 4(1a) of the 1975 Act as repugnant under Article 254(1) to the Central Chit Funds Act, 1982.

Questions to be answered

7. (i) Whether making of the law or its commencement brings about repugnancy or inconsistency as envisaged in Article 254(1) of the Constitution? □

(ii) The effect in law of a repeal.

Inconsistencies in the provisions of the Kerala Chitties Act, 1975 vis-a-vis the Central Chit Funds Act, 1982

8. The impugned judgment of the Division Bench has accepted the contention advanced on behalf of the private chitty firms that there are inconsistencies between the provisions of the two Acts. [see paras 13, 14 and 15 of the impugned

judgment]. However, the Single Judge held that absent notification under Section 1(3) of the Central Chit Funds Act, 1982 bringing the said 1982 Act into force in the State and absent framing of the Rules under Section 89 of the said 1982 Act, it cannot be said that the Kerala Chitties Act, 1975 stood repealed on the enactment of the said 1982 Act, which is the Central Act; whereas the Division Bench declared Section 4(1a) of the 1975 Act as extra-territorial and, consequently, unconstitutional, hence, the State of Kerala came to this Court by way of appeal.

9. For the sake of clarity some of the conflicting provisions indicated in the impugned judgment are set out herein below:

Kerala Chitties Act, 1975 (State Act)	The Chit Funds Act, 1982 (Central Act)
Section 1 – Short title, extent and commencement	Section 1 -Short title, extent and commencement
(1) This Act may be called the Kerala Chitties Act, 1975	(1) This Act may be called the Chit Funds Act, 1982.
(2) It extends to the whole of the State of Kerala.	(2) It extends to the whole of India except the State of Jammu and Kashmir.
(3) It shall come into force on such date as the government may, by notification in the Gazette, appoint.	(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different States.

Section 2 -Definitions In this Act, unless the context otherwise requires,— (4) "discount" means the amount of money or quantity of grain or other commodity, which a prize winner has, under the terms of the variola, to forego for the payment of veethapalisa, foreman's commission or such other expense; as may be prescribed;	Section 2 -Definitions In this Act, unless the context otherwise requires,— (g) "discount" means the sum of money or the quantity of grain which a prized subscriber is, under the terms of the chit agreement required to forego and which is set apart under the said agreement to meet the expenses of running the chit or for distribution among the subscribers or for both;
Section 3 -Prohibition of chitty not sanctioned or registered under this Act (1) No chitty shall, after the commencement of this Act, be started and conducted unless the previous sanction of the Government or of such officer as may be empowered by the Government in this behalf is obtained therefor and unless the chitty is registered in accordance with the provisions of this Act:	Section 4 -Prohibition of chits not sanctioned or registered under the Act (1) No chit shall be commenced State Government within whose jurisdiction the chit is to be commenced or conducted or of such officer as may be empowered by that Government in this behalf, and unless the chit is registered in that State in accordance with the provisions of this Act:

Provided that the previous sanction under this sub-section shall lapse unless the chitty is registered before the expiry of six months from the date of such sanction: Provided further that such previous sanction shall not be necessary for starting and conducting any chitty by— (i) a company owned by the Government of Kerala; or (ii) a co-operative society registered or deemed to be registered under the Co-operative Societies Act for the time being in force; or (iii) a scheduled bank as defined in the Reserve Bank of India Act, 1934 ; or (iv) a corresponding new bank constituted or conducted without obtaining the previous sanction of the under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (Central Act 5 of 1970).	Provided that a sanction obtained under this subsection shall lapse if the chit is not registered within twelve months from the date of such sanction or within such further period or periods not exceeding six months in the aggregate as the State Government may, on application made to it in this behalf, allow.
Section 4 -Prohibition of	

invitation for subscription except under certain conditions (1) Where previous sanction is required by section 3 for starting and conducting a chitty, no person shall issue or publish any notice, circular, prospectus, proposal or other document inviting the public to subscribe for tickets in any such chitty or containing the terms and conditions of any such chitty unless such notice, circular, prospectus, proposal or other document contains a statement that the previous sanction required by section 3 has been obtained, together with the particulars of such sanction. **(1a)*** Where a chitty is registered outside the State and twenty per cent more of the subscribers are persons normally residing in the State, the foreman of the chitty shall open a branch in the State and obtain sanction and registration under the provisions of this Act.	

(*) As Amended by Finance Act, 2002 (2) Whoever contravenes the provisions of subsection (1) shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to three hundred rupees, or with both.	
Section 15 -Security to be given by foreman (1) Every foreman shall, before the first drawing of the chitty,— (a) execute a bond in favour of or in trust for the other subscribers for the proper conduct of the chitty, charging immovable property sufficient to the satisfaction of the Registrar for the realization of twice the chitty amount; or (b) deposit in an approved bank an amount equal to the chitty amount or invest in Government securities of the face value of note less than one and a half times the chitty amount and	Section 20 -Security to be given by foreman (1) For the proper conduct of the chit, every foreman shall, before applying for a previous sanction under section 4,- (a) deposit in the name of the Registrar, an amount equal to,- (i) fifty per cent, of the chit amount in cash in an approved bank; and (ii) fifty per cent, of the chit amount in the form of bank guarantee from an approved bank; or (b) transfer Government securities of the face

transfer the amount so deposited or the Government securities in favour of the Registrar to be held in trust by him as security for the due conduct of the chitty.

(2) If any foreman makes default in complying with the requirements of sub-section (1), he shall be punishable with fine which may extend to five hundred rupees.

(3) The security given by the foreman under sub-section (1) or any security substituted under subsection (6) shall not be liable to be attached in execution of a decree or otherwise until the chitty is terminated and the claims of all are fully satisfied.

(4) The Registrar shall, after the termination of a chitty and after satisfying himself that the claims of all the subscribers have been fully satisfied, order the release of the security furnished by the foreman under sub-section bank; and

(5) The security furnished under sub-section (1) shall,

value or market value (whichever is less) of not less than one and a half times the chit amount in favour of the Registrar; or

(c) transfer in favour of the Registrar such other securities, being securities in which a trustee may invest money under section 20 of the Indian Trusts Act, 1882 (2 of 1882), of such value, as may be prescribed by the State Government from time of time:

Provided that the value of the securities referred to in clause (c) shall not, in any case, be less than one and a half times the value of the chit amount.

(2) Where a foreman conducts more than one chit, he shall furnish security in accordance with the provisions of sub-section (1) in respect of each chit.

(3) The Registrar may, at any time during the currency of the chit, permit the

subject to the provisions of sub-section (6), be kept intact during the currency of the chitty and the foreman shall not commit any such act with respect thereto as are calculated to impair materially the nature of the security or the value thereof.

(6) The Registrar may:—

(a) at any time during the currency of the chitty, permit the substitution of the security:

Provided that such substituted security shall not be less than the security given by the foreman under subsection (1); or

(b) on the termination of the chitty, release a part of the security:

Provided that the security left release of the part is sufficient to satisfy the outstanding claims of all subscribers.

substitution of the security:

Provided that the face value or market value (whichever is less) of the substituted security shall not be less than the value of the security given by the foreman under sub-section (1).

(4) The security given by the foreman under subsection (1), or any security substituted under sub-section (3), shall not be liable to be attached in execution of a decree or otherwise until the chit is terminated and the claims of all the subscribers are fully satisfied.

(5) Where the chit is terminated and the Registrar has satisfied himself that the claims of all subscribers. all the subscribers have been fully satisfied, he shall order the release of the security furnished by the foreman under subsection (1), or the security substituted under subsection (3), as the case may be, and in doing so, he shall follow such procedure as may be prescribed.

	(6) Notwithstanding anything to the contrary contained in any other law for the time being in force, the security furnished under this section shall not be dealt with by the foreman during the currency of the chit to which it relates and any dealing by the foreman with respect thereto by way of transfer or other encumbrances shall be null and void."

10. Apart from the conflicting provisions mentioned hereinabove, the impugned judgment has brought out various inconsistencies between the various provisions of the State Act and the Central Act in the following terms:

> "13. When we scan through the various provisions of both the legislations it is clear that there is repugnancy between some of the provisions of those legislations. The expression "discount" in Section 2(g) of the Chit Funds Act gives a different definition compared to Sub-section (4) of Section 2 of the Kerala Chitties Act, 1975. So also Section 4(1) of the Chit Funds Act deals with registration of chits, commencement and conduct of chit business. Provisions of the Kerala Chitties Act, Section 3(1) are also contextually different. Section 6(3) of the Central Act states that the amount of discount referred to in Clause (f) of Sub-section (1) shall not exceed thirty per cent of the chit amount. As per Section 7(3) of the Chit Funds Act registration of a chit shall lapse if the declaration by the Foreman under Sub-section (1) of Section 9 is not filed within three months from the date of such endorsement or within such further period or periods not exceeding three months in the aggregate as the Registrar may, on an

application made to him in that behalf. Section 8 of the Chit Funds Act deals with minimum capital requirement for the commencement etc. of a chit and creation of a reserve fund by a company and there is no corresponding provision in the Kerala Chitties Act.

14. Learned Single Judge has also found that once the requirement of furnishing security is satisfied under Section 20 of the Act, it would be arbitrary for the authorities in Kerala to insist for another security for the same chitty merely because 20% or more subscribers are residing in the State. Learned Single Judge further held that the Registrar in Kerala is absolutely free to call for details of registration and security furnished by the Foreman in any other State under Section 20 of the Central Act and after confirmation with the Registrar in that State he will record the same and shall not call for further security being furnished under Section 15 of the Kerala Act from the same Foreman for the same chitty. Learned Single Judge also found if a Foreman is registered under the Central Act in any State outside Kerala and has subscribers in Kerala, the Central Act applies to the Foreman even in regard to the business he has in Kerala, no matter the Central Act is not notified in the State and in such cases the learned Single Judge opined that the provisions of the State Act will yield to the extent the same is inconsistent with the Central Act. Learned Single Judge himself has therefore noticed inconsistencies between the various provisions of the State Act and the Central Act.

15. On a comparison of the various provisions in the Chit Funds Act and the Kerala Chitties Act we have come across several such inconsistent and hostile provisions which are (sic) repugnant to each other. Suffice to say that if Sub-section (1a) (sic) of Section 4 is given effect to, a Foreman who has already got the registration under the Central Act and governed by the provisions of that Act

would also be subjected to various provisions of the Kerala Act which are inconsistent and repugnant to the Central Act. If Section 4(1a) (sic) is therefore given effect to it would have extra territorial operation."

(i) Point Of Time For Determination Of Repugnance

11. The key question that arises for determination is as to from when the repugnancy of the State Act will come into effect? Did repugnancy arise on the making of the Central 1982 Act or will it arise as and when the Central Act is brought into force in the State of Kerala?

12. Before dealing with the respective submissions made by counsel before us, we need to quote Articles 245(1), 246(1), (2) and (3), 249(1) and (3), 250(1) and (2), 251 and 254 of the Constitution, which read as follows:

"PART XI
RELATIONS BETWEEN THE UNION AND THE STATES
CHAPTER I.—LEGISLATIVE RELATIONS

Distribution of Legislative Powers

245. Extent of laws made by Parliament and by the Legislatures of States -(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

246. Subject-matter of laws made by Parliament and by the Legislatures of States. (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in clause (3), Parliament, and,

subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

249. Power of Parliament to legislate with respect to a matter in the State List in the national interest. -(1) Notwithstanding anything in the foregoing provisions of this Chapter, if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force.

(2) xxx xxx xxx

(3) A law made by Parliament which Parliament would not but for the passing of a resolution under clause (1) have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the resolution has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period.

250. Power of Parliament to legislate with respect to any matter in the State List if a Proclamation of Emergency is in operation -

(1) Notwithstanding anything in this Chapter, Parliament shall, while a Proclamation of Emergency is in operation, have power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List.

(2) A law made by Parliament which Parliament would not but for the issue of a Proclamation of Emergency have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period.

251. Inconsistency between laws made by Parliament under Articles 249 and 250 and laws made by the Legislatures of States.-

Nothing in articles 249 and 250 shall restrict the power of the Legislature of a State to make any law which under this Constitution it has power to make, but if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament has under either of the said articles power to make, the law made by Parliament, whether passed before or after the law made by the Legislature of the State, shall prevail, and the law made by the Legislature of the State shall to the extent of the repugnancy, but so long only as the law made by Parliament continues to have effect, be inoperative.

254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States-

(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the

matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State. "

(emphasis supplied)

Submissions

13. Shri K.K. Venugopal, learned senior counsel appearing for the State of Kerala and Shri V. Shekhar, learned senior counsel for Union of India submitted that the word "made" in Article 254 is relevant only to identify the law, i.e., the Parliamentary law or the State law and has nothing to do with the point of time for determination of repugnance. According to the learned counsel, a decision by a Court, on the question as to whether any State Act is repugnant to a Central Act, can be made only after both laws have been brought into force for the simple reason that the very object of determination of repugnance between two laws, by a Court, is to decide and

declare as to which one of the two laws has to be obeyed or in the language of Article 254, which of the two laws "shall prevail". Therefore, according to the learned counsel, the very text of Article 254 makes it clear that a declaration of repugnance by a Court presupposes both laws actually being in operation. That, though the term employed in Article 254(2) is "a law made by the Legislature of a State", it actually refers to a stage when the law is still a Bill passed by the State legislature which under Article 200 is given to the Governor for his assent. According to the learned counsel, the phrase "law made" would also include a law which is brought in force. In this connection, it was submitted that if a petition is filed before a Court to declare a State law void, as being repugnant to Parliamentary law which has not been brought in force, the court would reject the petition as premature as repugnancy cannot arise when the Parliamentary law has not even been brought in force. In this connection, learned counsel relied upon the judgment of this Court in *Tika Ramji v. State of U.P.* [1956 SCR 393] in which there is an observation to the effect that repugnance must exist in fact and not depend on a mere possibility. According to the learned counsel there is no merit in the contention advanced on behalf of private chit firms that upon mere enactment by the Parliament of a law relating to a subject in List III, all State enactments on that subject become immediately void, as repugnant. Further, learned counsel emphasized on the words "to the extent of the repugnancy" in Article 254(1). He submitted that the said words have to be given a meaning. Learned counsel submitted that the said words indicate that the entire State Act is not rendered void under Article 254(1) merely by enactment of a Central law. In this connection, it was submitted that the words "if any provision of a law" and the words "to the extent of repugnancy" used in Article 254(1) militate against an interpretation that the entire State Act is rendered void as repugnant merely upon enactment by Parliament of a law on the same subject. Lastly, learned counsel submitted that a purposive interpretation of Article 254 must be adopted which does not lead to a legislative vacuum. In this connection learned

counsel submitted that the State law came into force w.e.f. 25.08.1975 as per notification published in Kerala Gazette No. 480 whereas the Chit Funds Act, 1982 came into force w.e.f. 19.08.1982. Under Section 1(3) of that Act, the Central Government has been empowered to bring the said Act into force on such date as it may, by notification in the official gazette, appoint and different dates may be appointed for different States. Till date, the said 1982 Act has not been extended to the State of Kerala. According to the learned counsel, if one was to accept the contention advanced on behalf of the private chit firms that "when a Central law is made as envisaged in Article 254 of the Constitution then all repugnant State laws would immediately stand impliedly repealed, even without the Central Act being brought into force by a notification under Section 1(3) of the 1982 Act"; then, in that event, there would be a total legislative vacuum particularly when transactions have taken place in the State of Kerala on and from 19.08.1982 till date and even up to the date of notification which has not been issued under Section 1(3) till today. According to the learned counsel, keeping in view the provisions of Sections 1(3), 4, 89 and 90 of the 1982 Act and absent framing of the Rules by the State Government in terms of Section 89, making of the central law cannot be the test for determining repugnancy.

14. On behalf of the private chitty firms, it was submitted by Shri T.R. Andhyarujina, Shri Shyam Divan, Shri Mathai M. Paikeday and Shri C.U. Singh, that the bringing into force or commencement of the Central Act was irrelevant in considering repugnancy under Article 254(1), and that the repugnancy arose when the State law came into conflict with the enactment of the Central law, even when the Central law is not brought into force in the State of Kerala. That, under Article 254(1), the repugnancy of the State law to the law made by the Parliament is to be considered with reference to the law made. The words "law made" have reference to the enactment of the law. In this connection, it was pointed out that the words "law made" have

been used at seven places but there is no mention to the commencement of a law in Article 254. Thus, according to the learned counsel, repugnancy arose when the Central Chit Funds Act, 1982 received the assent of the President and on its publication in the Official Gazette and not on its commencement, which till date is not there in the State of Kerala. In consequence, the Kerala Chitties Act, 1975 became void on 19.08.1982 when the Central Chit Funds Act, 1982 was made after receiving the assent of the President. On the question as to whether the Kerala Chitties Act, 1975 is repugnant to the Central Chit Funds Act, 1982 and whether Section 4(1a) inserted by Finance Act No. 7 of 2002 was void, the learned counsel submitted that the Central Act, 1982 intended to occupy the entire field of contracts in Entry 7 of the Concurrent List; that, both the legislations are made under Entry 7 of the Concurrent List and, therefore, in such a situation there would be repugnancy between the State legislation existing at the time of the enactment of the Central Act, 1982. Applying these tests, it was submitted that the Kerala Chitties Act, 1975 became void under Article 254(1) on the enactment of the Central Chit Funds Act, 1982. That, in consequence of the said repugnancy, the Kerala Chitties Act, 1975 became void under Article 254(1) on 19.08.1982 and the Kerala Chitties Act, 1975 stood impliedly repealed. However, according to the learned counsel, the previous operation of the Kerala Chitties Act, 1975 is not affected nor any right, privilege, obligation or liability acquired under the Kerala Chitties Act shall stand affected in view of Article 367 of the Constitution. By reason of Article 367, the General Clauses Act, 1897 would apply to the said repeal. Thus, after 19.08.1982, the Kerala Chitties Act, 1975 stood repealed except for the limited purposes of Section 6 of the General Clauses Act, 1897. According to the learned counsel for the private chitties, to bring the Central Chit Funds Act, 1982 into operation in any State the Central Government has to issue a notification in the Official Gazette under Section 1(3). This has been done for several States but not for States like Kerala,

Gujarat, etc. That, until such notification neither the Kerala Chitties Act, 1975 prevails in the State of Kerala as it has become void and stands repealed under Article 254(1) nor the Central Chit Funds Act, 1982 as it is not notified. Thus, according to the learned counsel, as and when the Central Government brings into force the Chit Funds Act, 1982 by a notification in the State of Kerala under Section 1(3), Section 90(2) of the 1982 Act will come into play and thereby the Kerala Chitties Act, 1975 shall continue to apply only to the chits in operation in Kerala on the date of commencement of the Central Act, 1982 in the same manner as the Kerala Chitties Act, 1975 applied to such chits before such commencement. However, as the Kerala Act, 1975 stood repealed on 19.08.1982, on the enactment of the Central Chit Funds Act, 1982, there could be no Amendment of the Kerala Act, 1975 by Finance Act No. 7 of 2002. In the circumstances, it was submitted that Section 4(1a) inserted in Section 4 by the Kerala Finance Act No. 7 of 2002 was void and inoperative in law as the President's assent under Article 254(2) has not been obtained.

15. According to Shri V. Giri, learned counsel for one of the private chitty firms, the judgment of this Court in *Pt. Rishikesh* (supra) has been correctly decided. In this connection, it was submitted that the aspect of repugnancyprimarily arises in the mind of the Legislature. That, in the case of *Deep Chand v. State of U.P.* (1959 Suppl. (2) SCR 8), three principles were laid down as indicative of repugnancy between a State law and a Central law, which have to be borne in mind by the State Legislature whenever it seeks to enact a law under any entry in the Concurrent List. Thus, where there is a Central law which intends to override a State law or where there is a Central law intending to occupy the field hitherto occupied by the State law or where the Central law collides with the State law in actual terms, then the State Legislature would have to take into account the possibility of repugnancy within the meaning of Article 254 of the

Constitution. In this connection, it was submitted that tests 1 and 2 enumerated in *Deep Chand* (supra) do not require the Central law to be actually brought into force for repugnancy between two competing legislations to arise, in the context of Article 254 of the Constitution. It was submitted that in the present case an intention to override the State law is clearly manifest in the Central Law, especially Section 3 of the Central Act which makes it clear that the provisions of the 1982 Act shall have effect notwithstanding anything contrary contained in any other law for the time being in force. Similarly, Section 90 of the Central Act providing for repeal of State Legislations also manifests an intention on the part of the Parliament to occupy the entire field hitherto occupied by the State Legislature. Further, each and every aspect relating to the conduct of a Chit as sought to be covered by the State Act has been touched upon by the Central Act. Thus, the Parliament in enacting the Central law has manifested its intention not only to override the existing State laws, but also to occupy the entire field relating to chits, which are special contracts, under Entry 7 of List III. Thus, the actual bringing into force of the Central Act is not a relevant circumstance insofar as the legislative business of the State Legislature is concerned. That, when the State of Kerala intended to amend the State Act in 2002 by insertion of Section 4(1a), it was bound to keep in mind the fact that there is already a Central law governing chits since 19.08.1982, though not in force in Kerala, whereby there is a pro tanto repeal of the State Act. Therefore, the State Legislature ought to have followed the procedure in Article 254(2) by reserving the law for the consideration of the President and obtained Presidential assent. Therefore, according to the learned counsel, there is no merit in the contention of the State that there would be a legislative vacuum in the State of Kerala if the propositions advanced on behalf of the private chit firms are to be accepted. According to the learned counsel, Section 85(a) and Section 90(2) of the Central Chit Funds Act, 1982 inter alia provide for continuance of the application of the provisions of the Kerala

Chitties Act, 1975 till the commencement of the Central Act by issuance of notification under Section 1(3) of the Central Chit Funds Act, 1982. On commencement of that Act there is a pro tanto repeal of the State Act by Section 90 of the Central Act. However, according to the learned counsel, repugnancy arose between two competing legislations, the moment the Legislature took up the Kerala Chitties Act, 1975 for amendment by Finance Act No. 7 of 2002. Such repugnancy had to arise in the mind of the legislature and the State Legislature was bound to take note of the 1982 Central Act. In this view of the matter, there is no legislative vacuum at any point of time as urged on behalf of the State of Kerala. To hold otherwise would mean bypassing the legislative will of the Parliament expressed by passing the 1982 Act.

Our Answer to Question No. (i):-Point of time for determination of repugnance:

16. Article 254 deals with inconsistency between laws made by Parliament and laws made by the Legislatures of States. It finds place in Part XI of the Constitution. Part XI deals with relations between the Union and the States. Part XI consists of two Chapters. Chapter I deals with Distribution of Legislative Powers. Articles 245 to 255 find place in Chapter I of Part XI. Article 245 deals with extent of laws made by Parliament and by the Legislatures of States. The verb “made”, in past tense, finds place in the Head Note to Article 245. The verb “make”, in the present tense, exists in Article 245(1) whereas the verb “made”, in the past tense, finds place in Article 245 (2). While the legislative power is derived from Article 245, the entries in the Seventh Schedule of the Constitution only demarcate the legislative fields of the respective Legislatures and do not confer legislative power as such. While the Parliament has power to make laws for the whole or any part of the territory of India, the Legislature of a State can make laws only for the State or part thereof. Thus, Article 245, inter alia, indicates the extent of laws made by

Parliament and by the State Legislatures. Article 246 deals with subject-matter of laws made by Parliament and by the Legislatures of States. The verb "made" once again finds place in the Head Note to Article 246. This Article deals with distribution of legislative powers as between the Union and the State Legislatures, with reference to the different Lists in the Seventh Schedule. In short, the Parliament has full and exclusive powers to legislate with respect to matters in List I and has also power to legislate with respect to matters in List III, whereas the State Legislatures, on the other hand, have exclusive power to legislate with respect to matters in List II, minus matters falling in List I and List III and have concurrent power with respect to matters in List III. [See: *A.L.S.P.P.L. Subrahmanyan Chettiar v. Muttuswami Goundan* – AIR 1941 F.C. 47]. Article 246, thus, provides for distribution, as between Union and the States, of the legislative powers which are conferred by Article 245. Article 245 begins with the expression "subject to the provisions of this Constitution". Therefore, Article 246 must be read as "subject to other provisions of the Constitution". For the purposes of this decision, the point which needs to be emphasized is that Article 245 deals with conferment of legislative powers whereas Article 246 provides for distribution of the legislative powers. Article 245 deals with extent of laws whereas Article 246 deals with distribution of legislative powers. In these Articles, the Constitution framers have used the word "make" and not "commencement" which has a specific legal connotation. [See: Section 2(13) of the General Clauses Act, 1897]. One more aspect needs to be highlighted. Article 246(1) begins with a non-obstante clause "Notwithstanding anything in clauses (2) and (3)". These words indicate the principle of federal supremacy, namely, in case of inevitable conflict between the Union and State powers, the Union powers, as enumerated in List I, shall prevail over the State powers, as enumerated in Lists II and III, and in case of overlapping between Lists III and II, the former shall prevail. [See: *Indu Bhusan Bose versus Rama Sundari Devi & Anr.* – (1970) 1 SCR 443 at 454]. However, the principle of federal

supremacy in Article 246(1) cannot be resorted to unless there is an "irreconcilable" conflict between the entries in Union and State Lists. The said conflict has to be a "real" conflict. The non-obstante clause in Article 246(1) operates only if reconciliation is impossible. As stated, Parliamentary Legislation has supremacy as provided in Article 246 (1) and (2). This is of relevance when the field of legislation is in the Concurrent List. The Union and the State Legislatures have concurrent power with respect to the subjects enumerated in List III. [See: Article 246(2)]. Hence, the State Legislature has full power to legislate regarding subjects in the Concurrent List, (1970) 1 SCR 443 at 454]. However, the principle of federal supremacy in Article 246(1) cannot be resorted to unless there is an "irreconcilable" conflict between the entries in Union and State Lists. The said conflict has to be a "real" conflict. The non-obstante clause in Article 246(1) operates only if reconciliation is impossible. As stated, Parliamentary Legislation has supremacy as provided in Article 246 (1) and (2). This is of relevance when the field of legislation is in the Concurrent List. The Union and the State Legislatures have concurrent power with respect to the subjects enumerated in List III. [See: Article 246(2)]. Hence, the State Legislature has full power to legislate regarding subjects in the Concurrent List, , i.e., provided the provisions of the State Act do not come in conflict with those of the Central Act on the subject. [See: *Amalgamated Electricity Co. (Belgaum) Ltd. versus Municipal Committee, Ajmer* – (1969) 1 SCR 430]. Thus, the expression "subject to" in clauses (2) and (3) of Article 246 denotes supremacy of Parliament. Further, in Article 246(1) the expression used is "with respect to". There is a distinction between a law "with respect to", and a law "affecting", a subject matter. The opening words of Article 245 "Subject to the provisions of this Constitution" make the legislative power conferred by Article 245 and Article 246, as well as the legislative Lists, "subject to the provisions of the Constitution". Consequently, laws made by a Legislature may be void not only for lack of legislative powers in respect of the subject-matter, but also for transgressing constitutional limitations. [See: Para

22.6 of Vol.3 at Page 2305 of the Constitutional Law of India by H.M. Seervai, Fourth Edition]. This aspect is important as the word "void" finds place in Article 254(1) of the Constitution. Therefore, the Union and State Legislature have concurrent power Constitution" make the legislative power conferred by Article 245 and Article 246, as well as the legislative Lists, "subject to the provisions of the Constitution". Consequently, laws made by a Legislature may be void not only for lack of legislative powers in respect of the subject-matter, but also for transgressing constitutional limitations. [See: Para 22.6 of Vol.3 at Page 2305 of the Constitutional Law of India by H.M. Seervai, Fourth Edition]. This aspect is important as the word "void" finds place in Article 254(1) of the Constitution. Therefore, the Union and State Legislature have concurrent power subjects enumerated in List III. Hence, the State Legislature has full power to legislate regarding the subjects in List III, subject to the provision in Article 254(2), i.e., provided the provisions of the State Act do not conflict with those of the Central Act on the subject. Where the Parliament has made no law occupying the field in List III, the State Legislature is competent to legislate in that field. As stated, the expression "subject to" in clauses (2) and (3) of Article 246 denotes the supremacy of the Parliament. Thus, the Parliament and the State Legislature derive the power to legislate on a subject in List I and List II from Article 246 (1) and (3) respectively. Both derive their power from Article 246(2) to legislate upon a matter in List III subject to Article 254 of the Constitution. The respective Lists merely demarcate the legislative fields or legislative heads. Further, Article 250 and Article 251 also use the word "make" and not "commencement". If one reads the Head Note to Article 250 it refers to power of the Parliament to legislate with respect to any matter in the State List if a Proclamation of Emergency is in operation. The word "made" also finds place in Article 250(2). In other words, the verb "make" or the verb "made" is equivalent to the expression "to legislate". Thus, making of the law is to legislate with respect to any matter in the State List if Proclamation of Emergency is in operation. The importance of

this discussion is to show that the Constitution framers have deliberately used the word "made" or "make" in the above Articles. Our Constitution gives supremacy to the Parliament in the matter of making of the laws or legislating with respect to matters delineated in the three Lists. The principle of supremacy of the Parliament, the distribution of legislative powers, the principle of exhaustive enumeration of matters in the three Lists are all to be seen in the context of making of laws and not in the context of commencement of the laws.

17. Under clause (1) of Article 254, a general rule is laid down to say that the Union law shall prevail where the State law is repugnant to it. The question of repugnancy arises only with respect to the subjects enumerated in the Concurrent List as both the Parliament and the State Legislatures have concurrent powers to legislate over the subject-matter in that List. In such cases, at times, conflict arises. Clause (1) of Article 254 states that if a State law, relating to a concurrent subject, is "repugnant" to a Union law, relating to that subject, then, whether the Union law is prior or later in time, the Union law will prevail and the State law shall, to the extent of such repugnancy, be void. Thus, Article 254(1) also gives supremacy to the law made by Parliament, which Parliament is competent to enact. In case of repugnancy, the State Legislation would be void only to the extent of repugnancy. If there is no repugnancy between the two laws, there is no question of application of Article 254(1) and both the Acts would prevail. Thus, Article 254 is attracted only when Legislations covering the same matter in List III made by the Centre and by the State operate on that subject; both of them (Parliament and the State Legislatures) being competent to enact laws with respect to the subject in List III. In the present case, Entry 7 of List III in the Seventh Schedule deals with the subject of "Contracts". It also covers special contracts. Chitties are special contracts. Thus, the Parliament and the State Legislatures are competent to enact a law with respect to such contracts. The question of repugnancy between the Parliamentary Legislation and State

Legislation arises in two ways. First, where the Legislations, though enacted with respect to matters in their allotted spheres, overlap and conflict. Second, where the two Legislations are with respect to matters in the Concurrent List and there is a conflict. In both the situations, the Parliamentary Legislation will predominate, in the first, by virtue of non-obstante clause in Article 246(1); in the second, by reason of Article 254(1). Article 254(2) deals with a situation where the State Legislation having been reserved and having obtained President's assent, prevails in that State; this again is subject to the proviso that Parliament can again bring a legislation to override even such State Legislation. In clause (1) of Article 254 the significant words used are "provision of a law made by the Legislature of a State", "any provision of a law made by Parliament which Parliament is competent to enact", "the law made by Parliament, whether passed before or after the law made by the Legislature of such State", and "the law made by the Legislature of the State shall, to the extent of repugnancy, be void". Again, clause (2) of Article 254 speaks of "a law made by the Legislature of a State", "an earlier law made by Parliament", and "the law so made by the Legislature of such State". Thus, it is noticeable that throughout Article 254 the emphasis is on law-making by the respective Legislatures. Broadly speaking, law-making is exclusively the function of the Legislatures (see Articles 79 and 168). The President and the Governor are a part of the Union or the Legislatures of the States. As far as the Parliament is concerned, the legislative process is complete as soon as the procedure prescribed by Article 107 of the Constitution and connected provisions are followed and the Bill passed by both the Houses of Parliament has received the assent of the President under Article 111. Similarly, a State legislation becomes an Act as soon as a Bill has been passed by the State Legislature and it has received the assent of the Governor in accordance with Article 200. It is only in the situation contemplated by Article 254(2) that a State Legislation is required to be reserved for consideration and assent by the President. Thus, irrespective of the date of enforcement of a

Parliamentary or State enactment, a Bill becomes an Act and comes on the Statute Book immediately on receiving the assent of the President or the Governor, as the case may be, which assent has got to be published in the official gazette. The Legislature, in exercise of its legislative power, may either enforce an Act, which has been passed and which has received the assent of the President or the Governor, as the case may be, from a specified date or leave it to some designated authority to fix a date for its enforcement. Such legislations are conditional legislations as in such cases no part of the legislative function is left unexercised. In such legislations, merely because the Legislature has postponed the enforcement of the Act, it does not mean that the law has not been made. In the present case, the Central Chit Funds Act, 1982 is a law-made. The Chit Funds Bill was passed by both Houses of Parliament and received the assent of the President on 19.08.1982. It came on the Statute Book as the Chit Funds Act, 1982 (40 of 1982). Section 1(2) of the said Act states that the Act extends to the whole of India, except the State of Jammu and Kashmir whereas Section 1(3) states that it shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different States. The point to be noted is that the law-making process ended on 19.08.1982. Section 1(3) is a piece of conditional legislation. As stated, in legislations of such character, merely because the legislation has postponed the enforcement of the Act, it does not mean that the law has not been made. In the present case, after enactment of the Chit Funds Act, 1982 on 19.08.1982, the said Act has been applied to 17 States by notifications issued from time to time under Section 1(3). How could Section 1(3) operate and make the said Act applicable to 17 States between 2.04.1984 and 15.09.2008 and/ or postpone the commencement of the Act for certain other States including State of Kerala, Gujarat, Haryana, etc. unless that Section itself is in force? To put the matter in another way, if the entire Act including Section 1(3) was not in operation on 19.08.1982, how could the Central

Government issue any notification under that very Section in respect of 17 States? There must be a law authorizing the Government to bring the Act into force. Thus, Section 1(3) came into force immediately on passing of the Act (see *A. Thangal Kunju Musaliar v. M. Venkatachalam Potti* AIR 1956 SC 246). Thus, the material dates, in our opinion, are the dates when the two enactments received the assent of the President which in the case of Central Act is 19.08.1982 while in the case of the Kerala Chitties Act, 1975, it is 18.07.1975. There is one more way in which this problem can be approached. Both the courts below have proceeded on the basis that there are conflicting provisions in the Central Act, 1982 vis-à-vis the State Act, 1975 (see paragraphs 13, 14 & 15 of the impugned judgment). In our view, the intention of the Parliament was clearly to occupy the entire field falling in Entry 7 of List III. The 1982 Act was enacted as a Central Legislation to "ensure uniformity in the provisions applicable to chit fund institutions throughout the country as such a Central Legislation would prevent such institutions from taking advantage either of the absence of any law governing chit funds in a State or exploit the benefit of any lacuna or relaxation in any State law by extending their activities in such States". The background of the enactment of the Central Chit Funds Act, which refers to the Report of the Banking Commission has been exhaustively dealt with in the case of *Shriram Chits and Investment (P) Ltd. v. Union of India* [(1993) Supp 4 SCC 226] as also in the Statement of Objects and Reasons of the 1982 Act. The clear intention of enacting the Central 1982 Act, therefore, was to make the Central Act a complete code with regard to the business of conducting chit funds and to occupy the legislative field relating to such chit funds. Moreover, the intention to override the State laws is clearly manifested in the Central Act, especially Section 3 which makes it clear that the provisions of the Central Act shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force. Similarly, Section 90 of the Central Act providing for the repeal of State legislations also manifests the intention on the part of the Parliament to occupy the field hitherto

occupied by State Legislation. Each and every aspect relating to the conduct of the chits as is covered by the State Act has been touched upon by the Central Act in a more comprehensive manner. Thus, on 19.08.1982, the Parliament in enacting the Central law has manifested its intention not only to override the existing State Laws, but to occupy the entire field relating to Chits, which is a special contract, coming under Entry 7 of List III. Consequently, the State Legislature was divested of its legislative power/ authority to enact Section 4(1a) vide Finance Act No. 7 of 2002 on 29.07.2002, save and except under Article 254(2) of the Constitution. Thus, Section 4(1a) became void for want of assent of the President under Article 254(2). Let us assume for the sake of argument that the State of Kerala were to obtain the assent of the President under Article 254(2) of the Constitution in respect of the insertion of Section 4(1a) by Finance Act No. 7 of 2002. Now, Article 254(2) deals with the situation where State Legislation is reserved and having obtained the President's assent, prevails in the State over the Central Law. However, in view of the proviso to Article 254(2), the Parliament could have brought a legislation even to override such assented to State Finance Act No. 7 of 2002 without waiting for the Finance Act No. 7 of 2002 to be brought into force as the said proviso states that nothing in Article 254(2) shall prevent Parliament from enacting at any time, any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the State Legislature) [emphasis supplied]. Thus, Parliament in the matter of enacting such an overriding law need not wait for the earlier State Finance Act No. 7 of 2002 to be brought into force. In other words, Parliament has the power under the said proviso to override the Finance Act No. 7 of 2002 even before it is brought into force. Therefore, we see no justification for construing Article 254(2) read with the proviso in a manner which inhibits the Parliament from repealing, amending, or varying a State Legislation which has received the President's assent under Article 254(2), till that State Legislation is brought into force. We have to read the word "made" in the proviso to

Article 254(2) in a consistent manner. The entire above discussion on Articles 245, 246, 250, 251 is only to indicate that the word "made" has to be read in the context of law-making process and, if so read, it is clear that to test repugnancy one has to go by the making of law and not by its commencement.

Case Law

18(i) In *T. Barai v. Henry Ah Hoe* reported in (1983) 1 SCC 177, this Court has laid down the following principles on repugnancy.

> "15. There is no doubt or difficulty as to the law applicable. Article 254 of the Constitution makes provision firstly, as to what would happen in the case of conflict between a Central and State law with regard to the subjects enumerated in the Concurrent List, and secondly, for resolving such conflict. Article 254(1) enunciates the normal rule that in the event of a conflict between a Union and a State law in the concurrent field, the former prevails over the latter. Clause (1) lays down that if a State law relating to a concurrent subject is "repugnant" to a Union law relating to that subject, then, whether the Union law is prior or later in time, the Union law will prevail and the State law shall, to the extent of such repugnancy, be void. To the general rule laid down in Clause (1), Clause (2) engrafts an exception viz. that if the President assents to a State law which has been reserved for his consideration, it will prevail notwithstanding its repugnancy to an earlier law of the Union, both laws dealing with a concurrent subject. In such a case, the Central Act will give way to the State Act only to the extent of inconsistency between the two, and no more. In short, the result of obtaining the assent of the President to a State Act which is inconsistent with a previous Union law relating to a concurrent subject would be that the State Act will prevail in that State and override the provisions of the Central Act in their applicability to that State only. The predominance of the State law may

> however be taken away if Parliament legislates under the proviso to Clause (2). The proviso to Article 254(2) empowers the Union Parliament to repeal or amend a repugnant State law even though it has become valid by virtue of the President's assent. Parliament may repeal or amend the repugnant State law, either directly, or by itself enacting a law repugnant to the State law with respect to the "same matter". Even though the subsequent law made by Parliament does not expressly repeal a State law, even then, the State law will become void as soon as the subsequent law of Parliament creating repugnancy is made. A State law would be repugnant to the Union law when there is direct conflict between the two laws. Such repugnancy may also arise where both laws operate in the same field and the two cannot possibly stand together, e.g., where both prescribe punishment for the same offence but the punishment differs in degree or kind or in the procedure prescribed. In all such cases, the law made by Parliament shall prevail over the State law under Article 254(1)."

(ii) In *I.T.C. Limited v. State of Karnataka* reported in 1985 Supp. SCC 476, this Court vide para 18 stated as under.

> "18. Thus, in my opinion, the five principles have to be read and construed together and not in isolation — where however, the Central and the State legislation cover the same field then the Central legislation would prevail. It is also well settled that where two Acts, one passed by the Parliament and the other by a State Legislature, collide and there is no question of harmonising them, then the Central legislation must prevail."

(iii) In the case of *M. Karunanidhi v. Union of India* (1979) 3 SCC 431, the test for determining repugnancy has been laid down by the Supreme Court as under.

> "8. It would be seen that so far as clause (1) of Article 254 is concerned it clearly lays down that where there is a direct

collision between a provision of a law made by the State and that made by Parliament with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the State law would be void to the extent of the repugnancy. This naturally means that where both the State and Parliament occupy the field contemplated by the Concurrent List then the Act passed by Parliament being prior in point of time will prevail and consequently the State Act will have to yield to the Central Act. In fact, the scheme of the Constitution is a scientific and equitable distribution of legislative powers between Parliament and the State Legislatures. First, regarding the matters contained in List I, i.e. the Union List to the Seventh Schedule, Parliament alone is empowered to legislate and the State Legislatures have no authority to make any law in respect of the Entries contained in List I. Secondly, so far as the Concurrent List is concerned, both Parliament and the State Legislatures are entitled to legislate in regard to any of the Entries appearing therein, but that is subject to the condition laid down by Article 254(1) discussed above. Thirdly, so far as the matters in List II, i.e. the State List are concerned, the State Legislatures alone are competent to legislate on them and only under certain conditions Parliament can do so. It is, therefore, obvious that in such matters repugnancy may result from the following circumstances:

1. Where the provisions of a Central Act and a State Act in the Concurrent List are fully inconsistent and are absolutely irreconcilable, the Central Act will prevail and the State Act will become void in view of the repugnancy.

2. Where however a law passed by the State comes into collision with a law passed by Parliament on an Entry in the Concurrent List, the State Act shall prevail to the extent of the repugnancy and the provisions of the Central Act would become void provided the State Act has been

passed in accordance with clause (2) of Article 254.

3. Where a law passed by the State Legislature while being substantially within the scope of the entries in the State List entrenches upon any of the Entries in the Central List the constitutionality of the law may be upheld by invoking the doctrine of pith and substance if on an analysis of the provisions of the Act it appears that by and large the law falls within the four corners of the State List and entrenchment, if any, is purely incidental or inconsequential.

4. Where, however, a law made by the State Legislature on a subject covered by the Concurrent List is inconsistent with and repugnant to a previous law made by Parliament, then such a law can be protected by obtaining the assent of the President under Article 254(2) of the Constitution. The result of obtaining the assent of the President would be that so far as the State Act is concerned, it will prevail in the State and overrule the provisions of the Central Act in their applicability to the State only. Such a state of affairs will exist only until Parliament may at any time make a law adding to, or amending, varying or repealing the law made by the State Legislature under the proviso to Article 254.

So far as the present State Act is concerned we are called upon to consider the various shades of the constitutional validity of the same under Article 254(2) of the Constitution.

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24. It is well settled that the presumption is always in favour of the constitutionality of a statute and the onus lies on the person assailing the Act to prove that it is unconstitutional. Prima facie, there does not appear to us to be any inconsistency between the State Act and the Central Acts. Before any repugnancy can arise, the following conditions must be satisfied:

1. That there is a clear and direct inconsistency between the Central Act and the State Act.

2. That such an inconsistency is absolutely irreconcilable.

3. That the inconsistency between the provisions of the two Acts is of such nature as to bring the two Acts into direct collision with each other and a situation is reached where it is impossible to obey the one without disobeying the other.

25. In Colin Howard's Australian Federal Constitutional Law, 2nd Edn. the author while describing the nature of inconsistency between the two enactments observed as follows:

"An obvious inconsistency arises when the two enactments produce different legal results when applied to the same facts."

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35. On a careful consideration, therefore, of the authorities referred to above, the following propositions emerge:

1. That in order to decide the question of repugnancy it must be shown that the two enactments contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field.

2. That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes.

3. That where the two statutes occupy a particular field, but there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results.

4. That where there is no inconsistency but a statute

occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field."

Applying the above tests to the facts of the present case, on the enactment of the Central Chit Funds Act 1982 on 19.08.1982, intending to occupy the entire field of Chits under Entry 7 of List III, the State Legislature was denuded of its power to enact the Finance Act No. 7 of 2002. However, as held in numerous decisions of this Court, a law enacted by the State legislature on a topic in the Concurrent List which is inconsistent with and repugnant to the law made by the Parliament can be protected by obtaining the assent of the President under Article 254(2) and that the said assent would enable the State law to prevail in the State and override the provisions of the Central Act in its applicability to that State only. Thus, when the State of Kerala intended to amend the State Act in 2002, it was bound to keep in mind the fact that there is already a Central law on the same subject, made by Parliament in 1982, though not in force in Kerala, whereunder there is a pro tanto repeal of the State Act. Therefore, the State legislature ought to have followed the procedure in Article 254(2) and ought to have obtained the assent of the President.

(iv) In *Tika Ramji* (supra), the facts were as follows:-The State Legislature enacted the U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 which empowered the State Government to issue notifications, which were in fact issued on 27.09.1954 and 9.11.1955 regulating supply and purchase of sugarcane. It was inter alia contended that the U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953, being the State Act was repugnant to Act LXV of 1951 enacted by the Parliament which empowered the Central Government vide Section 18G to issue an order regulating distribution of finished articles at fair prices relatable to the scheduled industry. The question that arose for determination was whether "sugar" was an item covered by the Central Act No. LXV of 1951 and, if

so, whether the State Act was void being repugnant to the Central Law. This Court held that the whole object of the Central Act (LXV of 1951) was to regulate distribution of manufactured/ finished articles at fair prices and not to legislate in regard to the raw material (sugarcane). This Court further held that Section 18G of the Central Act No. LXV of 1951 did not cover "sugarcane"; Section 18G of the Central Act No. LXV of 1951 only dealt with the finished products manufactured by scheduled industries, and, hence, there was no repugnancy. In the said judgment, this Court also referred to three tests of inconsistency or repugnancy enumerated by Nicholas in his commentary on Australian Constitution, 2nd Edition, Page 303. In the said judgment, this Court also relied upon the ratio of the judgment in the case of *Clyde Engineering Co. Ltd. v. Cowburn* [1926] 37 C.L.R. 466, in which Isaacs, J. laid down one test of inconsistency as conclusive: "If, a competent legislature expressly or implicitly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another Legislature assumes to enter to any extent upon the same field." Applying these tests, this Court held that there was no repugnancy as "sugarcane" was dealt with by the impugned State Act whereas the Central Act dealt with supply and distribution of manufactured articles at fair prices and, therefore, there was no question of any inconsistency in the actual terms of the Acts enacted by Parliament and the State. The only question that arose was whether Parliament and the State Legislature sought to exercise their powers over the same subject matter or whether the laws enacted by Parliament were intended to be a complete exhaustive code or whether such Acts evinced an intention to cover the whole field. This Court held that as "sugarcane" was not the subject-matter of the Central Act, there was no intention to cover the whole field and, consequently, both the Acts could co-exist without repugnancy. Having come to the conclusion that there was no repugnancy, the Court observed that, "Even assuming that sugarcane was an article relatable to the sugar industry as a final product within the meaning of Section 18G of Central Act No. LXV of 1951, it

is to be noted that no order was issued by the Central Government in exercise of the powers vested in it under that Section and no question of repugnancy could arise because repugnancy must exist in fact and not depend merely on a possibility. The possibility of an order under Section 18G being issued by the Central Government would not be enough. The existence of such an order was an essential pre-requisite before repugnancy could arise." This sentence has been relied upon by learned counsel for the State of Kerala in the present case in support of his submission that repugnancy must exist in fact and not depend on a mere possibility. According to the learned counsel, in the present case, applying the ratio of the judgment in the case of *Tika Ramji* (supra), it is clear that the repugnancy has not arisen in the present case before us for the simple reason that the Central Chit Funds Act, 1982 has not come into force in the State of Kerala. That, a mere possibility of the Central Act coming into force in future in the State of Kerala would not give rise to repugnancy.

(v) In the case of *State of Orissa v. M.A. Tulloch and Co.* reported in (1964) 4 SCR 461, the facts were as follows:-On a lease being granted by State of Orissa under Mines and Minerals (Development and Regulation) Act 1948 (Central Act), Tulloch and Company started working a manganese mine. The State of Orissa passed Orissa Mining Areas Development Fund Act, 1952 under which the State Government was authorized to levy a fee for development of "mining areas" in the State. After bringing these provisions into operation, State of Orissa demanded from Tulloch and Company on August 1, 1960 fees for the period July, 1957 to March, 1958. Tulloch and Company challenged the legality of the demand before the High Court under Article 226 of the Constitution. The writ petition was allowed on the ground that on the coming into force of the Mines and Minerals (Regulation and Development) Act of 1957, hereinafter called the "Central Act of 1957", which was brought into force from 1st June, 1953 the Orissa Mining Areas Development Fund Act 1952 should be deemed to be non-

existent. This was the controversy which came before this Court. One of the points which arose for determination was that of repugnancy. It was urged that the object and purpose of Orissa Mining Areas Development Fund Act, 1952 was distinct and different from the object and purpose of the Central Act of 1957, with the result that both the enactments could validly co-exist since they did not cover the same field. This argument was rejected by this Court. It was held that having regard to the terms of Section 18(1) the intention of Parliament was to cover the entire field. That, by reason of declaration by Parliament under the said Section the entire subject matter of conservation and development of minerals was taken over for being dealt with by Parliament thus depriving the State of the power hitherto possessed. Relying on the judgment of the Constitution Bench of this Court in the case of *Hingir-Rampur Coal Co. v. State of Orissa* (1961) 2 SCR 537, it was held in Tulloch's case that for the declaration to be effective it is not necessary that the rules should be made or enforced; all that was required was a declaration by Parliament to the effect that in public interest regulation and development of the mines should come under the control of the Union. In such a case the test must be whether the legislative declaration covers the field or not. Applying the said test, in *Tulloch's* case, the Constitution Bench held that the Central Act of 1957 intended to cover the entire field dealing with regulation and development of mines being under the control of the Central Government. In *Tulloch's* case, reliance was placed on the above underlined portion in *Tika Ramji's* case (supra) which, as stated above, was on the assumption that sugarcane was an article relatable to sugar industry within Section 18G of the Central Act No. LXV of 1951. It was urged on behalf of the State of Orissa in *Tulloch's* case that Section 18(1) of the Central Act of 1957 merely imposes a duty on the Central Government to take steps for ensuring conservation and development of mineral resources. That, since the Central Government had not framed Rules under the Act for development of mining areas till such Rules were framed, the Central Act of 1957 did not cover the entire field, and, thus, the

Orissa Mining Areas Development Fund Act, 1952 continued to operate in full force till the Central Government enacted Rules under Section 18 of the 1957 Act. The said contention of the State of Orissa was rejected by the Constitution Bench of this Court in Tulloch's case by placing reliance on the judgment of this Court in *Hingir-Rampur's* case (supra) in following words:

> "We consider that this submission in relation to the Act before us is without force besides being based on a misapprehension of the true legal position. In the first place the point is concluded by the earlier decision of this court in *Hingir Rampur Coal Co. Ltd. v. State of Orissa* where this court said:
>
> "In order that the declaration should be effective it is not necessary that rules should be made or enforced. All that this required is a declaration by Parliament that it was expedient in the public interest to take the regulation of development of mines under the control of the Union. In such a case the test must be whether the legislative declaration covers the field or not."
>
> But even if the matter was res integra, the argument cannot be accepted. Repugnancy arises when two enactments both within the competence of the two Legislatures collide and when the Constitution expressly or by necessary implication provides that the enactment of one legislature has superiority over the other then to the extent of the repugnancy the one supersedes the other. But two enactments may be repugnant to each other even though obedience to each of them is possible without disobeying the other. The test of two legislations containing contradictory provisions is not, however, the only criterion of repugnancy, for if a competent legislature with a superior efficacy expressly or impliedly evinces by its legislation an intention to cover the whole field, the enactments of the other legislature whether passed before or after would be

overborne on the ground of repugnance. Where such is the position, the inconsistency is demonstrated not by a detailed comparison of provisions of the two statutes but by the mere existence of the two pieces of legislation. In the present case, having regard to the terms of Section 18(1) it appears clear to us that the intention of Parliament was to cover the entire field and thus to leave no scope for the argument that until rules were framed, there was no inconsistency and no supersession, of the State Act."

19. To sum up, Articles 246(1), (2) and 254(1) provide that to the extent to which a State law is in conflict with or repugnant to the Central law, which Parliament is competent to make, the Central law shall prevail and the State law shall be void to the extent of its repugnancy. This general rule of repugnancy is subject to Article 254(2) which inter alia provides that if a law made by a State legislature in respect of matters in the Concurrent List is reserved for consideration by the President and receives his/ her assent, then the State law shall prevail in that State over an existing law or a law made by the Parliament, notwithstanding its repugnancy. The proviso to Article 254(2) provides that a law made by the State with the President's assent shall not prevent Parliament from making at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by a State legislature. Thus, Parliament need not wait for the law made by the State with the President's assent to be brought into force as it can repeal, amend, vary or add to the assented State law no sooner it is made or enacted. We see no justification for inhibiting Parliament from repealing, amending or varying any State Legislation, which has received the President's assent, overriding within the State's territory, an earlier Parliamentary enactment in the concurrent sphere, before it is brought into force. Parliament can repeal, amend, or vary such State law no sooner it is assented to by the President and that it need not wait till such assented to State law is brought into force. This view finds support in the judgment

of this Court in *Tulloch* (supra). Lastly, the definition of the expressions "laws in force" in Article 13(3)(b) and Article 372(3), Explanation I and "existing law" in Article 366(10) show that the laws in force include laws passed or made by a legislature before the commencement of the Constitution and not repealed, notwithstanding that any such law may not be in operation at all. Thus, the definition of the expression "laws in force" in Article 13(3)(b) and Article 372(3), Explanation I and the definition of the expression "existing law" in Article 366(10) demolish the argument of the State of Kerala that a law has not been made for the purposes of Article 254, unless it is enforced. The expression "existing law" finds place in Article 254. In *Edward Mills Co. Ltd., Beawar v. State of Ajmer* [AIR 1955 SC 25], this Court has held that there is no difference between an "existing law" and a "law in force". Applying the tests enumerated hereinabove, we hold that the Kerala Chitties Act, 1975 became void on the making of the Chit Funds Act, 1982 on 19.08.1982, [when it received the assent of the President and got published in the Official Gazette] as the Central 1982 Act intended to cover the entire field with regard to the conduct of the Chits and further that the State Finance Act No. 7 of 2002, introducing Section 4(1a) into the State 1975 Act, was void as the State legislature was denuded of its authority to enact the said Finance Act No. 7 of 2002, except under Article 254(2), after the Central Chit Funds Act, 1982 occupied the entire field as envisaged in Article 254(1) of the Constitution. Thus, repugnancy arises on the making and not commencement of the Central Chit Funds Act, 1982. On 19.08.1982, the Kerala Chitties Act, 1975 ceased to operate except to the extent of Section 6 of the General Clauses Act, 1897.

(ii) Our Answer to Question No. (ii) :-The Effect in Law of a Repeal

20. In *State of Orissa v. M.A. Tulloch & Co.* (supra), this Court came to the conclusion that by reason of the declaration

by Parliament the entire subject matter of "conservation and development of minerals" stood taken over, for being dealt with by Parliament, thus, denying the State of the power within it hitherto possessed and consequently the Central Act superseded the State law, thus effecting a repeal. After coming to the conclusion that the State law stood repealed, this Court was required to consider a submission advanced on behalf of *Tulloch & Co.* It was submitted that Section 6 of the General Clauses Act, 1897 applied only to express repeals and not to repeals consequent upon the supersession of the State Act by a law having the constitutional superior efficacy. It was submitted that a mere disappearance or supersession of the State Act under Article 254(1) was at the highest a case of implied repeal and not an express repeal. That, Section 6 of the General Clauses Act applied only to express repeals and not to implied repeals. This contention was rejected in the following terms :

> "The entire theory underlying implied repeals is that there is no need for the later enactment to state in express terms that an earlier enactment has been repealed by using any particular set of words or form of drafting but that if the legislative intent to supersede the earlier law is manifested by the enactment of provisions as to effect such supersession, then there is in law a repeal notwithstanding the absence of the word 'repeal' in the later statute. Now, if the legislative intent to supersede the earlier law is the basis upon which the doctrine of implied repeal is founded could there be any incongruity in attributing to the later legislation the same intent which Section 6 presumes where the word 'repeal' is expressly used. So far as statutory construction is concerned, it is one of the cardinal principles of the law that there is no distinction or difference between an express provision and a provision which is necessarily implied, for it is only the form that differs in the two cases and there is no difference in intention or in substance. A repeal may be brought about by repugnant

> legislation, without even any reference to the Act intended to be repealed, for once legislative competence to effect a repeal is posited, it matters little whether this is done expressly or inferentially or by the enactment of repugnant legislation. If such is the basis upon which repeals and implied repeals are brought about it appears to us to be both logical as well as in accordance with the principles upon which the rule as to implied repeal rests to attribute to that legislature which effects a repeal by necessary implication the same intention as that which would attend the case of an express repeal. Where an intention to effect a repeal is attributed to a legislature then the same would, in our opinion, attract the incident of the saving found in Section 6 for the rules of construction embodied in the General Clauses Act are, so to speak, the basic assumptions on which statutes are drafted."

21. In *A. Thangal Kunju Mussaliar v. M. Venkitachalam Potti and Anr.* [1955] 2 SCR 1196, the Travancore State Legislature enacted Act No. XIV of 1124 on 7.03.1949 to provide for investigation of tax evasion cases. The Act was to come into force by Section 1(3) on the date appointed by the State Government. The States of Travancore and Cochin merged on 1.07.1949. By Ordinance 1 of 1124, all existing laws were to continue in force in the United State of Travancore and Cochin. After action was taken under Act No. XIV of 1124, a controversy was raised that as the said Act No. XIV of 1124 was not a law in force when the United State of Travancore and Cochin was formed, all proceedings under the Travancore Act No. XIV of 1124 had lapsed. This contention was dismissed by this Court in following terms:

> "The general rule of English law, as to the date of the commencement of a statute, since 1797, has been and is that when no other date is fixed by it for its coming into operation it is in force from the date when it receives the royal assent (33 Geo. 3, c. 13). The same rule has been

adopted in Section 5 of our General Clauses Act, 1897. We have not been referred to any Travancore law which provides otherwise. If, therefore, the same principle prevailed in that State, Travancore Act 14 of 1124 would have come into force on 7-3-1949 when it was passed by the Travancore Legislature. What prevented that result? The answer obviously points to Section 1(3) which authorises the Government to bring the Act into force on a later date by issuing a notification. How could Section 1(3) operate to postpone the commencement of the Act unless that section itself was in force? One must, therefore, concede that Section 1(3) came into operation immediately the Act was passed, for otherwise it could not postpone the coming into operation of the Act. To put the same argument in another way, if the entire Act including Section 1(3) was not in operation at the date of its passing, how could the Government issue any notification under that very section? There must be some law authorising the Government to bring the Act into force. Where is that law to be found unless it were in Section 1(3)? In answer, Shri Nambiyar referred us to the principle embodied in Section 37 of the English Interpretation Act which corresponds to Section 22 of our General Clauses Act. That section does not help the petitioner at all. All that it does is to authorise the making of rules or byelaws and the issuing of orders between the passing and the commencement of the enactment but the last sentence of the section clearly says that "rules, bye-laws or orders so made or issued shall not take effect till the commencement of the Act or Regulation". Suppose Shri Nambiyar is right in saying that the Government could issue a notification under Section 1(3) by virtue of the principle embodied in Section 22 of the General Clauses Act, it will not take his argument an inch forward, for that notification, by reason of the last sentence of Section 22 quoted above, will not take effect till the commencement of the Act. It will bring about a stalemate. It is, therefore, clear that a notification bringing an Act into

force is not contemplated by Section 22 of the General Clauses Act. Seeing, therefore, that it is Section 1(3) which operates to prevent the commencement of the Act until a notification is issued thereunder by the Government and that it is Section 1(3) which operates to authorise the Government to issue a notification thereunder, it must be conceded that that Section 1(3) came into force immediately on the passing of the Act. There is, therefore, no getting away from the fact that the Act was an "existing law" from the date of its passing right up to 1-7-1949 and was, consequently, continued by Ordinance 1 of 1124. This being the position, the validity of the notification issued on 26-7-1949 under Section 1(3), the reference of the case of the petitioner, the appointment of Respondent 1 as the authorised official and all proceedings under the Travancore Act 14 of 1124 cannot be questioned on the ground that the Act lapsed and was not continued by Ordinance 1 of 1124."

22. In *T.S. Baliah v. T.S. Rengachari* [1969] 3 SCR 65, the underlying principle of Section 6 of the General Clauses Act, 1897 is explained as under :

> "The question is not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. Section 6 of the General Clauses Act therefore will be applicable whenever there is a repeal of an enactment. In such cases consequences laid down in Section 6 will follow, unless, as the Section itself says, a different intention appears in the repealing statute."

23. In *State of Punjab vs. Mohar Singh* [1955] 1 SCR 893 prosecution was commenced against Mohar Singh under Section 7 of the East Punjab Refugees (Registration of Land Claims) Act, 1948. The offence was committed at a time when the said Act was not in force. The offence was committed when East Punjab Refugees (Registration of Land Claims) Ordinance of 1948 was in force. That Ordinance was for a

temporary period. It was substituted by the Act. It is important to note that the Ordinance was a temporary law and the same was repealed before it expired by efflux of time. In the above circumstances, Section 6 of General Clauses Act, 1897 came for interpretation before this Court. It was held : "We cannot subscribe to the broad proposition that Section 6 is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases unless the new legislation manifests a contrary intention or incompatibility. Such incompatibility has to be ascertained from a consideration of all relevant provisions of the new law and mere absence of a saving clause by itself is not material."

24. Applying the tests laid down in the above judgments of this Court, when a State law is repealed expressly or by implication by a Union law, Section 6 of the General Clauses Act 1897 applies as to things done under the State law which are so repealed, so that transactions under the State law before the repeal are saved as also any rights and liabilities arising under the State Act, prior to the enactment of the Central Act. Repeal of an enactment is a matter of substance. It depends on the intention of the Legislature. If by reason of the subsequent enactment, the Legislature intended to abrogate or wipe off the former enactment, wholly or in part, then, it would be a case of pro tanto repeal.

25. In the present case, repugnancy is established by both the tests. As can be seen from the impugned judgment (vide paras 13-15) on comparison of the provisions of the Kerala Chitties Act, 1975, being the State Act, and the Chit Funds Act, 1982, being the Central Act, inconsistencies actually exist directly. Further, as stated above, the intention of the Parliament in enacting the Central Act is to cover the entire field relating to or with respect to Chits. Hence, on both counts the two Acts cannot stand together. In consequence of this repugnancy the Kerala Chitties Act, 1975 became void under Article 254(1) on the enactment of the Central Chit Funds Act, 1982 on 19.08.1982 and the Kerala Chitties Act, 1975 thus stood

impliedly repealed. By reason of Article 367 of the Constitution, the General Clauses Act, however, applies to the said repeal. Under Sections 6(b) and (c) of the General Clauses Act the previous operation of the Kerala Chitties Act, 1975 is not affected nor any right, privilege, obligation or liability acquired or incurred under the said Kerala repealed Act. This is the Constitutional position which would prevail if Section 90(1) of the Central Chit Funds Act, 1982 would not have been there. In other words, Section 90(1) of the Central Chit Funds Act, 1982 is stated out of abundant caution. Thus, after 19.08.1982 the Kerala Chitties Act, 1975 stood repealed except for the limited purposes of Section 6 of the General Clauses Act. Likewise, the other existing six State laws on Chits, referred to in Section 90 of the Chit Funds Act, 1982, existing on 19.08.1982 also stood repealed subject to the saving under Section 6 of the General Clauses Act.

26. To bring the Central Chit Funds Act, 1982 into operation in any State the Central Government has to issue a notification in the Official Gazette under Section 1(3). This has been done for some States but it has not been done for others like Kerala. It is for the Central Government to issue a notification bringing into force the Chit Funds Act, 1982 in Kerala when it deems appropriate as it has done in some States. Until such notification is issued neither the Kerala Chitties Act, 1975 prevails in the State of Kerala as it has become void and has been repealed under Article 254(1), nor the Central Chit Funds Act, 1982 as it is not notified till date. If and when the Central Government brings into force the Chit Funds Act, 1982 by a notification in the State of Kerala, under Section 1(3), Section 90(2) will come into play and thereby the Kerala Chitties Act, 1975 shall continue to apply only to chits in operation in State of Kerala on the date of the commencement of the Central Chit Funds Act, 1982 in the same manner as the Kerala Chitties Act, 1975 applied to such chits before such commencement. Moreover, Sections 85(a) and 90(2) of the Central Chit Funds Act, 1982 provide for

continuance of the application of the provisions of the Kerala Chitties Act, 1975 till the commencement of the Central Chit Funds Act, 1982. Such commencement is dependent upon notification under Section 1(3). Thus, on such commencement of the Central Chit Funds Act, 1982, the transactions (chits) between 19.08.1982 and the date of commencement of the Central Act will stand protected under Section 90(2). Hence, there would be no legislative vacuum.

27. Before concluding, one aspect needs to be highlighted. Section 4(1a) was inserted into Section 4(1) vide State Finance Act No. 7 of 2002. Under Section 4(1a), in cases where a chitty is registered outside the State, say in Jammu & Kashmir, but having 20% or more of the subscribers normally residing in State of Kerala, the Foreman (who has got registration outside the State of Kerala) has to open a branch in the State of Kerala and obtain registration under the Kerala Chitties Act, 1975. This sub-section was inserted to plug a loophole. In many cases, chitties were registered outside the State of Kerala even when large number of subscribers were residing in State of Kerala. It is true that on the making of the Central Chit Funds Act, 1982, the State legislature could not have enacted the Finance Act No. 7 of 2002 inserting Section 4(1a) into the State Act as the entire field stood occupied by the Central Chit Funds Act, 1982 without the assent of the President as envisaged under Article 254(2), however, we find that Section 4(1) of the Central Chit Funds Act, 1982 is much wider and more stringent than Section 4(1a) of the Kerala Chitties Act, 1975, as amended by Finance Act No. 7 of 2002, inasmuch as under Section 4(1) of the Central Chit Funds Act, 1982, no chit shall be commenced or conducted without obtaining sanction of the State Government within whose jurisdiction the chit is to be commenced or conducted and unless such chit is registered in that State in accordance with the provisions of the Central Chit Funds Act 1982. Conclusions

28. To sum up, our conclusions are as follows :i) On timing, we hold that, repugnancy arises on the making and not

commencement of the law, as correctly held in the judgment of this Court in *Pt. Rishikesh and Another v. Salma Begum (Smt)* [(1995) 4 SCC 718].

ii) Applying the above test, we hold that, on the enactment of the Central Chit Funds Act, 1982, on 19.08.1982, which covered the entire field of "chits" under entry 7 of List III of the Constitution, the Kerala Chitties Act, 1975, on account of repugnancy as enshrined in Article 254(1), became void and stood impliedly repealed. That, on the occupation of the entire field of "chits", the Kerala Legislature could not have enacted the State Finance Act No. 7 of 2002, inserting Section 4(1a) into the Kerala Chitties Act, 1975, particularly on the failure of the State in obtaining Presidential assent under Article 254(2).

iii) That, the Central Chit Funds Act, 1982 though not brought in force in the State of Kerala is still a law made, which is alive as an existing law. By reason of Article 367 of the Constitution, the General Clauses Act, 1897 applies to the repeal. Section 6 of the General Clauses Act, 1897 is, therefore, relevant, particularly Sections 6(b) and 6(c) and consequently, the previous operation of the Kerala Chitties Act, 1975 is not affected nor any right, privilege, obligation or liability acquired or incurred under that repealed State Act of 1975. Thus, after 19.08.1982, the Kerala Chitties Act, 1975 stands repealed except for the limited purposes of Section 6 of General Clauses Act, 1897. If and when the Central Government brings into force the Chit Funds Act, 1982 by a notification in State of Kerala, under Section 1(3), Section 90(2) will come into play and thereby the Kerala Chitties Act, 1975 shall continue to apply only to chits in operation on the date of commencement of the Central Chit Funds Act, 1982 in the same manner as the Kerala Chitties Act, 1975 applied to chits before such commencement.

29. The reference is answered accordingly.

K.K.T. Reference answered.

SINNAMANI & ANR.
v.
G. VETTIVEL AND ORS.
(Civil Appeal No. 4368 of 2012 etc.)

MAY 09, 2012

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

Trust Act, 1882 – s. 59 – Trust Original Petition – Filed by beneficiaries of trust – For execution of the trust – Original petition rejected being barred by s. 9 CPC as for the relief sought, suit alone was maintainable – High Court upholding the order and also denying conversion of the petition into a suit – On appeal, Held: s. 59 gives right to the beneficiaries to sue for execution of trust only by filing a suit and not any original petition – When the Act provides for filing of a suit, suit alone can be filed – In the absence of a statutory provision conversion of original petition to civil suit or vice-versa is not permissible – The petition cannot be construed as suit or equated to be a suit – Code of Civil Procedure, 1908 – s. 26, r.3(9) and Ors. IV and VII.

Appellants-the beneficiaries of different trusts filed Trust Original Petition. On objection by the opposite party, the Trust Original Petition was rejected on the ground interalia that the Trust Original Petition was barred u/s. 9 CPC as the relief sought, could have been agitated only by means of a suit. High Court upheld the impugned order and also held that the Trust Original Petition could not be converted as a civil suit. Hence the present appeals.

Disposing of the appeals, the Court

HELD: 1. Section 59 of the Trust Act confers a right upon the beneficiaries to sue for execution of the trust which would indicate that the beneficiaries may institute

a suit for execution of the trust. Therefore, in order to execute the trust, the right is only to file a suit and not any original petition. Few of the provisions of the Act permit for filing of original petitions. Thus, when the Trust Act provides for filing of a suit then suit alone can be filed and when it provides for original petition then original petition alone can be filed and there is no question of conversion of original petition to that of a civil suit or vice-versa, especially in the absence of a statutory provision under the Trust Act. Certain legislations specifically provide for conversion of original petition into a suit. The Trust Act contains no such enabling provision to convert the original petition into a suit. [Paras 11 and 12] [519-C-G; 520-E]

2. A comprehensive reading of r. 3(9) CPC and s. 2(14) CPC will make it clear that the original petition filed by the appellants cannot either be construed a suit or equated to be a suit. The final order passed in the original petition cannot also be construed as a decree as defined in Section 2(2) C.P.C. It can only be an "order" as defined in Section 2(14) C.P.C. The term 'suit', as such is not defined in the CPC. However, Section 26, C.P.C. gives an indication as to the manner in which suit has to be instituted. A suit can be instituted by presentation of a plaint and Orders IV and VII C.P.C. deals with the presentation of the plaint and the contents of the plaint. Chapter I of the Civil Rules of Practice deals with the form of a plaint. When the statutory provision clearly says as to how the suit has to be instituted, it can be instituted only in that manner alone, and no other manner. [Paras 10 and 11] [518-F-G; 519-B-C]

3. The Trust Oirginal Petition cannot be allowed to be converted into a suit. However, the rejection of the Trust Original Petition under Order VII Rule 11 CPC shall not operate as a bar for the appellants to file a fresh suit in accordance with law. [Para 13] [520-F-G]

P.A. Ahmad Ibrahim v. Food Corporation of India **(1999) 7 SCC 39:1999 (1) Suppl. SCR 498 – relied on.**

Case Law Reference:

1999 (1) Suppl. SCR 498 Relied on. Para 11

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4368 of 2012 etc.

From the Judgment & Order dated 11.09.2007 of the High Court of Madras, Madurai Bench in A.S. No. 49 of 2006.

WITH

C.A. Nos. 4372-4386 of 2012.

P.S. Narsimha, T.V. Ratnam, Sriram P., Munawwar Naseem, V. Prabhakar, Revathy Raghavan, Jyoti Prashar for the Appellants.

Vijay Hansaria, Ashok Mathur, S. Rajappa for the Respondents.

The Judgment of the Court was delivered by

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

2. These appeals arise out of a common judgment of the High Court of Madras at Madurai dated 11.9.2007 declining to convert the Trust OP No.96 of 2002 as a civil suit and be tried accordingly.

3. Trust OP No.96 of 2002 was filed by the appellants who were beneficiaries of six trusts before the Principal District Judge, Thoothukudi under Sections 61, 62, 65, 66 and 92 of the Trust Act read with Order VI Rules 1 to 3, 5 to 7 and 26 of the Code of Civil Procedure for the following reliefs:

> "a. To call upon the respondents 1 to 12 to restore the corpus and accretions gained by the six trusts detailed in the schedule from the date of their incorporation till the date of realization.
>
> b. To trace the fissipations effected on the schedule Trusts by the I defendant and his associate companies.
>
> c. To appoint a receiver for all the properties of the I defendant and through lifting the corporate veil on the company held by the I defendant including Mountain Spinning Mills.
>
> d. To trace the fissipations on the Schedule Trusts and bring the properties and monies to the petitioner's Court account from whichever source they are available.
>
> e. To call upon the I defendant to account from the late of creation of the six schedule trusts as to bring the proceeds to the Court."

3. During the pendency of the OP, respondent Nos.1 to 14 and 16 filed interlocutory applications separately under Order VII Rule 11 C.P.C. requesting the court to reject the said Trust O.P. on common grounds. The sum and substance of those grounds were as follows:

> "(a) there is no cause of action disclosed against the respondents.
>
> (b) the said Trust O.P. is barred under Section 9 of the Code of Civil Procedure, since the relief sought for are to be agitated only by means of a suit.
>
> (c) the reliefs prayed for in the Trust O.P. is barred by limitation; and
>
> (d) lastly, the said Trust O.P. is liable to be rejected on the ground that the same has not been properly valued for the purpose of paying the Court Fees."

4. Matter was hotly contested before the Principal District Judge, Thoothukudi and the applications filed under Order VII Rule 11 C.P.C. was allowed vide common judgment dated 17.10.2005. Aggrieved by the same, the petitioners in Trust O.P. approached the Hon'ble High Court by way of an appeal AS 49 of 2006 and the respondent. Nos. 1 to 14 and 16 in the Trust O.P. filed appeal Nos.50 to 64 of 2006 under Section 96 of the Code of Civil Procedure, and the 11th Respondent in the Trust O.P. filed M.P. No.4 of 2007. The maintainability of the appeals was successfully questioned by the respondents before the High Court, but the High Court converted those appeals as revision petitions and were heard along with M.P. No. 4 of 2007. The High Court vide judgment dated 11.9.2007 dismissed all the revision petitions and allowed M.P. No.4 of 2007 and held that the District Court was justified in allowing the applications filed under Order VII Rule 11 CPC rejecting the Trust O.P. and it was also ordered that the Trust O.P. could not be converted as a civil suit. However, it was held that the order of rejection of the Trust O.P. would not stand in the way of the petitioners in Trust O.P. filing a fresh suit in accordance with law. Aggrieved by the judgment of the Madras High Court these appeals have been preferred.

6. Shri P.S. Narsimha, learned senior counsel appearing for the appellants submitted relying upon Section 49 of the Trust Act that the Court has a duty to control the affairs of the Trust and its trustees under its discretionary powers when they are being mismanaged. Learned senior counsel pointed out that while invoking Section 49 of the Act the Court should not stick on to hyper technicalities in respect of forms and procedures, it is the duty of the principal civil court even to act suo motu whenever it is brought to the notice of the court that there is a misconduct or any other mal practice committed by the Trustees. Learned counsel also submitted that in the event of the Court coming to the conclusion that by some improper advice given, the appellants have misdirected themselves in

filing the Trust O.P., the same can always be converted into a civil suit.

7. Shri Vijay Hansaria, learned senior counsel appearing for the respondents, on the other hand, supported the findings recorded by the courts below. Learned senior counsel also placed reliance on the judgment of this Court in *P.A. Ahmad Ibrahim v. Food Corporation of India* (1999) 7 SCC 39 and submitted that the Trust O.P. cannot be converted as a civil suit.

8. We have perused the Trust O.P. filed by the appellants in the lower court which is not in the nature of a plaint. The expression "Original Petition" as such is not defined either in the Trust Act or in the Code of Civil Procedure. However, Rule 3(9) of the Code of Civil Procedure defines Original Petition as follows:

> "3(9). 'Original petition means a petition whereby any proceeding other than a suit or appeal or a proceedings in execution of a decree or order, is instituted in a court."

9. Section 2(14) C.P.C. defines the term 'Order' which reads as under:

> "2(14). "Order" means the formal expression of any decision of a civil court which is not a decree;"

10. A comprehensive reading of the above-mentioned provisions will make it clear that the Trust O.P. filed by the appellants before the Principal District Judge cannot either be construed a suit or equated to be a suit. The final order passed in the Trust O.P. cannot also be construed as a decree as defined in Section 2(2) C.P.C. It can only be an "order" as defined in Section 2(14) C.P.C. The term "suit", as such is not defined in the Code of Civil Procedure. However, Section 26, C.P.C. gives an indication as to the manner in which suit has to be instituted. Section 26 reads as under:

> "26. Institution of suits:

(1) Every suit shall be instituted by the presentation of a plaint or in such other matter as may be prescribed.

(2) In every plaint, facts shall be proved by affidavit."

11. A suit can be instituted by presentation of a plaint and Order IV and VII C.P.C. deals with the presentation of the plaint and the contents of the plaint. Chapter I of the Civil Rules of Practice deals with the form of a plaint. When the statutory provision clearly says as to how the suit has to be instituted, it can be instituted only in that manner alone, and no other manner. The Trust Act contains 9 chapters. Chapter 6 deals with the rights and liabilities of the beneficiaries, which would indicate that the beneficiaries of trust have been given various rights and those rights are enforceable under the law. Section 59 of the Act confers a right upon the beneficiaries to sue for execution of the trust which would indicate that the beneficiaries may institute a suit for execution of the trust. Therefore, the above-mentioned provisions would show that in order to execute the trust, the right is only to file a suit and not any original petition. Under the Trust Act also for certain other purposes original petitions can be filed. Section 72 of the Trust Act provides for a trustee to apply to a principal civil court of original jurisdiction by way of petition to get himself discharged from his office. Similarly, Section 73 of the Act empowers the principal civil court of original jurisdiction to appoint new trustees. Few of the provisions of the Act permit for filing of original petitions. The above facts would clearly indicate that the Trust Act provides for filing of a suit then suit alone can be filed and when it provides for original petition then original petition alone can be filed and there is no question of conversion of original petition to that of a civil suit or vice-versa, especially in the absence of a statutory provision under the Trust Act. A similar question came up for consideration before this Court in *P.A. Ahmad Ibrahim v. Food Corporation of India* (supra) wherein, while interpreting Section 20 C.P.C. the Court held as follows:

"Further, before applying the provisions of Order VI Rule 17, there must be institution of the suit. Any application filed under the provisions of different statutes cannot be treated as a suit or plaint unless otherwise provided in the said Act. In any case, the amendment would introduce a totally new cause of action and change the nature of the suit. It would also introduce a totally different case which is inconsistent with the prayer made in the application for referring the dispute to the arbitrator. Prima facie, such amendment would cause serious prejudice to the contention of the appellant that the claim of the respondent to recover the alleged amount was barred by the period of limitation as it was pointed out that cause of action for recovery of the said amount arose in the year 1975 and the amendment application was filed on 30.3.1986. Lastly, it is to be stated that in such cases, there is no question of invoking the inherent jurisdiction of the Court under Section 151 of the C.P.C. as it would nullify the procedure prescribed under the Code."

12. Certain legislations specifically provide for conversion of original petition into a suit. Section 295 of the Indian Succession Act is such a provision. The Trust Act, however, contains no such enabling provision to convert the original petition into a suit.

13. In the above facts situation, we find no infirmity in the judgment rendered by the courts below. We, therefore, hold that the Trust O.P. cannot be allowed to be converted into a suit. However, it is made clear that the rejection of the Trust O.P. under Order VII Rule 11 shall not operate as a bar for the appellants to file a fresh suit in accordance with law. Hence, the appeals are disposed of as above. There will be no order as to costs.

K.K.T. Appeals disposed of.

COMMON CAUSE
v.
UNION OF INDIA AND ORS.
(Writ Petition (C) No. 35 of 2012)

MAY 10, 2012

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

Protection of Human Rights Act, 1993: s.5(2) – Procedure for removal of a Chairperson/Member of the Commission – Held: If a decision is to be taken to hold an enquiry against an incumbent Chairperson/Member of the Commission, the President of India would require the advice of the Council of Ministers – It is only thereafter, if a prima facie case is found to be made out, that the President of India on being satisfied, may require the Supreme Court to initiate an enquiry into the allegations u/s.5(2) of the Act – In the instant writ petition, a series of allegations were levelled against the Chairman of the Commission, in the communication addressed by Campaign for Judicial Accountability and Reforms, to the President of India and Prime Minister of India, on 4.4.2011 – Prayer was made in writ petition for the issuance of a writ in the nature of Mandamus, requiring the President of India to make a reference to the Supreme Court u/s.5(2) of the Act, for holding an enquiry against the Chairman of the Commission – The prayer made at the hands of the petitioner was not accepted since the first step contemplated u/s.5(2) of the Act is the satisfaction of the President of India – It is only upon the satisfaction of the President based on advice of the Council of Ministers that a reference can be made to the Supreme Court for holding an enquiry – The pleadings in the writ petition did not reveal, whether or not any deliberations were conducted either by the President of India or by the Council

of Ministers in response to the communication dated 4.4.2011 – In the peculiar facts, the instant writ petition is disposed of by requesting the competent authority to take a decision on the communication dated 4.4.2011 – If the allegations, in the said determination, are found to be unworthy of any further action, petitioner to be informed accordingly – Alternatively, the President of India, based on the advice of the Council of Ministers, may proceed with the matter in accordance with the mandate of s.5(2) of the Act.

The instant writ petition was filed by common cause wherein extensive allegations were made against the Chairman of the National Human Rights Commission (respondent no.3). The grievance of the petitioner was that communication dated 4.4.2011 was addressed by Campaign for Judicial Accountability and Reforms, to the President of India, requesting her to make a reference to the Supreme Court for holding an enquiry, to probe the allegations leveled against the Chairman of the Commission under Section 5 of the Protection of Human Rights Act, 1993. The petitioner did not receive any response to communication dated 4.4.2011 nor reference was made by the President to the Supreme Court under Section 5 of the 1993 Act.

Disposing of the writ petition, the Court

HELD: 1. A perusal of Section 5(2) of the Protection of Human Rights Act, 1993 reveals the procedure for removal of a Chairperson/Member of the Commission. It is apparent from the procedure contemplated under Section 5(2) of the 1993 Act, that on being satisfied, the President of India shall require an enquiry to be conducted by the Supreme Court. It is also apparent that the President of India, while discharging her duties, is to be guided by the Council of Ministers. Accordingly, in terms of the mandate of Section 5(2) of the 1993 Act, if a

decision is to be taken to hold an enquiry against an incumbent Chairperson/Member of the Commission, the President of India would require the advice of the Council of Ministers. It is only thereafter, if a prima facie case is found to be made out, that the President of India on being satisfied, may require the Supreme Court to initiate an enquiry into the allegations, under Section 5(2) of the 1993 Act. [Para 4] [527-B-E]

2. A series of allegations were levelled against the Chairman of the Commission, in the communication addressed by Campaign for Judicial Accountability and Reforms, to the President of India and Prime Minister of India, on 4.4.2011. These allegations ought to have been forwarded to the Supreme Court, for an enquiry into the matter. The same having not been done, a prayer was made by the petitioner, for the issuance of a writ in the nature of Mandamus, requiring the President of India to make a reference to the Supreme Court under Section 5(2) of the 1993 Act, for holding an enquiry against respondent No. 3, i.e., the Chairman of the Commission. The prayer made at the hands of the petitioner cannot be accepted for the simple reason that the first step contemplated under Section 5(2) of the 1993 Act is the satisfaction of the President of India. It is only upon the satisfaction of the President, that a reference can be made to the Supreme Court for holding an enquiry. The satisfaction of the President of India is based on the advice of the Council of Ministers. The pleadings in the writ petition did not reveal, whether or not any deliberations were conducted either by the President of India or by the Council of Ministers in response to the communication dated 4.4.2011 (addressed to the President of India, by the Campaign for Judicial Accountability and Reforms). In the peculiar facts, the instant writ petition is disposed of by requesting the competent authority to take a decision on the

communication dated 4.4.2011. If the allegations, in the said determination, are found to be unworthy of any further action, the petitioner shall be informed accordingly. Alternatively, the President of India, based on the advice of the Council of Ministers, may proceed with the matter in accordance with the mandate of Section 5(2) of the 1993 Act. [Paras 5, 6, 7] [527-E-G; 528-A-G]

Manohar Lal Sharma Vs. Union of India W.P. **(C) No. 60 of 2011 decided on 7.5.2012 – relied on.**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 35 of 2012.

Under Article 32 of the Constitution of India.

Prashant Bhushan for the Petitioner.

Amarjit Singh Bedi, Bina Madhavan for the Respondents.

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. Through the instant Writ Petition filed by Common Cause invoking the jurisdiction of this Court under Article 32 of the Constitution of India, it is brought out, that there are extensive allegations against the present Chairman of the National Human Rights Commission (hereinafter referred to as the "Commission"), which require to be enquired into. It is submitted, that under the provisions of the Protection of Human Rights Act, 1993 (hereinafter referred to as the "1993 Act"), the authority to initiate an enquiry into the matter, is vested with the President of India. It is accordingly pointed out, that a communication dated 4.4.2011 was addressed by Campaign for Judicial Accountability and Reforms, to the President of India, requesting her to make a reference to the Supreme Court for holding an enquiry, to probe the allegations levelled against Mr. Justice K.G. Balakrishnan, ex-Chief Justice of India, under Section 5 of the 1993 Act.

2. It is pointed out, that even though a period of more than one year has lapsed since the aforesaid communication was addressed to the President of India and the Prime Minister of India, the petitioner has neither received a response to the communication dated 4.4.2011, nor has a reference been made by the President of India to the Supreme Court under Section 5 of the 1993 Act.

3. During the course of hearing, learned counsel for the petitioner invited our attention to a newspaper report, which had appeared in the Economic Times dated 22.6.2011, containing allegations against three relatives of Mr. Justice K.G. Balakrishnan. It is submitted, that two sons-in-law and a brother of the present incumbent of the Office of Chairman of the Commission, were blamed for having assets beyond their known sources of income. Reference was also made to the communication dated 4.4.2011 addressed by the Campaign for Judicial Accountability and Reforms to the President of India, where allegations were levelled against the Chairman of the Commission under five heads. Firstly, for owning benami properties in the names of his daughters, sons-in-law and brother ; secondly, for getting allotted benami properties from the Chief Minister of Tamil Nadu in the name of his former-aide M. Kannabiran ; thirdly, for approving evasive and false replies to an application under the Right to Information Act filed by Shri Subhash Chandra Agarwal, relating to declaration of assets by Judges of this Court ; fourthly, resisting attempts to stop the elevation of Justice P.D. Dinakaran to the Supreme Court of India, despite allegations of land-grab, encroachment and possessing assets beyond his known sources of income ; and lastly, suppressing a letter written by a Judge of the High Court of Madras, alleging that a former Union Minister (A. Raja) had tried to interfere in his judicial functioning. Based on the aforesaid allegations, it was sought to be concluded, that Justice K.G. Balakrishnan, the present incumbent of the Office of Chairman of the Commission, has been guilty of several acts of serious misbehaviour. It was accordingly the claim of the

petitioner, that a reference be made for an enquiry into the aforesaid alleged acts of misbehaviour at the hands of Justice K.G. Balakrishnan, to the Supreme Court under Section 5 of the 1993 Act.

4. Section 5 of the 1993 Act is being extracted hereinbelow:-

"5. Resignation and removal of Chairperson and Members

(1) The Chairperson or any Member may, by notice in writing under his hand addressed to the President of India, resign his office.

(2) Subject to the provisions of sub-section (3), the Chairperson or any Member shall only be removed from his office by order of the President of India on the ground of proved misbehaviour or incapacity after the Supreme Court, on reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf by the Supreme Court, reported that the Chairperson or the Member, as the case may be, ought on any such ground to be removed.

(3) Notwithstanding anything in sub-section (2), the President, may, by order, remove from office the Chairperson or any other Member if the Chairperson or such other Member, as the case may be, -

(a) is adjudged an insolvent; or

(b) engages during his term of office in any paid employment out side the duties of his office: or

(c) is unfit to continue in office by reason of infirmity of mind or body; or

(d) is of unsound mind and stands so declared by a competent court; or

(e) is convicted and sentenced to imprisonment for an offence which in the opinion of the President involves moral turpitude."

A perusal of Section 5(2) reveals the procedure for removal of a Chairperson/Member of the Commission. It is apparent from the procedure contemplated under Section 5(2) of the 1993 Act, that on being satisfied, the President of India shall require an enquiry to be conducted by the Supreme Court. It is also apparent that the President of India, while discharging her duties, is to be guided by the Council of Ministers. Accordingly, in terms of the mandate of Section 5(2) of the 1993 Act, if a decision is to be taken to hold an enquiry against an incumbent Chairperson/Member of the Commission, the President of India would require the advice of the Council of Ministers. It is only thereafter, if a prima facie case is found to be made out, that the President of India on being satisfied, may require the Supreme Court to initiate an enquiry into the allegations, under Section 5(2) of the 1993 Act.

5. The facts narrated in the pleadings of the instant case and the submissions made by the learned counsel appearing on behalf of the petitioner reveal, that a series of allegations have been levelled against the Chairman of the Commission, in the communication addressed by Campaign for Judicial Accountability and Reforms, to the President of India and Prime Minister of India, on 4.4.2011. These allegations ought to have been forwarded to the Supreme Court, for an enquiry into the matter. The same having not been done, a prayer has been made by the petitioner, for the issuance of a writ in the nature of Mandamus, requiring the President of India to make a reference to this Court under Section 5(2) of the 1993 Act, for holding an enquiry against respondent No. 3, i.e., the present Chairman of the Commission.

6. We have given our thoughtful consideration to the

solitary prayer made in the instant Writ Petition. It is not possible for us to accept the prayer made at the hands of the petitioner, for the simple reason that the first step contemplated under Section 5(2) of the 1993 Act is the satisfaction of the President of India. It is only upon the satisfaction of the President, that a reference can be made to the Supreme Court for holding an enquiry. This Court had an occasion to deal with a similar controversy based on similar allegations against respondent No. 3 in Manohar Lal Sharma Vs. Union of India [W.P. (C) No. 60 of 2011 decided on 7.5.2012], wherein this Court, while disposing of the Writ Petition, required the petitioner to approach the competent authority under Section 5(2) of the 1993 Act. As noticed above, the satisfaction of the President of India is based on the advice of the Council of Ministers. The pleadings in the Writ Petition do not reveal, whether or not any deliberations have been conducted either by the President of India or by the Council of Ministers in response to the communication dated 4.4.2011 (addressed to the President of India, by the Campaign for Judicial Accountability and Reforms). It is also the submission of the learned counsel for the petitioner, that the petitioner has not been informed about the outcome of the communication dated 4.4.2011.

7. In the peculiar facts noticed hereinabove, we are satisfied, that the instant Writ Petition deserves to be disposed of by requesting the competent authority to take a decision on the communication dated 4.4.2011 (addressed by the Campaign for Judicial Accountability and Reforms, to the President of India). If the allegations, in the aforesaid determination, are found to be unworthy of any further action, the petitioner shall be informed accordingly. Alternatively, the President of India, based on the advice of the Council of Ministers, may proceed with the matter in accordance with the mandate of Section 5(2) of the 1993 Act.

8. Disposed of in the abovesaid terms.

D.G. Writ Petition disposed of.

ATMARAM & ORS.
v.
STATE OF MADHYA PRADESH
(Criminal Appeal No. 2003 of 2008)

MAY 10, 2012

[SWATANTER KUMAR AND RANJAN GOGOI, JJ.]

PENAL CODE, 1860:

ss. 302, 302/149, 307 and 307/149 – Five accused attacking two brothers and their sister with various weapons – One of the brothers died – Conviction and sentence of life imprisonment awarded to all the five accused by trial court – Affirmed by High Court – Held: The presence of the two injured eye-witnesses at the place of occurrence has been established beyond reasonable doubt – They are reliable witnesses and worthy of credence – They have stated that all the accused caused injuries to the deceased with 'farsi', 'dharia' and 'lathis' – The medical evidence shows 10 injuries on the body of the deceased – The motive has also been brought out – The fact that the injuries were inflicted by a collective offence upon the deceased and the injured witnesses, is duly demonstrated not only by the medical report, but also by the statements of the doctors – Thus, the prosecution has been able to establish its case.

s. 300, 3rdly – Murder – Held: If there is an intention to kill and with that intent, injury is caused which is sufficient to cause death in the ordinary course of nature, then the offence would clearly fall within the ambit of para '3rdly' of s. 300 and, therefore, would be culpable homicide amounting to murder – In the instant case, the intention on the part of the accused persons to kill the deceased was manifest – The cause for having such an intent is also proved by the prosecution – The manner in which all the accused assaulted the deceased even

after he fell to the ground and the act of continuously inflicting blows on the body of the deceased, clearly shows that they had a pre-determined mind to kill the deceased at any cost, which they did – The accused even caused injuries to the vital parts of the body of the deceased – The cumulative effect of all the injuries was obviously known to each of the accused, i.e., all the injuries inflicted were bound to result in the death of the deceased which, in fact, they intended – Furthermore, the doctor had opined that the deceased had died because of multiple injuries and fracture on the vital organs, due to shock and haemorrhage.

The five accused appellants were prosecuted for causing the murder of the brother of PW-1 and causing injuries to PW-1 and PW-2. The prosecution case was that on the day of incident at about 4-4.30 p.m., when PW-1, his younger brother 'G' and sister PW-2 were returning to their village and had reached near the village, the five accused-appellants emerged from the fields shouting that the said 'G' and his relatives had set their soyabean crop afire and attacked the complainant party with *farsi, dharia* and *lathis.* The injured were taken to the hospital with the help of PW 8 and others. On the basis of the statement of PW1, a *dehati nalish* was recorded at about 6.20 p.m. At about 7 p.m. the statement of injured 'G' was also recorded in the presence of the witnesses. His condition being serious, arrangements were made to shift him to Civil Hospital, but he died on the way at about 11.30 p.m. The trial court convicted the five accused u/ss 302, 302/ 149, 307 and 307/149 IPC etc. and sentenced all of them to imprisonment for life with fine. The High Court confirmed the conviction and the sentence awarded by the trial court.

In the instant appeal, it was contended for the appellants that there were serious contradictions between the statements of PWs 1 and 2; that the medical evidence did not support the statements of PWs 1 and

2; and that as per the medical evidence, there was no single injury which could be said to be sufficient in the ordinary course of nature to cause the death, there was no intention on the part of the accused to cause the death and, therefore, at best it could be a case u/s 304 (Part-II) and/or u/s 326 IPC and not a case u/s 302 IPC.

Dismissing the appeal, the Court

HELD: 1.1. From a bare reading of the statements of PW-1 and PW-2, it is clear that according to PW1, not only accused 'GK' had caused injury on the head of the deceased by *farsi* but other accused persons had also caused injuries to him with *lathis* etc. However, according to PW2 accused 'GK', had caused injuries on the head of the deceased, both hands, above the eyes and on the wrist while other accused hit her. This cannot be termed as a material contradiction in the statements of these two witnesses. These are two eye-witnesses who themselves were injured by the accused. Every variation is incapable of being termed as a serious contradiction that may prove fatal to the case of prosecution. It is a settled canon of criminal jurisprudence that every statement of the witness must be examined in its entirety and the court may not rely or reject the entire statement of a witness merely by reading one sentence from the deposition in isolation and out of context. [para 12] [540-G-H; 541-A-C]

1.2. It has been completely established that both PW1 and PW2 are injured eye- witnesses and their presence at the place of occurrence cannot be doubted. If one reads the statements of PW1 and PW2 in their entirety, it will be difficult to trace any element of serious contradiction in their statements which may prove fatal to the case of the prosecution. PW2 has categorically stated that all the accused persons had come to the site, abused her brother 'G' and claimed that he had burnt their soyabean crop and that they would kill him.

Whereafter, they started hitting her brothers, 'G' and PW-1. In the face of this specific statement and the medical evidence which shows presence of as many as ten injuries on the body of the deceased, it is difficult to believe that in the given situation, one accused could have caused so many injuries, especially when all accused persons are stated to have caused injuries to the deceased as well as to the witnesses. [para 12] [541-C-D, F-H; 542-A]

Ashok Kumar v. State of Haryana **2010 (7) SCR 1119 = (2010) 12 SCC 350 – referred to.**

1.3. It is true that some other witnesses have turned hostile and have not fully supported the case of the prosecution, but that by itself would not be a circumstance for the court to reject the statements of PW1 and PW2, who are reliable and worthy of credence and more particularly, when their presence at the place of occurrence has been established beyond reasonable doubt. [para 13] [543-C-D]

2.1. As per the statement of PW14, who had prepared the post mortem report, Ext. P30, there were as many as ten injuries on the body of the deceased. All that PW1 and PW2 have stated is that the accused had inflicted the injury on the head of the deceased with a *farsi* and even on other parts of the body of the deceased. According to them, even other accused had inflicted injuries upon the body of the deceased with lathis. The accused were carrying *farsi*, *dharia* and *lathis,* as per the statements of these witnesses. The medical evidence clearly shows that there were incised wounds, contusions, lacerated wounds and swelling found in the various injuries on the body of the deceased. The Investigating Officer, PW26, has clearly proved the case of the prosecution with the assistance of the corroborating evidence. [para 14 and15] [543-E; 544-H; 545-A-B]

2.2. It is significant to refer to some pertinent aspects of the case of the prosecution. The incident had occurred at about 4.30 p.m. on 6.11.1993 and the FIR itself was registered at 6.30 p.m. on the statement of PW1 recorded in the hospital. The doctor had also recorded the dying declaration (Ext. P-6) of the deceased. After recording of the FIR, (Ext. P-37), the investigation was started immediately and on the second day, the accused were taken into custody. Names of all the accused were duly shown in Column No.7 of the FIR. Two witnesses, PW1 and PW2, have given the eye witness version of the occurrence. All the accused persons were hiding themselves in the field and had a clear intention to kill the deceased. The motive for commission of the offence which, of course, is not an essential but is a relevant consideration, has also been brought out in the case of the prosecution that the deceased had allegedly burnt the soyabean crops of the accused and, therefore, the accused wanted to do away with the deceased and his brother. These factors have been clearly brought out in the statement of PW1 and PW2. [para 16-17] [545-C-D; 546-A-C]

2.3. The fact that the injuries were inflicted by a collective offence upon the deceased and the injured witnesses is duly demonstrated not only by the medical report, but also by the statements of the doctors, PW4 and PW14. Thus, the prosecution has been able to establish its case. [para 17] [546-D]

3.1. It is incorrect to suggest that the Court should exercise its discretion to alter the offence to one u/s 304 (Part II) or s.326 IPC from that u/s 302 IPC. If there is an intention to kill and with that intent, injury is caused which is sufficient to cause death in the ordinary course of nature, then the offence would clearly fall within the ambit of para '3rdly' of s. 300 IPC and, therefore, would be culpable homicide amounting to murder. In the instant

case, the intention on the part of the accused persons to kill 'G' was manifest as is evident from the statements of PW1 and PW2. The cause for having such an intent is also proved by the prosecution that according to the accused, the deceased and PW1 had burnt their soyabean crops. The manner in which all the accused assaulted the deceased even after he fell to the ground and the act of continuously inflicting blows on the body of the deceased, clearly shows that they had a pre-determined mind to kill the deceased at any cost, which they did. The accused even caused injuries to the vital parts of the body of the deceased, i.e., the skull. As per the medical evidence, there was incised wound of 5½"x skull thick on left skull region, which shows the brutality with which the said head injury was caused to the deceased. [para 19, 20 and 23] [547-G-H; 548-A-B; 549-C-D; 552-C]

State of Haryana v. Shakuntala & Ors. **2012 (4) SCALE 526;** *State of Andhra Pradesh v. Rayavarapu Punnayya & Anr*. **1977 (1) SCR 601 = (1976) 4 SCC 382; and** *Anda & Ors. v. State of Rajasthan* **AIR 1996 SC 148 – relied on**

Molu & Ors. v. State of Haryana **(1976) 4 SCC 362; and** *Rattan Singh & Ors.v. State of Punjab* **1988 Supp. SCC 456 – distinguished.**

3.2. The cumulative effect of all the injuries was obviously known to each of the accused, i.e., all the injuries inflicted were bound to result in the death of the deceased which, in fact, they intended. Furthermore, the doctor, PW14, had opined that the deceased had died because of multiple injuries and fracture on the vital organs, due to shock and haemorrhage. Thus, even as per the medical evidence, the injuries were caused on the vital parts of the body of the deceased. [para 22] [551-H; 552-A-B]

Case Law Reference:

2010 (7) SCR 1119	**referred to**	**para 12**
1976 (4) SCC 362	**distinguished**	**para 18**
1977 (1) SCR 601	**relied on**	**para 21**
1988 Suppl. SCC 456	**distinguished**	**para 18**
2012 (4) SCALE 526	**relied on**	**para 19**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2003 of 2008.

From the Judgment & Order dated 23.01.2008 of the High Court of Madhya Pradesh, Bench at Indore in Criminal Appeal No. 783 of 1999.

K.B. Sinha, Niraj Sharma, Vikrant Singh Bais, Sumit Kumar Sharma for the Appellants.

Praveena Gautam, C.D. Singh for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. This appeal is directed against the judgment of the High Court of Madhya Pradesh, Bench at Indore dated 23rd January, 2008. We may notice the necessary facts giving rise to the present appeal. According to the prosecution, Udayram, PW-1 along with his younger brother namely Gokul (the deceased) and sister Rajubai, PW-2 had gone to the village Lod for pilgrimage. After they reached the said village, they came to know that the Pujari who was to perform the puja was not available. Resultantly, all the said three persons decided to return back to their village Dhuvakhedi, Tehsil Tarana, District Ujjain.

2. At about 4-4.30 p.m., when they reached near the said village, all of a sudden the accused persons namely Atmaram, Gokul, Vikram, Ramchandran and Umrao emerged from the fields having soyabean crop. They shouted that the deceased and his relatives had set their soyabean crop afire and

therefore, they should be taught a lesson. The accused Ramachandra was armed with farsi, Gokul was carrying dharia and other three accused were having lathis. All these accused persons started assaulting Udayram (PW1) causing injury on his head, left hand and legs. Gokul (the deceased) and PW2 tried to intervene and protect Udayram. In this process, both these witnesses sustained a number of injuries caused by the accused with the help of the same weapons. The other witnesses present at the site, Gajrajsingh, Sardarsingh and Gokul did not interfere in the assault because of fear and silently slipped away.

3. Another witness, Pannalal, PW8, was working in the fields nearby. Upon being called by Rajubai, PW2, Pannalal came to the place of occurrence and seeing the deceased and witnesses in injured condition, Pannalal and one Prem brought the bullock cart of one Kanhaiya Balai. Thereafter, one Umrao Bai also joined them. They finally found a jeep on the road in which Pannalal, Prem and Umrao Bai took the injured persons to the Tarana Hospital where they were admitted. From the hospital, information was sent to the Police Station, Makdon on which basis, the Head Constable Chedilal Yadav, PW23, reached Tarana Hospital. On the basis of the statement of Udayram, PW1, Dehati Nalishi (Ex.P1) was recorded at about 6.20 p.m. on 6th November, 1993.

4. A case under Section 307 read with Sections 147, 148 and 149 of the Indian Penal Code, 1860 (for short 'IPC') was registered. All the three injured persons were subjected to medical examination by Dr. Anil Kumar Dubey, PW4, who issued their MLC reports, Ex.P2-A to P.4-A. Udayram and Rajubai were treated by the doctors. At about 7 p.m., the statement of Gokul was also recorded in the presence of the witnesses. Keeping in view the serious condition of Gokul, he was required to be transferred from Tarana Hospital to Civil Hospital, Ujjain for treatment. However, he died on the way at about 11.30 p.m. on 6th November, 1993 and his dead body was kept in the Civil Hospital, Ujjain. Information was sent to

the Police Station, Makdon, whereafter an offence of Section 302 read with Section 149 IPC was added to the charges.

5. Inquest proceedings were completed. The dead body of the deceased was subjected to post mortem and post mortem report Ext. P30 was prepared by Dr. Ajay Nigam (PW14).

6. After registration of the offence, the investigating officer, PW26, Sohan Pal Singh Choudhary visited the spot of occurrence on 7th November, 1993, from where the blood stained earth, cycle and sandal of the deceased were seized and the spot map was prepared. On 8th November, 1993, all the accused persons were arrested. Upon their interrogation and in furtherance to their statements, the arms involved in the commission of crime were recovered and seized. These seized weapons were sent to forensic science laboratory for examination on 3rd December, 1993. The examination report was received on 8th December, 1993 and in terms of the Report, no blood stain was found, either in the soil or in the sealed farsi. The Investigating Officer submitted the charge sheet to the Court of competent jurisdiction. Upon committal, the accused were tried by the Court of Sessions.

7. The learned Trial Court vide its detailed judgment dated 13th April, 1999 held that the prosecution had succeeded in proving the charges, while finding all the accused guilty of the offences with which they were charged. It sentenced them as follows:-

> "46. On the point of punishment, on behalf of accused evidence were not produced on conviction. The counsel for accused produced oral argument and prayed for least punishment to accused whereas Assistant Public Prosecutor have prayed for harder conviction.
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> 47. In any opinion from the case, it is clear that this is the first offence of accused. Looking into the circumstances

> under which crime is committed and nature of crime, it does not seem proper to convict with life imprisonment under Section 302 I.P.C. and it seems proper to convict accused for life imprisonment and fine. Therefore, all the five accused shall be convicted under Section 148 I.P.C. with rigorous imprisonment of two years. Accused Ramchandra No. 4 is held guilty under Section 307 I.P.C. and Section 307/149 I.P.C. for both the offences prescribed punished is same, therefore, it is proper to convict accused Ramchandra only under Section 307/149 I.P.C. and accused Atmaram No. 1 for charges under Section 307 I.P.C. and accused Gokul No. 2, Vikram No. 3, Ramchandra No. 4, Umrao No. 5 for Section 307 read with 149 I.P.C. shall be convicted respectively with rigorous imprisonment for 5 year each and fine of Rs. 500/- (Rs. five hundred) each. In default of payment of fine accused shall be imprisoned for another term of 2 month each.
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> 48. Similarly, accused Gokul No. 2 charged under Section 302 I.P.C. and Section 302/149 I.P.C. and accused Vikram No. 3 was held guilty under Section 302 or Section 302 read with Section 149 I.P.C., whereas punishment prescribed for both the offences is same, both the accused are held guilty under Section 307/149 I.P.C. and accused Atmaram No. 1 is found guilty for charges under Section 302, I.P.C. and accused No. 2, Gokul, No. 3 Vikram, No. 4 Ramchandra, No. 5 Umrao are found guilty under Section 302 read with Section 149 I.P.C. and convicted accordingly, and all the accused for such charges are convicted with life imprisonment and in addition all the accused are also punished with fine of Rs. 2000 (Two Thousand Rupees) each. In default of payment of fine all the accused shall be imprisoned for another term of 4 month each. Similarly, accused No. 5, Umrao, is charged under Section 323 I.P.C. and accused Atmaram No. 1 Gokul No. 2, Vikram No. 3, and Ramchandra No. 4 are found guilty under Section 323 read with Section 149 I.P.C.

and all the accused are convicted with 6 month rigorous imprisonment and fine of Rs. 200 each (Two Hundred Rupees). In default of payment of fine all the accused shall be imprisoned for another term of 1 month rigorous imprisonment each. All the punishment shall run concurrently.

49. During prosecution, accused No. 1 Atmaram from 8.11.93 to 3.3.94, accused No. 2 Gokul from 8.11.93 to 24.6.94, accused No. 3 Vikram from 8.11.93 to 3.3.94 and accused No. 4 Ramchandra from 11.1.93 to 6.1.94 and accused No. 5 Umrao from 11.11.93 to 6.1.94, were in judicial custody. Such duration shall be adjusted towards punishment.

50. On payment of fine from accused and after the expiration of the period of limitation Rs. 8000/- from the amount of fine shall be paid to widowed mother of Gokul, Umraobai w/o Lalji r/o village Dhaukhedi, Thana Makdone, as compensation and from the said fine Rs. 5000 (Five Thousand Rupees) shall be paid to applicant Udairam s/o Lalji r/o Village Dhaukhedi, Thana Makdone.

51. After the expiration of period of appeal, blood mixed soil, simple soil, Sandel, cloths of Gokul, cloths of Udairam, and Farsi, Dharia, Lathi, seized from accused shall be discarded being available."

8. The Trial Court also punished them on other counts.

9. Being aggrieved from the judgment of conviction and order of sentence passed by the Trial Court, the accused preferred an appeal before the High Court, which by its judgment dated 23rd January, 2008, confirmed the judgment of the Trial Court and also did not interfere with the order of sentence.

10. Feeling aggrieved therefrom, all the five accused have preferred the present appeal before this Court.

11. While raising a challenge to the impugned judgment, the learned counsel appearing for the appellants argued that there are serious contradictions between the statements of PW1 and PW2. These two witnesses being the eye-witnesses, such serious contradictions in their statements make the conviction of the appellants unsustainable on that basis. To substantiate his plea, the learned counsel for the appellants has relied upon the paragraph 2 of the deposition of PW2, Rajubai and paragraph 3 of the statement of PW1, Udayram. In order to properly appreciate the merit or otherwise of this contention, it would be appropriate to refer to the relevant paragraphs of deposition of these two witnesses. They, respectively, read as under :

> "2. Ramchandra hit Udairam with Farsi which hit on his head and both hands. My brother Gokul was hit by accused Gokul with Dhariya due to which he got injuries on his head, both hands, above the eye and on the waist. Umrao hit me with two ladhi blows which hit me on my hand and foot. The accused hit a lot.
>
> XXX XXX XXX
>
> 3. Accused Ramchand had hit farsi on my head, Atmaram had hit lathi which hit me near the joint of my left hand thumb. Accused Gokul hit my brother Gokul on the head with Dharia. Ramchand had hit after me, my brother Gokul with farsi on his head. The other accused started hitting my brother with lathi due to which my brother fell down and I was also attached with lathi. My sister Rajubai was also hit with lathi by accused Umrao. She had received injury on her hand and Rajubai also received injury on her foot."

12. From a bare reading of the statements of these witnesses, it is clear that according to PW1, not only Gokul, the accused, had caused injury on the head of the deceased by farsi but accused persons had also caused injuries to him with lathis etc. However, according to PW2, Gokul, the accused, had

caused injuries on the head of the deceased, both hands, above the eyes and on the wrist while other accused hit her. This cannot be termed as a material contradiction in the statements of these two witnesses. These are two eye-witnesses who themselves were injured by the accused. Every variation is incapable of being termed as a serious contradiction that may prove fatal to the case of prosecution. It is a settled cannon of criminal jurisprudence that every statement of the witness must be examined in its entirety and the Court may not rely or reject the entire statement of a witness merely by reading one sentence from the deposition in isolation and out of context. In the present case, it has been completely established that both PW1 and PW2 are injured eye-witnesses and their presence at the place of occurrence cannot be doubted. If one reads the statements of PW1 and PW2 in their entirety, it will be difficult to trace any element of serious contradiction in their statements which may prove fatal to the case of the prosecution. PW2, even in the paragraph extracted above has said that accused 'hit a lot'. However, the language in which her statement was recorded states 'abhiyukton ne khoob mara' which obviously means that all the accused had hit the deceased and other victims including herself, because this sentence immediately precedes the part of the statement where she gives details of all the accused persons as well as the injuries inflicted on the deceased and herself by each of the accused. The very first paragraph of her statement clearly indicates the essence of her statement. She has categorically stated that all the accused persons had come to the site, abused her brother Gokul and clearly claimed that he had burnt their soyabean crop and that they shall kill him. Whereafter, they started hitting her brothers, Gokul and Udayram. In face of this specific statement and the medical evidence which shows presence of as many as ten injuries on the body of the deceased Gokul, it is difficult to believe that in the given situation, one accused could have caused so many injuries on the body of deceased, especially when all accused persons are stated to have caused injuries to the deceased as well as to

the witnesses. It seems appropriate her to refer to a recent judgment of this Court in the case of *Ashok Kumar v. State of Haryana* [(2010) 12 SCC 350] wherein this Court, while dealing with the discrepancies in the statement of the witnesses, held as under :

> "41. The above statement of this witness (DW 3) in cross-examination, in fact, is clinching evidence and the accused can hardly get out of this statement. The defence would be bound by the statement of the witness, who has been produced by the accused, whatever be its worth. In the present case, DW 3 has clearly stated that there was cruelty and harassment inflicted upon the deceased by her husband and in-laws and also that a sum of Rs. 5000 was demanded. The statement of this witness has to be read in conjunction with the statement of PW 1 to PW 3 to establish the case of the prosecution. There are certain variations or improvements in the statements of PWs but all of them are of minor nature. Even if, for the sake of argument, they are taken to be as some contradictions or variations in substance, they are so insignificant and mild that they would in no way be fatal to the case of the prosecution.
>
> 42. This Court has to keep in mind the fact that the incident had occurred on 16-5-1988 while the witnesses were examined after some time. Thus, it may not be possible for the witnesses to make statements which would be absolute reproduction of their earlier statement or line to line or minute to minute correct reproduction of the occurrence/events. The Court has to adopt a reasonable and practicable approach and it is only the material or serious contradictions/variations which can be of some consequence to create a dent in the case of the prosecution. Another aspect is that the statements of the witnesses have to be read in their entirety to examine their truthfulness and the veracity or otherwise. It will neither be

just nor fair to pick up just a line from the entire statement and appreciate that evidence out of context and without reference to the preceding lines and lines appearing after that particular sentence. It is always better and in the interest of both the parties that the statements of the witnesses are appreciated and dealt with by the Court upon their cumulative reading."

13. In light of the above judgment, it is clear that every variation or discrepancy in the statement of a witness cannot belie the case of the prosecution per se. It is true that in the present case, some other witnesses have turned hostile and have not fully supported the case of the prosecution, but that by itself would not be a circumstance for the Court to reject the statements of PW1 and PW2, who are reliable and worthy of credence and more particularly, when their presence at the place of occurrence has been established beyond reasonable doubt.

14. The other contention which has been raised on behalf of the appellants is that the medical evidence does not support the statements of PW1 and PW2. This is equally devoid of any merit. As per the statement of PW14, who had prepared the post mortem report, Ext. P30, there were as many as ten injuries on the body of the deceased and they were as follows :

"Similarly on the said date itself, Gokul S/o. Laljiram @ Lalchand was brought by Head Constable Chedilal for which he had brought Ex.P-3 letter. I examined him at 6.35 p.m. and found the following injuries :

(i) Incised wound 5½ x scalp thick on left central region.

(ii) Incised superficial (skin deep) 1 x ¼ cm. on right temple near eye. Both these injuries appear to have been caused by sharp edged seapon. It was not possible to understand injury No.1 therefore, X-ray advice was written and injury No.2 was simple and caused within 0-6 hrs.

(iii) One contusion 12 x 8 cm on right forearm.

(iv) Swelling on left forearm ½ lower portion and ½ right portion on left side.

The aforesaid injuries appeared to have been caused with hard and blunt object and X-ray was advised to ascertain seriousness.

(v) One lacerated wound with fracture 2 x 1 x ½ on right leg in front on middle portion which appear to have been caused with hard and blunt weapon and was serious within 0-6 hrs. and X-ray was advised for the same.

(vi) Lacerated wound 1 x ½ x ¼ on lower portion of left leg.

(vii) Swelling on left hand in full back portion.

(viii) Swelling and contusion 13 x 4 cm. on left forearm out and front portions. Injuries Nos.6, 7 and 8 appear to have been caused with hard and blunt weapon and simple caused within 0-6 hrs.

(ix) One contusion with parallel margin on left forearm which appear to have been caused with hard and blunt weapon like lathi and X-ray was advised for this injury.

(x) One contusion of parallel margin of 28 x 1 cm. in front portion of the chest laterally. It appeared to have been caused with hard and blunt weapon like lathi which was simple caused within 6 hrs."

15. All that PW1 and PW2 have stated is that the accused had inflicted the injury on the head of the deceased with a farsi and even on other parts of the body of the deceased. According to them, even other accused had inflicted injuries upon the body

of the deceased with lathis. The accused were carrying farsi, dharia and lathis, as per the statements of these witnesses. The medical evidence clearly shows that there were incised wounds, contusions, lacerated wounds and swelling found in the various injuries on the body of the deceased. The Investigating Officer, PW26, has clearly proved the case of the prosecution with the assistance of the corroborating evidence. We see no reason to accept this contention raised on behalf of the appellants.

16. Before dealing with the last contention raised on behalf of the appellants, we may usefully refer to some pertinent aspects of the case of the prosecution. In this case, the incident had occurred at about 4.30 p.m. on 6th November, 1993 and the FIR itself was registered at 6.30 p.m. on the statement of PW1 recorded in the hospital. In the hospital itself, the doctor had also recorded the dying declaration Ext. P-6 of the deceased. The relevant part of the declaration reads as under:

"My First question was : What is your name?

Ans : Gokulsingh S/o Laljiram Lalsingh.

Q: Where do you live?

Ans: Dhuankheri.

I again asked what happened to you when he replied that the well of Kanhaiya, myself, my brother Udayram and sister were hit by 5 brothers Ramchand, Umrao, Vikram, Gokul and Atmaram sons of Devaji of Balai caste. He stated so. Thereafter I asked where all have you received injuries whereupon he replied that on head, hands and legs. Thereafter I again asked who saw you being beaten up then he replied that we were seen by Udaysingh, Gokulsingh, Gajrajsingh, Ramchandra etc. I again asked what did you do thereupon he replied, what could we do, we were un-armed, we kept shouting. Our sister had tried to rescue us."

17. After recording of the FIR, Ext. P-37 the investigation was started immediately and on the second day, the accused were taken into custody. Names of all the accused were duly shown in Column No.7 of the FIR. Two witnesses, PW1 and PW2, have given the eye witness version of the occurrence. All the accused persons were hiding themselves in the field and had a clear intention to kill the deceased. The motive for commission of the offence which, of course, is not an essential but is a relevant consideration, has also been brought out in the case of the prosecution that the deceased had allegedly burnt their soyabean crops and, therefore, the accused wanted to do away with the deceased Gokul and his brother. These factors have been clearly brought out in the statement of PW1 and PW2. The fact that these injuries were inflicted by a collective offence upon the deceased and the injured witnesses is duly demonstrated not only by the medical report, but also by the statements of the doctors, PW4 and PW14. Thus, the prosecution has been able to establish its case.

18. The contention lastly raised on behalf of the appellants is that no single injury has been found to be sufficient in the ordinary course of nature to cause death as per the medical evidence. There was no intention on the part of the accused to cause death of the deceased. At best, they have only caused an injury which was likely to cause death. Therefore, no case for an offence under Section 302 IPC is made out and, at best, it could be a case under Section 304 Part II and/or even Section 326 IPC. Reliance has been placed upon the judgments of this Court in the case of *Molu & Ors. v. State of Haryana* [(1976) 4 SCC 362] and *Rattan Singh & Ors. v. State of Punjab* [1988 Supp. SCC 456]. In any case and in the alternative, it is also contended that as per the statement of PW2, accused Gokul alone had caused injuries to the deceased and therefore, all the other accused persons are entitled to acquittal or at best, are liable to be convicted under Section 326 IPC for causing injuries to the eye-witnesses, PW1 and PW2 or even to the deceased. This argument, at the first blush, appears to be have

substance, but when examined in its proper perspective and in light of the settled law, we find it untenable, for the reason that even in the case of *Molu* (supra), this Court had noticed that none of the injuries was on any vital part of the bodies of the two deceased persons and even injuries upon the skull appeared to be very superficial. There was nothing to show that the accused intended to cause murder of the deceased persons deliberately and there was no evidence to show that any of the accused ordered the killing of the deceased persons or indicated or in any way expressed a desire to kill the deceased persons on the spot. It was upon returning this finding on appreciation of evidence that the Court found that there was only a common intention to assault the deceased, with the knowledge that the injuries caused to them were likely to cause death of the deceased and, therefore, the Court permitted alteration of the offence from that under Section 302 to one under Section 304 Part II, IPC. Also in the case of *Rattan Singh* (supra), this Court had found that as per the case of the prosecution, the injuries on the person of the deceased which could be attributed to the accused were either on the hands or feet and at best could have resulted in fractures. None of the appellants could be convicted for causing such injuries individually which could make out an offence under Section 302 and, thus, the Court altered the offence.

19. We are unable to see as to what assistance the appellants seek to derive from these two judgments. They were judgments on their own facts and in the case of *Molu* (supra), as discussed above, the Court had clearly returned a finding that the accused had no intention to kill the accused, which is not the circumstance in the case at hand. If there is an intention to kill and with that intent, injury is caused which is sufficient to cause death in the ordinary course of nature, then the offence would clearly fall within the ambit of para Thirdly of Section 300 IPC and, therefore, would be culpable homicide amounting to murder. In the present case, the intention on the part of the accused persons to kill Gokul was manifest as is evident from

the statements of PW1 and PW2. The cause for having such an intent is also proved by the prosecution that according to the accused, Gokul and PW1 had burnt their soyabean crops. The manner in which all the accused assaulted the deceased even after he fell to the ground and the act of continuously inflicting blows on the body of the deceased, clearly shows that they had a pre-determined mind to kill the deceased at any cost, which they did. In the case of *State of Haryana v. Shakuntala & Ors.* [2012 (4) SCALE 526], this Court held :

> "…Reverting back to the present case, it is clear that, as per the case of the prosecution, there were more than five persons assembled at the incident. All these nine persons were also convicted by the Trial Court and the conviction and sentence of six of them has been affirmed by the High Court. The members of this assembly had acted in furtherance to the common object and the same object was made absolutely clear by the words of accused Matadin, when he exhorted all the others to 'finish' the deceased persons.
>
> 27. In other words, the intention and object on the part of this group was clear. They had come with the express object of killing Manohar Lal and his family members. It might have been possible for one to say that they had come there not with the intention to commit murder, but only with the object of beating and abusing Manohar Lal and others, but in view of the manner in which Matadin exhorted all the others and the manner in which they acted thereafter, clearly establishes that their intention was not to inflict injuries simplicitor. Manohar Lal, admittedly, had fallen on the ground. However, the accused still continued inflicting heavy blows on him and kept on doing so till he breathed his last. They did not even spare his wife Sushila and inflicted as many as 33 injuries on her body. Where a person has the intention to cause injuries simplicitor to another, he/she would certainly not inflict 30/33 injuries on

the different parts of the body of the victim, including the spine. The spine is a very delicate and vital part of the human body. It, along with the ribs protects all the vital organs of the body, the heart and lungs, etc. Powerful blows on these parts of the body can, in normal course, result in the death of a person, as has happened in the case before us. The way in which the crime has been committed reflects nothing but sheer brutality. The members of the assembly, therefore, were aware that their acts were going to result in the death of the deceased. Therefore, we find no merit in this contention of the accused also."

20. They even caused injuries to the vital parts of the body of the deceased, i.e., the skull. As per the medical evidence, there was incised wound of 5½"x skull thick on left skull region, which shows the brutality with which the said head injury was caused to the deceased.

21. We may usefully refer to the judgment of this Court in the case of *State of Andhra Pradesh v. Rayavarapu Punnayya & Anr.* [(1976) 4 SCC 382] wherein the Court was concerned with somewhat similar circumstances, where a number of accused had caused multiple bodily injuries to the deceased and it was contended that since none of the injuries was caused upon any vital part of the body of the deceased, the offence was, therefore, at best to be altered to an offence under Section 304, Part II. This contention of the accused had been accepted by the High Court. While disturbing this finding, this Court held as under :

"38. Question arose whether in such a case when no significant injury had been inflicted on a vital part of the body, and the weapons used were ordinary lathis, and the accused could not be said to have the intention of causing death, the offence would be "murder" or merely "culpable homicide not amounting to murder". This Court, speaking through Hidayatullah, J. (as he then was) after explaining the comparative scope of and the distinction between

Sections 299 and 300, answered the question in these terms:

"The injuries were not on a vital part of the body and no weapon was used which can be described as specially dangerous. Only lathis were used. It cannot, therefore, be said safely that there was an intention to cause the death of Bherun within the first clause of Section 300. At the same time, it is obvious that his hands and legs were smashed and numerous bruises and lacerated wounds were caused. The number of injuries shows that everyone joined in beating him. It is also clear that the assailants aimed at breaking his arms and legs. Looking at the injuries caused to Bherun in furtherance of the common intention of all it is clear that the injuries intended to be caused were sufficient to cause death in the ordinary course of nature even if it cannot be said that his death was intended. This is sufficient to bring the case within thirdly of Section 300."

39. The ratio of *Anda v. State of Rajasthan* applies in full force to the facts of the present case. Here, a direct causal connection between the act of the accused and the death was established. The injuries were the direct cause of the death. No secondary factor such as gangrene, tetanus etc., supervened. There was no doubt whatever that the beating was premeditated and calculated. Just as in Anda case, here also, the aim of the assailants was to smash the arms and legs of the deceased, and they succeeded in that design, causing no less than 19 injuries, including fractures of most of the bones of the legs and the arms While in Anda case, the sticks used by the assailants were not specially dangerous, in the instant case they were unusually heavy, lethal weapons. All these acts of the accused were preplanned and intentional, which, considered objectively

in the light of the medical evidence, were sufficient in the ordinary course of nature to cause death. The mere fact that the beating was designedly confined by the assailants to the legs and arms, or that none of the multiple injuries inflicted was individually sufficient in the ordinary course of nature to cause death, will not exclude the application of clause thirdly of Section 300. The expression "bodily injury" in clause thirdly includes also its plural, so that the clause would cover a case where all the injuries intentionally caused by the accused are cumulatively sufficient to cause the death in the ordinary course of nature, even if none of those injuries individually measures upto such sufficiency. The sufficiency spoken of in this clause, as already noticed, is the high probability of death in the ordinary course of nature, and if such sufficiency exists and death is caused and the injury causing it is intentional, the case would fall under clause thirdly of Section 300. All the conditions which are a prerequisite for the applicability of this clause have been established and the offence committed by the accused, in the instant case was "murder".

40. For all the foregoing reasons, we are of opinion that the High Court was in error in altering the conviction of the accused-respondent from one under Sections 302, 302/34, to that under Section 304, Part II of the of the Penal Code. Accordingly, we allow this appeal and restore the order of the trial court convicting the accused (Respondent 2 herein) for the offence of murder, with a sentence of imprisonment for life. Respondent 2, if he is not already in jail, shall be arrested and committed to prison to serve out the sentence inflicted on him."

Reference can also be made to *Anda & Ors. v. State of Rajasthan* [AIR 1996 SC 148].

22. The case before us is quite similar to the case of *Rayavarapu Punnayya* (supra). The cumulative effect of all the

injuries was obviously known to each of the accused, i.e., all the injuries inflicted were bound to result in the death of the deceased which, in fact, they intended. Furthermore, the doctor, PW14, had opined that the deceased had died because of multiple injuries and fracture on the vital organs, due to shock and haemorrhage. In other words, even as per the medical evidence, the injuries were caused on the vital parts of the body of the deceased.

23. For these reasons, we are unable to accept the contention raised on behalf of the appellants that this is a case where the Court should exercise its discretion to alter the offence to one under Section 304 Part II or Section 326 IPC from that under Section 302 IPC. We also find the submission of the learned counsel for the appellants to be without merit that accused Gokul alone is liable to be convicted, if at all, under Section 302 IPC and all other accused should be acquitted. We reject this contention in light of the discussion above and the fact that all these accused have been specifically implicated by PW1 and PW2, the Investigating Officer, PW26 and the medical evidence.

24. Having found no substance in the pleas raised by the learned counsel for the appellants, we hereby dismiss the appeal.

R.P. Appeal dismissed.

ARUNA RODRIGUES AND ORS.
v.
UNION OF INDIA AND ORS.
(Writ Petition (Civil) No. 260 of 2005)

MAY 10, 2012

[S.H. KAPADIA, CJI, A.K. PATNAIK AND SWATANTER KUMAR, JJ.]

Environmental Laws:

Public health – Bio-safety concern – Release of Genetically Modified Organisms (GMS) – PIL – Prayer for issuance of direction to Union of India to stop release of GMOs into the environment by way of import, manufacture, use or any other manner and to prescribe protocol, to which all GMOs released would be subjected and for framing rules in that regard – Supreme court directed the constitution of Technical Expert Committee as well as terms of reference as suggested in the Minutes of the Ministry's meeting dated 15th March, 2011 – Committee is directed to submit its final report within 3 months and in the event the committee is not able to submit its final report within the stipulated time, the Committee is directed to submit its interim report regarding issue as to whether there should be any ban, partial or otherwise, upon conducting of open field tests of GMOs and in the event of permitting open field trials, what should be protocol in that regard.

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 260 of 2005 etc.

Under Article 32 of the Constitution of India.

WITH

W.P. (C) No. 115 of 2004.

Contempt Petition (C) No. 295 of 2007 in W.P. (C) No. 260 of 2005.

Prashant Bhushan, Sumeet Sharma, Rohit Kumar Singh, Shashank Singh, Kamini Jaiswal, Sanjay Parikh, Mamta Saxena, A.N. Singh, Bushra Parveen, Anitha, Shenoy for the Petitioners.

H.P. Rawal, ASG, T.A. Khan, Kiran Bharadwaj, B.K. Prasad, S.N. Terdal, Anil Katiyar, S. Hariharan, Jitendra Mohan Sharma, Abhijat P. Medh, Srikkala Gurukrishna Kumar, Kamini Jaiswal, Vijendra Kumar, Shaikh Chand Saheb, Subramonium Prasad for the Respondents.

The Order of the Court was delivered by

O R D E R

SWATANTER KUMAR, J. 1. The petitioners, who claim to be public spirited individuals possessing requisite expertise and with the access to information, stated that a grave and hazardous situation, raising bio safety concerns, is developing in our country due to release of Genetically Modified Organisms (for short 'GMOs'). The GMOs are allowed to be released in the environment without proper scientific examination of bio safety concerns and affecting both the environment and human health. Thus, the petitioners in this Public Interest Litigation, under Article 32 of the Constitution of India, submit that the intent and substance of the petition is to put in place a protocol that shall maintain scientific examination of all relevant aspects of bio safety before such release, if release were to be at all permissible. On this premise, their prayer in the main writ petition is for the issuance of a direction or order to the Union of India, not to allow any release of GMOs into the environment by way of import, manufacture, use or any other manner. The ancillary prayers seek prescribing a protocol, to which all GMOs released would be subjected and that the Union of India should

frame relevant rules in this regard and ensure its implementation.

2. This Court, vide its order dated 1st May, 2006, directed that till further orders, field trials of GMOs shall be conducted only with the approval of the Genetic Engineering Approval Committee (for short 'GEAC'). I.A. No. 4 was filed, in which the prayer was for issuance of directions to stop all field trials for all genetically modified products anywhere and everywhere. The Court, however, declined to direct stoppage of field trials and instead, vide order dated 22nd September, 2009 directed the GEAC to withhold approvals till further directions are issued by this Court, after hearing all parties. Except permitting field trials in certain specific cases, the orders dated 1st May, 2006 and 22nd September, 2009 were not substantially modified by the Court. As of 2007, nearly 91 varieties of plants, i.e., GMOs, were being subjected to open field tests, though in terms of the orders of this Court, no further open field tests were permitted nor had the GEAC granted any such approval except with the authorization of this Court. This has given rise to serious controversies before this Court as to whether or not the field tests of GMOs should be banned, wholly or partially, in the entire country. It is obvious that such technical matters can hardly be the subject matter of judicial review. The Court has no expertise to determine such an issue, which, besides being a scientific question, would have very serious and far-reaching consequences.

3. Nevertheless, this Court, vide its order dated 8th May, 2007, lifted the moratorium on open field trials, subject to the conditions stated in that order, including a directive in regard to the maintenance of 200 metres isolation distance while performing field tests of GMOs. A further clarification was introduced vide order of this Court dated 8th April, 2008, whereby all concerned were directed to comply with the specific protocol of Level Of Detection of 0.01 per cent.

4. The controversy afore-referred still persisted and further

applications were filed. Amongst others, I.A. No. 32 of 2011 was also filed. The prayers, in all the aforesaid applications, related to imposition of an absolute ban on GMOs in the country and appointment of an Expert Committee whose advice might be sought on these issues. Due to non-adherence to specified protocol and in face of the report of one of the independent Experts, Dr. P.M. Bhargava, who was appointed to meet with the GEAC by the orders of this Court dated 30th April, 2009, the Government, on its own, imposed a complete ban on Bt Brinjal.

5. In I.A. No. 32 of 2011, besides making prayers as noticed above, the Minutes of the meeting of the Ministry of Environment and Forests, Union of India dated 15th March, 2011 where even the petitioners had participated was also annexed. In these Minutes, the composition of the Expert Committee as well as the terms of reference was suggested. The learned Additional Solicitor General appearing for the Union of India had initially taken time to seek instructions, if any, for further modifications, as suggested by the learned counsel appearing for the petitioner, to be made to the constitution of the Committee. Later, it was stated before us that the Government prayed only for constitution of the Committee as well as the terms of reference, exactly as proposed in its Minutes dated 15th March, 2011, without any amendments.

6. We heard the learned counsel appearing for the different parties at some length. They all were ad idem on the constitution of the Expert Committee and the terms of reference as suggested in the Minutes of the Ministry's meeting dated 15th March, 2011 and jointly prayed for its implementation. However, then it was submitted on behalf of the petitioner, respondent and other intervenors that before taking a final view and submitting its Report to this Court, the Committee may hear them. In view of the above, we pass the following consented order, primarily and substantially with reference to the Minutes dated 15th March, 2011: -

(1) There shall be the Technical Expert Committee, the constitution whereof shall be as follows:

a. Prof. V.L. Chopra

Specialization/Work Focus:Plant Biotechnology Genetics and Agricultural Science. Former Member, Planning Commission and Former Member, Science & Advisory Committee to the PMO, Recepient of several awards including the Padma Bhushan.

b. Dr. Imran Siddiqui

Specialization/Work Focus : Plant Development Biology

Scientist & Group Leader, Centre for Cellular & Molecular Biology (CCMB)

c. Prof. P.S. Ramakrishnan

Emeritus Prof. JNU

Work Focus : Environmental Sciences and Biodiversity.

d. Dr. P.C. Chauhan, D.Phil (Sci)

Work Focus : Genetics toxicology and food safety

e. Prof. P.C. Kesavan

Distinguished Fellow, MS SRF (Research Foundation), Emeritus Professor, CSD, IGNOU, New Delhi.

Work Focus : Genetics Toxicology, Radiation Biology and Sustainable Science.

f. Dr. B. Sivakumar

Former Director, National Institute of Nutrition (NIN), Hyderabad.

(2) The terms of reference of the said Committee shall be as follows:

a. To review and recommend the nature of sequencing of risk assessment (environment and health safety) studies that need to be done for all GM crops before they are released into the environment.

b. To recommend the sequencing of these tests in order to specify the point at which environmental release though Open Field Trials can be permitted.

c. To advise on whether a proper evaluation of the genetically engineered crop/plants is scientifically tenable in the green house conditions and whether it is possible to replicate the conditions for testing under different agro ecological regions and seasons in greenhouse?

d. To advise on whether specific conditions imposed by the regulatory agencies for Open Field Trials are adequate. If not, recommend what additional measures/safeguards are required to prevent potential risks to the environment.

e. Examine the feasibility of prescribing validated protocols and active testing for contamination at a level that would preclude any escaped material from causing an adverse effect on the environment.

f. To advise on whether institutions/laboratories in India have the state-of-art testing facilities and professional expertise to conduct various biosafety tests and recommend mechanism to strengthen the same. If no such institutions are available in India,

recommend setting up an independent testing laboratory/institution.

g. The Expert Committee would be free to review reports or studies authored by national and international scientists if it was felt necessary. The petitioners opined that they would like to formally propose three Expert Reports from Prof. David Andow, Prof. Jack Heinemann and Dr. Doug Gurian Sherman to be a formal part of the Committee's deliberations. The MoEF may similarly nominate which experts they choose in this exercise.

3. The Court will highly appreciate if the said Committee submits its final report to the Court within three months from today.

4. The Committee may hear the Government, petitioners and any other intervenor in this petition, who, in the opinion of the Committee, shall help the cause of expeditious and accurate finalization of its report.

5. In the event and for any reason whatsoever, the Committee is unable to submit its final report to the Court within the time stipulated in this order, we direct that the Committee should instead submit its interim report within the same period to the Court on the following issue: "Whether there should or should not be any ban, partial or otherwise, upon conducting of open field tests of the GMOs? In the event open field trials are permitted, what protocol should be followed and conditions, if any, that may be imposed by the Court for implementation of open field trials."

7. Let the matter stand over to 6th August, 2012.

D.G. Matter adjourned.

ABDUL NAWAZ

v.

STATE OF WEST BENGAL

(Criminal Appeal No. 801 of 2012)

MAY 10, 2012

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

PENAL CODE, 1860:

s. 300, Exception 4 and s. 304(Part-I) – Scuffle between accused and Head Constable of police in order to release the dinghy from the police – Accused causing head injury to Head Constable and pushing him into the sea – Dead body of victim recovered from the sea – Held: Pushing a person into the sea with ableeding head injury may not have been with the intention to kill, but it would certainly show the "intention of causing a bodily injury as was likely to cause death", within the meaning of s. 300 and secondly s. 304(Part-I) — The act of the accused is more appropriately punishable u/s 304 (Part-I) instead of s. 302 as invoked by the courts below – Conviction u/s 302 set aside – Instead accused convicted u/s 304 (Part-I) and sentenced to 8 years RI – Evidence – Minor discrepancies in evidence and recording FIR – Effect of.

The appellant and 16 others were prosecuted for commission of offences punishable u/ss 302/392/411/201/120B/341/109 IPC. The prosecution case was that at about 23.50 hrs on 19.3.2008, when the policemen PWs 1 and 3 were on patrol duty, they noticed that in two dinghies tied to a ferry boat stationed at the jetty, diesel was being illegally removed from the ferry boat. On seeing the policemen, the miscreants escaped in one of the dinghies. When some more police personnel reached

the scene, the Engineer, the Master and the Lskar of the ferry boat were caught. Head Constable 'S' and PW1 boarded the dinghy left behind by the miscreants. Meanwhile, the other dinghy that had earlier fled away, returned to the spot with four persons on board including the appellant. They got into a scuffle with Head Constable 'S' to secure the release of the dinghy. The appellant picked up a *dao* that was lying in the dinghy, inflicted a blow on the head of 'S' and pushed him into the sea and escaped in the dinghy. The dead body of 'S' was recovered from the sea by the Coast Guard Divers on 20.3.2008. The trial court convicted the appellant u/s 302 IPC and sentenced him to imprisonment for life. A-1 to A-3 were convicted and sentenced u/s 332/34. The remaining accused charged with commission of offences punishable u/ss 392/409/411 were, however, acquitted. The High Court allowed the appeals of A-1 to A-3 and dismissed the appeal of the appellant.

In the instant appeal, it was, *inter alia*, contended for the appellant that the prosecution case was primarily based on the evidence of PWs 1 and 2; that the evidence of PW 1 was not worthy of credit and could not, therefore, be relied upon; that PW 2 was not an eye-witness and had not corroborated the version given by PW 1; that there was no evidence to prove that the injury stated to have been inflicted by the appellant was in the ordinary course of nature sufficient to cause the death; that even according to the prosecution case itself, there was a sudden fight between the deceased and the appellant and his companions bringing the case under Exception 4 to s. 300 IPC.

Partly allowing the appeal, the Court

HELD: 1.1. The trial court considered the evidence on record carefully and came to the conclusion that the

return of the appellant to recover the second dinghy, a scuffle taking place between the appellant and the deceased Head Constable on board the second dinghy, and the deceased being hit with a '*dao*' by the appellant and being pushed into the sea was proved by the evidence on record. [para 9] [568-F-H]

1.2. In appeal, the High Court re-appraised the evidence adduced by the prosecution and affirmed the findings recorded by the trial court as regards the presence and return of the appellant to recover the second dinghy left behind by the miscreants, the assault on the deceased with a '*dao*' and his being pushed into the sea. The High Court found that the depositions of PWs1 and 2 to the extent they proved the above facts were cogent and consistent hence acceptable. There does not seem to be any palpable error in the approach adopted by the High Court. The discrepancies indicated in the recording of the FIR, or the offence under which it was registered are not of much significance and do not affect the substratum of the prosecution case. [para 10 and 12] [569-A-B; 570-D-E]

Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, **1983 (3) SCR 280 =(1983) 3 SCC 217 – referred to.**

1.3. This Court accordingly affirms the findings of the two courts below to the extent that the appellant was indeed one of the four persons who returned to the place of occurrence to recover the second dinghy that had been left behind by them and finding the deceased-Head Constable inside the dinghy assaulted him in the course of a scuffle, pushed him into the sea and eventually took away the dinghy with the help of his companions. [para 12] [570-E-F]

2.1. The prosecution case clearly is that the appellant

and his companions had returned to the place of occurrence only to recover the second dinghy which they had left behind while they had escaped from the spot in the other dinghy. It is not the case of the prosecution that there was any pre-mediation to commit the murder of the deceased. It is also common ground that the appellant was not armed with any weapon. The weapon allegedly used by him to assault the deceased was even according to the prosecution case lying in the said dinghy. The nature of the injury inflicted upon the victim has not been proved to be sufficient in the ordinary course of nature to cause death. The blow given by the appellant to the deceased had not caused any fracture on the skull. [para 15] [571-F-H; 572-A]

2.2. It cannot be ignored that the deceased had sustained a head injury and was bleeding. Pushing a person into the sea, with a bleeding head injury may not have been with the intention to kill, but it would certainly show the "intention of causing a bodily injury as was likely to cause death", within the meaning of s. 300 and secondly 304 (Part I) of the IPC. [para 16] [572-E-F]

2.3. The appellant having assaulted the deceased with a '*dao*' and having thereby disabled him sufficiently ought to have known that pushing him into the sea was likely to cause his death. Pushing the deceased into the sea was in the circumstances itself tantamount to inflicting an injury which was likely to cause the death of the deceased. In the case at hand he was assaulted with a sharp edged weapon on the head and was bleeding. The injury on the head and the push into the sea have, therefore, to be construed as one single act which the appellant ought to have known was likely to cause death of the deceased. Even so, Exception 4 to s. 300 of the IPC would come to the rescue of appellant inasmuch as the act of the appellant even when tantamount to commission

of culpable homicide will not amount to murder as the same was committed without any pre-meditation and in a sudden fight, in the heat of passion, in the course of a sudden quarrel without the offender taking undue advantage or acting in a cruel or unusual manner. The act of the appellant is more appropriately punishable u/s 304 (Part I) instead of s. 302 IPC invoked by the courts below. [para 16] [572-G-H; 573-A-F]

2.4. The conviction of the appellant for the offence of murder u/s 302 IPC, is set aside. He is convicted of culpable homicide not amounting to murder punishable u/s 304(I) of the IPC and sentenced to undergo imprisonment for a period of eight years. [para 17] [573-F-G]

Chinnathaman v. State **2007 (14) SCC 690;** *Muthu v. State* **2007 (11) SCR 911 = 2009 (17) SCC 433,** *Arumugam v. State* **2008 (14) SCR 309 = 2008 (15) SCC 590;** *Ajit Singh v. State of Punjab* **2011 (12) SCR 375 = 2011 (9) SCC 462; and** *Elavarasan v. State* **2011 (10) SCR 1147 = 2011 (7) SCC 110 – cited.**

Case Law Reference:

1983 (3) SCR 280	**referred to**	**para 12**
2007 (14) SCC 690	**cited**	**para 14**
2007 (11) SCR 911	**cited**	**para 14**
2008 (14) SCR 309	**cited**	**para 14**
2011 (12) SCR 375	**cited**	**para 14**
2011 (10) SCR 1147	**cited**	**para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 801 of 2012.

From the Judgment & Order dated 30.08.2010 of the High

Court at Calcutta (Circuit Bench at Port Blair) in C. R. A. No. 5 of 2010.

Jaspal Singh, Rauf Rahim, Y. Bansal for the Appellant.

Ashok Bhan, Asha G. Nair, Sadhna Sandhu, CK Sharma, D.S. Mahra for the Respondent.

The Judgment of the Court was delivered by

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

2. This appeal by special leave arises out of a judgment and order dated 30th August, 2010 passed by the High Court of Calcutta whereby Criminal Appeal No.5 of 2010 filed by the appellant assailing his conviction under Section 302 of the IPC and sentence of life imprisonment with a fine of Rs.50,000/- and a default sentence of rigorous imprisonment for two years has been dismissed.

3. Two policemen deployed on patrol duty examined at the trial as PWs 1 & 3 reached Chatham Jetty at about 23.50 hrs. on the 19th of March, 2008. While at the Jetty they started smelling diesel odour and suspecting that something fishy was going on, parked their motor cycle to take a walk in the surrounding area. Soon they noticed that two dinghies were tied to M.V. Pillokunji, a vehicle ferry boat stationed at the jetty. In one of these dinghies there were 20 drums besides a man present on the dinghy while in the other there were three to four men and 14 drums, which were being filled with diesel using a plastic pipeline drawn from the vessel mentioned above. The suspects jumped in to one of the two dinghies and escaped, when they saw the approaching policemen that included Head Constable Sunil Kumar (PW-2) and Constable K.Vijay Rao (PW-5). The police party, it appears, tried to contact police station Chatham and the Control Room. While they were doing so the Engineer, Master and the Laskar of the said vessel attempted to snatch the VHF set from them. The police party, therefore, caught hold of these persons as they appeared to

be in league with the miscreants, who had escaped. Soon thereafter arrived Constable Amit Talukdar (PW-4) and the deceased Head Constable Shri Shaji from Police Station, Chatham. After hearing the version from the patrolling constables and the PCR van personnel who too had arrived on the spot the deceased informed the SHO, Chatham police station and requested him to reach the spot. In the meantime, the deceased and PW-1 boarded the dinghy that had been left behind by the miscreants leaving the three crew members of the vessel under the vigil of the remaining members of the police party. PW-1 who accompanied the deceased on to the dinghy firmly tied the rope of the dinghy but while both of them were still in the dinghy, the other dinghy that had earlier fled away returned to the spot with four persons on board. The prosecution case is that the appellant and one Abdul Gaffar were among those who entered the dinghy and got into a scuffle with the deceased to secure the release of the dinghy. In the course of the scuffle the appellant is alleged to have picked up a *dao* (sharp edged weapon lying in the dinghy) and inflicted an injury on the head of the deceased. The appellant is then alleged to have pushed the deceased into the sea. The rope of the dinghy was cut by the miscreants to escape in the dinghy towards Bambooflat.

4. A search for the deceased was launched by the SHO after he arrived on the spot which proved futile. His dead body was eventually recovered from the sea by the Coast Guard Divers on 20th March, 2008 at about 6.15 hours. The inquest was followed by the post-mortem examination of the dead body conducted by Dr. Subrata Saha. Statements of witnesses were recorded in the course of investigation and the *dao* recovered culminating in the filing of a charge-sheet against as many as seventeen persons for offences punishable under Sections 302/392/411/201/120B/341/109 IPC. The case was, in due course, committed for trial to the court of Sessions Judge, Andaman & Nicobar Islands at Port Blair before whom the accused pleaded not guilty and claimed a trial.

5. At the trial, the prosecution examined as many as 66 witnesses apart from placing reliance upon an equal number of documents marked at the trial apart from material exhibits. The accused did not examine any witnesses but produced a few documents in support of their defence.

6. The Trial Court eventually convicted the appellant for an offence of murder punishable under Section 302, IPC and sentenced him to undergo imprisonment for life. A-1 to A-3 were also similarly convicted but only for offences punishable under Sections 332/34 of the IPC. The remaining accused persons charged with commission of offences punishable under Sections 392/409/411 of the IPC were, however, acquitted.

7. Aggrieved by the conviction and sentence awarded to them, A-1 to A-3 and the appellant herein preferred appeals before the High Court of Calcutta, Circuit Bench at Port Blair. By the impugned judgment under appeal before us, the High Court has while allowing three of the appeals filed by the other convicts, dismissed that filed by the appellant herein thereby upholding his conviction and the sentence of life imprisonment awarded to him.

8. We have heard Mr. Jaspal Singh, learned senior counsel for the appellant and Mr. Ashok Bhan, learned senior counsel appearing for the respondent-State who have taken us through the judgments under appeal and the relevant portions of the evidence adduced at the trial. It was contended by Mr. Jaspal Singh that the prosecution case rests primarily on the depositions of PWs 1 & 2 as the remaining police witnesses were admittedly at some distance from the place of occurrence. Out of these witnesses PW-1, according to Mr. Jaspal Singh, was not worthy of credit and could not, therefore, be relied upon. A draft FIR was, according to the learned counsel, prepared by PW65-the investigating officer which PW1 is said to have signed without even reading the same. This implied that the version given in the FIR was not that of the witness, but of the person who had drafted the same. It was further contended that

although the FIR was recorded at 1:30 a.m., the body of the deceased was recovered only at about 5:40 a.m. In the intervening period it was not known whether the deceased was alive or dead. The FIR purportedly registered at about 1:30 a.m. all the same alleged the commission of an offence under Section 302 IPC. This, according to Mr. Singh, indicated that the FIR was actually registered much after the recovery of the body. Mr. Jaspal Singh, further, contended that PW-2 was not an eye-witness and had not corroborated the version given by PW-1. He had instead improved his own version given in the statement under Section 161 Cr.P.C. He further contended that the name of the appellant had been introduced subsequently as the contemporaneous documents showed that the name of the assailant was not known.

9. The Trial Court has viewed the occurrence in two distinct sequences. The first sequence comprises the police party's arrival on the spot and discovering the process of removal of diesel from the bigger vessel into the dinghies carrying drums with the help of a pipe and a pump and the escape of the four persons from the place after the police went near the spot. The second sequence comprises three crew members of the vessel being detained by the police party, the arrival of the deceased head Constable Shaji from police station-Chatham, the deceased entering the second dinghy left behind by the miscreants, the return of the four persons including the appellant to the place of occurrence, a scuffle ensuing in which the deceased was hit on the head and pushed into the sea. The Trial Court considered the evidence on record carefully in the context of the above two sequences and came to the conclusion that the return of the appellant to recover the second dinghy, a scuffle taking place between the appellant and the deceased Head Constable-Shaji on board the second dinghy, and the deceased being hit with a *dao* by the appellant and being pushed into the sea was proved by the evidence on record.

10. In appeal, the High Court re-appraised the evidence adduced by the prosecution and affirmed the findings recorded by the Trial Court as regards the presence and return of Nawaz to recover the second dinghy left behind by the miscreants, the assault on the deceased with a *dao* and his being pushed into the sea. The High Court found that the depositions of PWs1 and 2 to the extent they proved the above facts was cogent and consistent hence acceptable. The High Court observed:

> "From the above versions of the prosecution witnesses, it seems to be clear that the victim had been assaulted by a dao and then pushed into the sea water and it was thereafter that PW-2, for sending message, left for the PCR van. It is in the evidence of PWs 1 and 2 that they noticed Nawaz to be the assailant of the victim. While PW-1 was categorical that Nawaz pushed the victim into the sea water, PW-2 did not specifically say who pushed the victim into the sea water but having regard to the sequence of events sighted by him which support the version of PW-1, it would not be unreasonable to conclude based on the version of PW-1 that it was Nawaz who had also pushed the victim into the sea water.
>
> Number of similarities appear from a reading of the respective versions of PWs 1 and 2, viz. that PW-2 and other staff who were on the vehicle approaching the jetty were stopped by PW-1; that there were 20 drums on one dinghy and 14 drums on the other; that through green coloured pipe, diesel was being supplied to the drums from the said vessel; that the victim picked up the mobile phone lying in the detained dinghy; that PW-1 had come over to the said vessel for tying the dinghy; that both recognized Nawaz as the person who picked up the dao from the dinghy and hit the victim. These are some evidence tendered by PWs 1 and 2 which are absolutely mutually consistent. That apart, the other witnesses present at the spot (though had not recognized Nawaz or been informed about the identity of the assailant), had heard that the victim was assaulted with a dao."

11. Relying upon the decision of this Court in *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, (1983) 3 SCC 217*, the High Court held that minor discrepancies in the depositions of witnesses which did not go to the root of the matter cannot result in the entire prosecution case being thrown out.

12. We do not see any palpable error in the approach adopted by the High Court in appreciating the evidence adduced by the prosecution. The deposition of PWs 1 & 2 regarding the presence of the appellant at the place of occurrence, his getting into a scuffle with the deceased in an attempt to recover the dinghy and the assault on the deceased, who was then pushed into the sea is, in our opinion, satisfactorily proved. The discrepancies indicated by Mr. Jaspal Singh in the recording of the FIR, or the offence under which it was registered are not of much significance and do not, in our view, affect the substratum of the prosecution case. We accordingly affirm the findings of the two Courts below to the extent that the appellant was indeed one of the four persons who returned to the place of occurrence to recover the second dinghy that had been left behind by them and finding the deceased-Head Constable Shaji inside the dinghy assaulted him in the course of a scuffle and eventually took away the dinghy with the help of his companions, after the deceased was assaulted and pushed into the sea.

13. That brings us to the second limb of Mr. Jaspal Singh's contention in support of the appeal. It was contended by him that the evidence on record established that the appellant had not come armed to the place of occurrence. The *dao* allegedly used by him for assaulting the deceased was even according to the prosecution lying within the dinghy. That the appellant had not repeated the act and the intensity of the *dao* blow was not severe enough inasmuch as it had not caused any fracture on the skull of the deceased.

14. It was further argued that there was no evidence medical or otherwise to prove that the injury inflicted by the appellant was in the ordinary course of nature sufficient to cause death. As a matter of fact, the injury had not itself caused the death, as according to the trial Court, the victim had died of drowning. It was urged that while according to PW-1 the deceased was pushed into the sea that version had not been supported by PW2. To top it all the prosecution case itself suggested that there was a sudden fight between the deceased and the appellant and his companions and it was in the course of the said fight that an injury was sustained causing the death of the deceased thereby bringing the case under exception 4 to Section 300 of the IPC. Relying upon the decisions of this Court in *Chinnathaman v. State [2007 (14) SCC 690], Muthu v. State [2009 (17) SCC 433], Arumugam v. State [2008 (15) SCC 590]* and *Ajit Singh v. State of Punjab [2011 (9) SCC 462*] and judgment of this Court in *Elavarasan v. State [2011 (7) SCC 110]* it was contended that the conviction of the appellant under Section 302 of the IPC was erroneous in the facts and circumstances of the case and that the evidence at best made out a case punishable under Section 304 Part II of the IPC, and in the worst case scenario, one punishable under Section 304 Part I.

15. The contention urged by Mr. Jaspal Singh is not wholly without merit to be lightly brushed aside. The prosecution case clearly is that the appellant and his companions had returned to the place of occurrence only to recover the second dinghy which they had left behind while they had escaped from the spot in the other dinghy. It is not the case of the prosecution that there was any pre-mediation to commit the murder of the deceased. It is also common ground that the appellant was not armed with any weapon. The weapon allegedly used by him to assault the deceased was even according to the prosecution case lying in the said dinghy. The nature of the injury inflicted upon the victim has not been proved to be sufficient in the ordinary course of nature to cause death. The blow given by the appellant to the

deceased had not caused any fracture on the skull. The two courts below have, all the same, accepted the prosecution story that after the deceased was given a *dao* blow, the appellant pushed him into the sea. That finding has been affirmed by us in the earlier part of this judgment. The question, however, is whether this act of pushing the deceased into the sea after he was given a blow on the head, no matter the blow was not proved to be severe enough to cause death by itself, would be suggestive of an intention to kill. According to Mr. Jaspal Singh the answer is in the negative. That is so because, the main purpose of the appellant returning to the place of occurrence was not to kill any one, but only to have the dinghy back. The obstruction caused in the accomplishment of that object could be removed by pushing the deceased who was resisting the attempt made by the appellant into the sea. The fact that the deceased was pushed into the sea, should not, therefore, be seen as indication of an intention to kill the deceased.

16. The appellant was interested only in having the dinghy back. That could be done only by removing the obstruction caused by the deceased who was resisting the attempt. Pushing the deceased into the sea could be one way of removing the obstruction not necessarily by killing the deceased. Having said that we cannot ignore the fact that the deceased had sustained a head injury and was bleeding. Pushing a person into the sea, with a bleeding head injury may not have been with the intention to kill, but it would certainly show the "intention of causing a bodily injury as was likely to cause death", within the meaning of Sections 300 & secondly 304 Part I of the IPC.

The appellant having assaulted the deceased with a *dao* and having thereby disabled him sufficiently ought to have known that pushing him into the sea was likely to cause his death. Pushing the deceased into the sea was in the circumstances itself tantamount to inflicting an injury which was likely to cause the death of the deceased. The High Court has gone into the

question whether the deceased knew or did not know swimming. But that issue may have assumed importance if the deceased was not disabled by the assault on a vital part of his body. In the case at hand he was assaulted with a sharp edged weapon on the head and was bleeding. His ability to swim, assuming he knew how to swim, was not, therefore, of any use to him. The injury on the head and the push into the sea have, therefore, to be construed as one single act which the appellant ought to have known was likely to cause death of the deceased. Even so exception 4 to Section 300 of the IPC would come to the rescue of appellant inasmuch as the act of the appellant even when tantamount to commission of culpable homicide will not amount to murder as the same was committed without any pre-meditation and in a sudden fight, in the heat of passion, in the course of a sudden quarrel without the offender taking undue advantage or acting in a cruel or unusual manner. The prosecution evidence sufficiently suggests that a scuffle had indeed taken place on the dinghy where the appellant and his companions were trying to recover the dinghy while the deceased was preventing them from doing so. In the course of this sudden fight and in the heat of passion the appellant assaulted the deceased and pushed him into the sea eventually resulting in his death. The act of the appellant is more appropriately punishable under Section 304 (I) of the IPC instead of Section 302 of the Code invoked by the Courts below. The appeal must to that extent succeed.

17. In the result, we allow this appeal in part and to the extent that while setting aside the conviction of the appellant for the offence of murder under Section 302 of the IPC, we convict him for culpable homicide not amounting to murder punishable under Section 304 (I) of the IPC and sentence him to undergo imprisonment for a period of eight years. Sentence of fine and imprisonment in default of payment of fine is, however, affirmed.

R.P. Appeal partly allowed.

M/S. NARNE CONSTRUCTION P. LTD. ETC. ETC.
v.
UNION OF INDIA AND ORS. ETC.
(Civil Appeal Nos. 4432-4450 of 2012)

MAY 10, 2012

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

Consumer Protection Act, 1986: s.2(1)(o) –Activities of appellant-company involving offer of plots for sale to its customers with assurance of development of infrastructure/ amenities, lay-out approvals etc. – Whether activities of the appellant-company was a 'service' within the meaning of clause (o) of s.2(1) of the Act and amenable to the jurisdiction of the fora established under the Act – Held: Having regard to the nature of the transaction between the appellant-company and its customers-purchasers which involved much more than a simple transfer of a piece of immovable property, it is clear that the same constituted 'service' within the meaning of the Act – It was not a case where the appellant-company was selling the given property with all advantages and/or disadvantages on "as is where is" basis – It was a case where a clear cut assurance was made to the purchasers as to the nature and the extent of development that would be carried out by the appellant-company as a part of the package under which sale of fully developed plots with assured facilities was to be made in favour of the purchasers for valuable consideration – Thus, the appellant-company had indeed undertaken to provide a service – Any deficiency or defect in such service would make it accountable before the competent consumer forum at the instance of purchasers.

The question which arose for consideration in the instant appeals was whether the High Court was justified in holding that the appellant-company was a service provider within the meaning of the Consumer Protection

Act and thus amenable to the jurisdiction of the fora under the said Act.

Dismissing the appeals, the Court

HELD: The High Court was perfectly justified in holding that the activities of the appellant-company involving offer of plots for sale to its customers/members with assurance of development of infrastructure/ amenities, lay-out approvals etc. was a 'service' within the meaning of clause (o) of Section 2(1) of the Consumer Protection Act and would, therefore, be amenable to the jurisdiction of the fora established under the statute. Having regard to the nature of the transaction between the appellant-company and its customers which involved much more than a simple transfer of a piece of immovable property, it is clear that the same constituted 'service' within the meaning of the Act. It was not a case where the appellant-company was selling the given property with all advantages and/or disadvantages on "as is where is" basis. It was a case where a clear cut assurance was made to the purchasers as to the nature and the extent of development that would be carried out by the appellant-company as a part of the package under which sale of fully developed plots with assured facilities was to be made in favour of the purchasers for valuable consideration. Thus, the appellant-company had indeed undertaken to provide a service. Any deficiency or defect in such service would make it accountable before the competent consumer forum at the instance of consumers like the respondents. [Para 7] [581-E-H; 582-A-C]

Lucknow Development Authority v. M.K. Gupta **(1994) 1 SCC 243: 1993 (3) Suppl. SCR 615;** *Bangalore Development Authority v. Syndicate Bank* **(2007) 6 SCC 711: 2007 (7) SCR 47 – relied on.**

U.T. Chandigarh Administration and Anr. v. Amarjeet Singh and Ors. **(2009) 4 SCC 660: 2009 (4) SCR 541 – distinguished.**

Case Law Reference:

1993 (3) Suppl. SCR 615	**relied on**	**Para 1, 3**
2009 (4) SCR 541	**distinguished**	**Para 7**
2007 (7) SCR 47	**relied on**	**Para 8**

CRIMINAL APPELLATE JURISDICTION : Civil Appeal No. 4432-4450 of 2012.

From the Judgment & Order dated 13.08.2010 of the High Court of Judicature Andhra Pradesh at Hyderabad in Writ Petition Nos. 28246 of 2009, 302, 3947, 5091 of 2010, 26520 of 2009, 360, 364, 405, 429, 304, 305, 339, 356, 357, 5003, 5088, 5121, 5131 and 5903 of 2010.

T. Anamika for the Appellants.

Mohan Parasaran, ASG, Indra Sawhney, D.L. Chidanand, Sushma Suri, C. Mukund, Pankaj Jain, P.V. Sarvana Raja, Bijoy Kumar Jain, Ram Swarup Sharma, AP Roi, K. Maruthi Rao, K. Radha, Anjani Aiyagari, Priya Hingorani, Dr. Aman Hingorani, Hingorani & Associates, D. Mahesh Babu, Savita Devi, G.V.R. Choudhary, K. Shivraj Choudhuri, A. Chandra Sekhar, B. Ramana Murthy for the Respondents.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. The short question that falls for determination in these appeals by special leave is whether the appellant-company was, in the facts and circumstances of the case, offering any 'service' to the respondents within the meaning of the Consumer Protection Act, 1986 so as to make it amenable to the jurisdiction of the fora established under the said Act. Relying upon the decision of this Court in *Lucknow Development Authority v. M.K. Gupta (1994) 1 SCC 243*, the

High Court has answered the question in the affirmative and held that the respondents were 'consumers' and the appellant was a 'service' provider within the meaning of the Act aforementioned, hence amenable to the jurisdiction of the fora under the said Act.

2. The undisputed facts in the context of which the question arises have been summed up by the High Court in the following words:

> "Indisputable facts are that the opposite party promoted ventures for development of lands into house-sites and invited the intending purchasers through paper publication and brochures to join as members. The complainants responded and joined as members on payment of fees. It is also indisputable that the sale and allotment of plots were subject to terms and conditions extracted supra. The sale is not open to any general buyer but restricted only to the persons who have joined as members on payment of the stipulated fee. The members should abide by the terms and conditions set out by the seller. The sale is not on "as it is where it is" basis. The terms and conditions stipulated for sale of only developed plots and the registration of the plots would be made after the sanction of lay out by the concerned authorities. The sale price was not for the virgin land but included the development of sites and provision of infrastructure. The opposite party has undertaken the obligations to develop the plots and obtain permissions/ approvals of the lay outs. The opposite party itself pleaded in its counters that the plots were developed by spending huge amounts and subsequent to the amounts paid by the complainants also plots were developed. It pleaded that huge amounts were spent towards protection of the plots from the grabbers and developed roads, open drains, sewerage lines, streetlights etc. It is therefore, manifest that the transaction between the parties is not a sale simplicitor but coupled with obligations for development and provision

> of infrastructure. Inevitably, there is an element of service in the discharge of the said obligations."

3. In *Lucknow Development Authority's* case (supra) this Court while dealing with the meaning of the expressions 'consumer' and 'service' under the Consumer Protection Act observed that the provisions of the Act must be liberally interpreted in favour of the consumers as the enactment in question was a beneficial piece of legislation. While examining the meaning of the term 'consumer' this Court observed:

> "…… The word 'consumer' is a comprehensive expression. It extends from a person who buys any commodity to consume either as eatable or otherwise from a shop, business house, corporation, store, fair price shop to use of private or public services. In Oxford Dictionary a consumer is defined as, "a purchaser of goods or services". In Black's Law Dictionary it is explained to mean, "one who consumes. Individuals who purchase, use, maintain, and dispose of products and services. A member of that broad class of people who are affected by pricing policies, financing practices, quality of goods and services, credit reporting, debt collection, and other trade practices for which state and federal consumer protection laws are enacted." The Act opts for no less wider definition."

4. Similarly, this Court while examining the true purport of the word 'service' appearing in the legislation observed:

> "It is in three parts. The main part is followed by inclusive clause and ends by exclusionary clause. The main clause itself is very wide. It applies to any service made available to potential users. The words 'any' and 'potential' are significant. Both are of wide amplitude. The word 'any' dictionarily means 'one or some or all'. In Black's Law Dictionary it is explained thus, "word 'any' has a diversity of meaning and may be employed to indicate 'all' or 'every'

as well as 'some' or 'one' and its meaning in a given statute depends upon the context and the subject-matter of the statute". The use of the word 'any' in the context it has been used in Clause (o) indicates that it has been used in wider sense extending from one to all. The other word 'potential' is again very wide. In Oxford Dictionary it is defined as 'capable of coming into being, possibility'. In Black's Law Dictionary it is defined as "existing in possibility but not in act. Naturally and probably expected to come into existence at some future time, though not now existing; for example, the future product of grain or trees already planted, or the successive future instalments or payments on a contract or engagement already made." In other words service which is not only extended to actual users but those who are capable of using it are covered in the definition. The clause is thus very wide and extends to any or all actual or potential users. But the legislature did not stop there. It expanded the meaning of the word further in modern sense by extending it to even such facilities as are available to a consumer in connection with banking, financing etc. Each of these are wide-ranging activities in day to day life. They are discharged both by statutory and private bodies. In absence of any indication, express or implied there is no reason to hold that authorities created by the statute are beyond purview of the Act. When banks advance loan or accept deposit or provide facility of locker they undoubtedly render service. A State Bank or nationalised bank renders as much service as private bank. No distinction can be drawn in private and public transport or insurance companies. Even the supply of electricity or gas which throughout the country is being made, mainly, by statutory authorities is included in it. The legislative intention is thus clear to protect a consumer against services rendered even by statutory bodies. The test, therefore, is not if a person against whom complaint is made is a statutory body but whether the

nature of the duty and function performed by it is service or even facility."

(emphasis supplied)

5. In the context of the housing construction and building activities carried on by a private or statutory body and whether such activity tantamounts to service within the meaning of clause (o) of Section 2(1) of the Act, the Court observed:

"As pointed out earlier the entire purpose of widening the definition is to include in it not only day to day buying and selling activity undertaken by a common man but even such activities which are otherwise not commercial in nature yet they partake of a character in which some benefit is conferred on the consumer. Construction of a house or flat is for the benefit of person for whom it is constructed. He may do it himself or hire services of a builder or contractor. The latter being for consideration is service as defined in the Act. Similarly when a statutory authority develops land or allots a site or constructs a house for the benefit of common man it is as much service as by a builder or contractor. The one is contractual service and other statutory service. If the service is defective or it is not what was represented then it would be unfair trade practice as defined in the Act. Any defect in construction activity would be denial of comfort and service to a consumer. When possession of property is not delivered within stipulated period the delay so caused is denial of service. Such disputes or claims are not in respect of Immovable property as argued but deficiency in rendering of service of particular standard, quality or grade. Such deficiencies or omissions are defined in Sub-clause (ii) of Clause (r) of Section 2 as unfair trade practice. If a builder of a house uses substandard material in construction of a building or makes false or misleading representation about the condition of the house then it is denial of the facility or benefit of which a consumer is entitled to claim value under

the Act. When the contractor or builder undertakes to erect a house or flat then it is inherent in it that he shall perform his obligation as agreed to. A flat with a leaking roof, or cracking wall or substandard floor is denial of service. Similarly when a statutory authority undertakes to develop land and frame housing scheme, it, while performing statutory duty renders service to the society in general and individual in particular."

(emphasis supplied)

6. This Court further held that when a person applies for allotment of building site or for a flat constructed by development authority and enters into an agreement with the developer or a contractor, the nature of the transaction is covered by the expression 'service' of any description. The housing construction or building activity carried on by a private or statutory body was, therefore, held to be 'service' within the meaning of clause (o) of Section 2(1) of the Act as it stood prior to the inclusion of the expression 'housing construction' in the definition of 'service' by Ordinance No.24 of 1993.

7. In the light of the above pronouncement of this Court the High Court was perfectly justified in holding that the activities of the appellant-company in the present case involving offer of plots for sale to its customers/members with an assurance of development of infrastructure/amenities, lay-out approvals etc. was a 'service' within the meaning of clause (o) of Section 2(1) of the Act and would, therefore, be amenable to the jurisdiction of the fora established under the statute. Having regard to the nature of the transaction between the appellant-company and its customers which involved much more than a simple transfer of a piece of immovable property it is clear that the same constituted 'service' within the meaning of the Act. It was not a case where the appellant-company was selling the given property with all advantages and/or disadvantages on "as is where is" basis, as was the position in *U.T. Chandigarh*

Administration and Anr. v. *Amarjeet Singh and Ors. (2009) 4 SCC 660*. It is a case where a clear cut assurance was made to the purchasers as to the nature and the extent of development that would be carried out by the appellant-company as a part of the package under which sale of fully developed plots with assured facilities was to be made in favour of the purchasers for valuable consideration. To the extent the transfer of the site with developments in the manner and to the extent indicated earlier was a part of the transaction, the appellant-company had indeed undertaken to provide a service. Any deficiency or defect in such service would make it accountable before the competent consumer forum at the instance of consumers like the respondents.

8. This Court in *Bangalore Development Authority v. Syndicate Bank* (2007) 6 SCC 711, dealt with the nature of the relief that can be claimed by consumers in the event of refusal or delay in the transfer of the title of the property in favour of the allottees/purchasers and observed:

"Where full payment is made and possession is delivered, but title deed is not executed without any justifiable cause, the allottee may be awarded compensation, for harassment and mental agony, in addition to appropriate direction for execution and delivery of title deed."

9. Suffice it to say that the legal position on the subject is fairly well-settled by the pronouncements of this Court and do not require any reiteration. The High Court has correctly noticed the said pronouncements and applied them to the facts of the case at hand leaving no room for us to interfere with the answer given by it to the solitary question raised by the appellant-company.

10. In the result, these appeals are hereby dismissed but in the circumstances without any order as to cost.

D.G. Appeals dismissed.

###NEXT FILE
SALIM GULAB PATHAN
v.
STATE OF MAHARASHTRA THROUGH SHO
(Criminal Appeal No. 1882 of 2010)

MAY 10, 2012

[SWATANTER KUMAR AND RANJAN GOGOI, JJ.]

Penal Code, 1860 – s. 302 – Murder of wife – By setting her on fire – Statement by deceased implicating the accused – To three witnesses PWs 1, 3 and 5 immediately after the incident and to police constable in the hospital – Doctor certifying that the deceased was in fit mental condition to make the statement – Plea of discrepancies in the evidence of PW1 – Conviction by courts below – On appeal, held: Conviction justified in view of the dying declaration, evidence of PWs 1, 3 and 5 – Dying declaration is admissible in view of the evidence – Discrepancies in the evidence of PW 1 not material – Dying Declaration.

Dying Declaration – Admissibility of – Discussed.

The appellant-accused was prosecuted for having killed his wife by setting her on fire. The prosecution case was that the accused and the deceased were living in the house of PW1 (father of the deceased). On the day of the occurrence, after an altercation between the two, the

accused set the deceased on fire. She came out of the house in a burning condition. PW1 alongwith PWs3 and 5 extinguished the fire. The deceased stated to the witnesses that she was set on fire by the accused. In the hospital after certification of the doctor (PW2), she made her statement to the police constable (PW6). Trial court convicted the accused u/s. 302 IPC. High Court affirmed the conviction.

In appeal to this Court, appellant contended that the dying declaration was unworthy of credence; statements of PWs 1, 3 and 4 being related to the deceased were interested witnesses and hence not reliable.

Dismissing the appeal, the Court

HELD: 1. A dying declaration would not lose its efficacy merely because it was recorded by a police officer and not by a Magistrate. The statement of a decseased recorded by a police officer as a complaint and not as a dying declaration can in fact be treated as a dying declaration, if the other requirements in this regard are satisfied. [Para 9]

2. In a situation where PW 2 (doctor) has clearly certified, both at the time of commencement of the recording of the statement of the deceased as well as at the conclusion thereof, that deceased was fully conscious and in a fit mental condition to make the statement, the said opinion of the doctor who was present with the deceased at the relevant time is acceptable. Coupled with the above, there is the evidence of PW 1, PW 3 and PW 5 that immediately after the incident, the deceased had implicated her husband. In addition, the dying declaration stands fortified by the case history of the deceased recorded by PW 2 at the time of her admission into the hospital. As regards the plea that having regard to the extent of burn injuries suffered by the deceased, it was not possible on her part to make the

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