JAI PRAKASH SINGH
v.
THE STATE OF BIHAR & ANR. ETC.
(Criminal Appeal Nos. 525-526 of 2012)

MARCH 14, 2012

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

Code of Criminal Procedure, 1973 - s. 438 - Anticipatory bail - Grant of - On facts, FIR registered against respondent for commission of offence u/ss. 302/34 IPC - FIR was lodged promptly within two hours from the time of incident - Deceased received multiple abrasions and five gun shot injuries - There was a strong motive between the parties - High Court enlarged the respondents on anticipatory bail - Sustainability of - Held: Anticipatory bail can be granted only in exceptional circumstances where the court is prima facie of the view that the applicant has falsely been enroped in the crime and would not misuse his liberty - High Court did not apply any of the parameters laid down by the Supreme Court for grant of anticipatory bail, and rather dealt with a very serious matter in a most casual and cavalier manner - High Court ought to have exercised its extra-ordinary jurisdiction considering the nature and gravity of the offence and as the FIR had been lodged spontaneously, its veracity is reliable - High Court did not consider as to whether custodial interrogation was required and also did not record any reason as to how the pre-requisite condition incorporated in the statutory provision itself stood fulfilled - Order de hors the grounds provided in s. 438 itself suffers from non-application of mind - Thus, orders passed by the High Court set aside.

FIR - Promptness in filing - Object of - Effect on the prosecution case - Stated.

FIR was lodged against the respondents alleging commission of offences under Sections 302/34 IPC. It is alleged that the respondents opened indiscriminate firing at the deceased. The deceased received 5 bullet injuries on his person resulting in his death on the spot. 10-15 days ago, the respondent had threatened the complainant to kill him and his brother on account of old dispute between the parties. The respondents applied for anticipatory bail. The Sessions Judge rejected the same. However, the High Court enlarged the respondents on anticipatory bail under Section 438 Cr.P.C. Therefore, the appellants filed the instant appeals.

Disposing of the appeals, the Court

HELD: 1.1 The FIR had been lodged promptly within a period of two hours from the time of incident at midnight. Promptness in filing the FIR gives certain assurance of veracity of the version given by the informant/complainant. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question. The FIR in criminal case is a vital and valuable piece of evidence though may not be substantive piece of evidence. The object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well as the names of eye-witnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it looses the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consultations/ deliberations. [Paras 11 and 12] [10-B-E]

Thulia Kali v. The State of Tamil Nadu **AIR 1973 SC 501: 1972 (3) SCR 622 ;** *State of Punjab v. Surja Ram* **AIR 1995**

SC 2413: 1995 (2) Suppl. SCR 590; *Girish Yadav and Ors. v. State of M.P.* **(1996) 8 SCC 186:1996 (3) SCR 1021;** *Takdir Samsuddin Sheikh v. State of Gujarat and Anr.* **AIR 2012 SC 37 - relied on.**

1.2 There is no substantial difference between Sections 438 and 439 Cr.P.C. so far as appreciation of the case as to whether or not a bail is to be granted, is concerned. However, neither anticipatory bail nor regular bail can be granted as a matter of rule. The anticipatory bail being an extra-ordinary privilege should be granted only in exceptional cases. The judicial discretion conferred upon the court has to be properly exercised after proper application of mind to decide whether it is a fit case for grant of anticipatory bail. [Para 13] [10-G-H; 11-A]

State of M.P. and Anr. v. Ram Kishna Balothia and Anr. **AIR 1995 SC 198: 1995 (1) SCR 897;** *Siddharam Satlingappa Mhetre v. State of Maharashtra and Ors.* **AIR 2011 SC 312: 2010 (15) SCR 201;** *Kartar Singh v. State of Punjab* **(1994) 3 SCC 569;** *Narcotics Control Bureau v. Dilip Prahlad Namade* **(2004) 3 SCC 619: 2004 (3) SCR 92 - referred to.**

1.3 Parameters for grant of anticipatory bail in a serious offence are required to be satisfied and further while granting such relief, the court must record the reasons therefore. Anticipatory bail can be granted only in exceptional circumstances where the court is prima facie of the view that the applicant has falsely been enroped in the crime and would not misuse his liberty. [Para 18] [14-B-C]

D.K. Ganesh Babu v. P.T. Manokaran & Ors. **(2007) 4 SCC 434; 2007 (3) SCR 1;** *State of Maharashtra & Anr. v. Mohd. Sajid Husain Mohd. S. Husain and Ors.* **(2008) 1 SCC 213: 2007 (10) SCR 995;** *Union of India v. Padam Narain Aggarwal and Ors.* **(2008) 13 SCC 305: 2007 (3) SCR 1 -**

relied on.

1.4 The High Court did not apply any of the said parameters laid down by the Supreme Court, rather dealt with a very serious matter in a most casual and cavalier manner and showed undeserving and unwarranted sympathy towards the accused. The High Court erred in not considering the case in correct perspective and allowed the said applications on the grounds that in the FIR some old disputes had been referred to and the accused had fair antecedents. [Paras 19 and 20] [14-D-F]

1.5 In the facts and circumstances of the case, it was not a fit case for grant of anticipatory bail. The High Court ought to have exercised its extraordinary jurisdiction following the aforesaid parameters considering the nature and gravity of the offence and as the FIR had been lodged spontaneously, its veracity is reliable. The High Court very lightly brushed aside the fact that FIR had been lodged spontaneously and further did not record any reason as how the pre-requisite conditions incorporated in the statutory provision itself stood fulfilled. Nor did the court consider as to whether custodial interrogation was required. The court may not exercise its discretion in derogation of established principles of law, rather it has to be in strict adherence to them. Discretion has to be guided by law; duly governed by rule and cannot be arbitrary, fanciful or vague. The court must not yield to spasmodic sentiment to unregulated benevolence. The order dehors the grounds provided in Section 438 Cr.P.C. itself suffers from non-application of mind and therefore, cannot be sustained in the eyes of law. [Para 21] [14-H; 15-A-D]

1.6 The impugned judgments and orders passed by the High Court are set aside. The anticipatory bail granted to the said respondents is cancelled. [Para 22] [15-E]

Case Law Reference:

1972 (3) SCR 622	**Relied on**	**Para 12**
1995 (2) Suppl. SCR 590	**Relied on**	**Para 12**
1996 (3) SCR 1021	**Relied on**	**Para 12**
AIR 2012 SC 37	**Relied on**	**Para 12**
1995 (1) SCR 897	**Referred to**	**Para 14**
2010 (15) SCR 201	**Referred to**	**Para 16**
2004 (3) SCR 92	**Referred to**	**Para 16**
(1994) 3 SCC 569	**Referred to**	**Para 16**
2007 (3) SCR 1	**Relied on**	**Para 18**
2007 (10) SCR 995	**Relied on**	**Para 18**
2007 (3) SCR 1	**Relied on**	**Para 18**

CRIMINAL APPELLTAE JURISDICTION : Criminal Appeal No. 525-526 of 2012.

From the Judgment & Order dated 19.9.2011 & 25.10.2011 of the High Court of Judicature at Patna in Crl. Misc. Nos. 28318 & 33546 of 2011.

Dvijendra Kr. Pandey, Amit Pawan for the Appellant.

Gopal Singh, Prerna Singh, Kavita Jha, Rajeev Kumar Jha, S.P. Sharma for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. Leave granted.

2. These criminal appeals have been preferred against the judgments and orders dated 19.9.2011 and 25.10.2011 passed by the High Court of Judicature at Patna in Crl. Misc. Nos. 28318 and 33546 of 2011, by which the High Court has

enlarged the respondents Rajesh Kumar Singh @ Pappu Singh and Sanjay Kumar Singh @ Mintu Singh on anticipatory bail under Section 438 of Code of Criminal Procedure, 1973 (hereinafter referred as `Cr.P.C.')

3. Facts and circumstances giving rise to these appeals are that :

A. On 5.6.2011, the appellant Jai Prakash Singh lodged an FIR of Laheria Sarai Case No. 304 of 2011 under Sections 302/34 of Indian Penal Code, 1860 (hereinafter referred as `I.P.C.'), alleging therein that the informant/complainant and his elder brother Shiv Prakash Singh were having a medicine shop for the last 2-3 years. On 5.6.2011 around 10.00 p.m., his brother closed the shop and proceeded towards his house on his motorcycle. He was chased by the aforesaid respondents on a motorcycle and stopped. They opened indiscriminate firing and thus, he died on the spot. In the FIR, it was also alleged that the said respondents had threatened the complainant to kill him and his brother 10-15 days ago as there had been some old dispute of accounts between the parties.

B. As per the post-mortem report, the deceased received 5 bullet injuries on his person and he died because of the same. The said respondents had applied for anticipatory bail, however, their applications stood rejected by the learned Sessions Judge vide order dated 11.8.2011 observing that in the investigation, a strong motive had been found against the said respondents and there were certain affidavits of eye-witnesses to the effect that the said respondents were the assailants.

C. Aggrieved, the said respondents filed Miscellaneous Criminal Petitions for grant of anticipatory bail under Section 438 Cr.P.C. before the Patna High Court. The said applications have been allowed passing the impugned orders granting them anticipatory bail on the grounds that the FIR itself made it evident that there was some previous dispute between the

parties which led to a quarrel and the accused had fair antecedents.

Hence, these appeals.

4. Shri Dvijendra Kumar Pandey, learned counsel appearing for the appellant, has submitted that the High Court committed grave error while granting anticipatory bail to the said respondents without considering the gravity of the offence and the manner in which the offence had been committed and without realising that the FIR had been lodged promptly within a period of two hours of the incident and both the said accused persons had been named therein. Thus, the impugned judgments and orders are liable to be set aside.

5. On the contrary, Ms. Kavita Jha and Ms. Prerna Singh, learned counsel appearing for the said respondents and the State of Bihar, have opposed the appeals contending that the High Court has imposed very serious conditions while granting the anticipatory bail. The order does not require any interference at this stage. The appeals have no merit and are liable to be dismissed.

6. We have considered the rival submissions made by the learned counsel appearing for the parties and perused the record.

7. The provisions of Section 438 Cr.P.C. lay down guidelines for considering the anticipatory bail application, which read as under:

> "438. Direction for grant of bail to person apprehending arrest.- (1) Where any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest, he shall be released on bail; and that court may, after taking into consideration, inter alia, the following factors, namely:-

> (i) The nature and gravity of the accusation;
>
> (ii) The antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;
>
> (iii) the possibility of the applicant to flee from justice; and
>
> (iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail."

8. In view of the above, it is mandatory on the part of the court to ensure the compliance of the pre-requisite conditions for grant of anticipatory bail including the nature and gravity of the accusation.

9. Admittedly, the deceased had received several gun shot injuries. According to the post-mortem report, the following injuries were found on the person of the deceased:

> "A . Abrasions: (1) 1 1/4" x1/4" 1"- right and enter post of forehead (2) 1/4" x 1/4" 1/2 "x 1/4" and 1/2" X 1/10" in the lower 1/2 of the left leg (3) 1/4 " x l/4" right kneecap.
>
> B. Fire Arm injuries (1) entry wound 1/4 dia with inverted contused margins and abrasions. Collar placed on the outer aspect of the right arm 2" proxical to elbow - passed thro' arms breaking the bone into pieces and lacerating the to come out thro' exit wound 1/3" x 1/9" with even in the middle and inner portion of arm. Another entry wound, 1/5" in dia with abrasion collar, inverted margin and tattooing around (1-1/2 " x 1-1/2") was also present 1" distal to the preventing entry wound and come out through the same exit wound.
>
> (2) Entry wound - 1/4 " dia with inverted contused margin an abrasion collar in right anterior axillary line 5" below

nipple - right 8th intercortal space- right lobe of liver mes entry- small intestine at one place - came out through exit wound 1/3" in dia in lower left iliac fosa in the axilary line with inverted margin.

(3) Entry wound 1/4" dia with contused inverted margins and abrasion collar placed in the left iliac fosa- color at one place-small intestine at one place- came out this exit would >" x 1/2" on right abdominal flank with everted margin, in anterior oscillary line 9" bellow nipple.

(4) Entry would 1/3" in dia with contused inverted margin and abrasion collar over upper and inner part of left and soft tissue of the arm to came out through the exit wound 1/3" in dia with everted margin on the back of left arm 3" above (proximal) elbow.

(5) Entry wound 1/4" in dia on the back of abdomen 4" outer to midline at T12 level, with inverted and contused margins and abrasions collar mesentry large intestine at one place exit through a wound 1/4" dia with inverted margin in the hand.

Along the tracks, the. tissue were lacerated. Fluid blood red clots were seen inside abdominal cavity about 1000 cc in volume. Organs appeared pale. Both sides of the heart were partially full and the urinary bladder was found full. Stomach contained about 20 cc food without alcoholic smell. Skull and brain showed nothing particular.

Opinion Death resulted from hemorrhage and both due to fire arm injuries mentioned above."

10. The learned Sessions Judge did not consider it proper to grant anticipatory bail, rather rejected the same after considering the submissions made on behalf of the said accused persons observing that the court had perused the Case Diary, para 90 of which revealed a very strong motive.

There was material against the said accused in the case diary. The deceased had received multiple abrasions and 5 gun shot injuries, thus, it was not a fit case to enlarge the accused on anticipatory bail.

11. Admittedly, the FIR had been lodged promptly within a period of two hours from the time of incident at midnight. Promptness in filing the FIR gives certain assurance of veracity of the version given by the informant/complainant.

12. The FIR in criminal case is a vital and valuable piece of evidence though may not be substantive piece of evidence. The object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well as the names of eye- witnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it looses the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consultations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question. (Vide: *Thulia Kali v. The State of Tamil Nadu,* AIR 1973 SC 501; *State of Punjab v. Surja Ram,* AIR 1995 SC 2413; *Girish Yadav & Ors. v. State of M.P.,* (1996) 8 SCC 186; and *Takdir Samsuddin Sheikh v. State of Gujarat & Anr.,* AIR 2012 SC 37).

13. There is no substantial difference between Sections 438 and 439 Cr.P.C. so far as appreciation of the case as to whether or not a bail is to be granted, is concerned. However, neither anticipatory bail nor regular bail can be granted as a matter of rule. The anticipatory bail being an extraordinary privilege should be granted only in exceptional cases. The judicial discretion conferred upon the court has to be properly

exercised after proper application of mind to decide whether it is a fit case for grant of anticipatory bail.

14. In *State of M.P. & Anr. v. Ram Kishna Balothia & Anr.,* AIR 1995 SC 1198, this Court considered the nature of the right of anticipatory bail and observed as under: "We find it difficult to accept the contention that Section 438 of the Code of Criminal Procedure is an integral part of Article 21. In the first place, there was no provision similar to Section 438 in the old Criminal Procedure Code..... Also anticipatory bail cannot be granted as a matter of right. It is essentially a statutory right conferred long after the coming into force of the Constitution. It cannot be considered as an essential ingredient of Article 21 of the Constitution. And its non-application to a certain special category of offences cannot be considered as violative of Article 21."

15. While deciding the aforesaid cases, this Court referred to the 41st Report of the Indian Law Commission dated 24th September, 1969 recommending the introduction of a provision for grant of anticipatory bail wherein it has been observed that "power to grant anticipatory bail should be exercised in very exceptional cases".

16. Ms. Kavita Jha, learned counsel appearing for the accused/respondents has vehemently advanced the arguments on the concept of life and liberty enshrined in Article 21 of the Constitution of India placing a very heavy reliance on the observations made by this Court in *Siddharam Satlingappa Mhetre v. State of Maharashtra and Ors.,* AIR 2011 SC 312, and submitted that unless the custodial interrogation is warranted in the facts and circumstances of the case, not granting anticipatory bail amounts to denial of the rights conferred upon a citizen/person under Article 21 of the Constitution. We are afraid the law as referred to hereinabove does not support the case as canvassed by learned counsel for the accused-respondents. More so, the Constitution Bench of this Court in *Kartar Singh v. State of Punjab,* (1994) 3 SCC

569, while summing up the law in para 368, inter-alia, held as under:

> "Section 20(7) of the TADA Act excluding the application of Section 438 of the Code of Criminal Procedure in relation to any case under the Act and the Rules made thereunder, cannot be said to have deprived the personal liberty of a person as enshrined in Article 21 of the Constitution."

(See also: *Narcotics Control Bureau v. Dilip Prahlad Namade* (2004) 3 SCC 619).

Therefore, we are not impressed by the submissions so advanced by learned counsel for the accused-respondents.

17. This Court in Siddharam Satlingappa Mhetre (supra) after considering the earlier judgments of this Court laid down certain factors and parameters to be considered while considering application for anticipatory bail :

> "122. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:
>
> i. The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;
>
> ii. The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;
>
> iii. The possibility of the applicant to flee from justice;
>
> iv. The possibility of the accused's likelihood to repeat similar or the other offences.
>
> v. Where the accusations have been made only with the

object of injuring or humiliating the applicant by arresting him or her.

vi. Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

vii. The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over-implication in the cases is a matter of common knowledge and concern;

viii. While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

ix. The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

x. Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

123. The arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case.

124. The court must carefully examine the entire available

record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record."

18. Parameters for grant of anticipatory bail in a serious offence are required to be satisfied and further while granting such relief, the court must record the reasons therefore. Anticipatory bail can be granted only in exceptional circumstances where the court is prima facie of the view that the applicant has falsely been enroped in the crime and would not misuse his liberty. (See: *D.K. Ganesh Babu v. P.T. Manokaran & Ors.,* (2007) 4 SCC 434; *State of Maharashtra & Anr. v. Mohd. Sajid Husain Mohd. S. Husain & Ors.,* (2008) 1 SCC 213; and *Union of India v. Padam Narain Aggarwal & Ors.,* (2008) 13 SCC 305).

19. The case at hand, if considered in the light of aforesaid settled legal proposition, we reach an inescapable conclusion that the High Court did not apply any of the aforesaid parameters, rather dealt with a very serious matter in a most casual and cavalier manner and showed undeserving and unwarranted sympathy towards the accused.

20. The High Court erred in not considering the case in correct perspective and allowed the said applications on the grounds that in the FIR some old disputes had been referred to and the accused had fair antecedents. The relevant part of the High Court judgment impugned before us reads as under:

"Considering that the only allegation in the First Information Report is that there was previously some dispute between the deceased and the petitioner and they had quarrelled on account of the same, let the petitioner above named, who has fair antecedents, be released on anticipatory bail....."

21. In the facts and circumstances of this case, we are of

the considered opinion that it was not a fit case for grant of anticipatory bail. The High Court ought to have exercised its extraordinary jurisdiction following the parameters laid down by this Court in above referred to judicial pronouncements, considering the nature and gravity of the offence and as the FIR had been lodged spontaneously, its veracity is reliable. The High Court has very lightly brushed aside the fact that FIR had been lodged spontaneously and further did not record any reason as how the pre-requisite conditions incorporated in the statutory provision itself stood fulfilled. Nor did the court consider as to whether custodial interrogation was required.

The court may not exercise its discretion in derogation of established principles of law, rather it has to be in strict adherence to them. Discretion has to be guided by law; duly governed by rule and cannot be arbitrary, fanciful or vague. The court must not yield to spasmodic sentiment to unregulated benevolence. The order dehors the grounds provided in Section 438 Cr.P.C. itself suffers from non- application of mind and therefore, cannot be sustained in the eyes of law.

22. The impugned judgments and orders dated 19.9.2011 and 25.10.2011 passed by the High Court of Judicature at Patna in Crl. Misc. Nos.28318 and 33546 of 2011 are, thus, set aside. The anticipatory bail granted to the said respondents is cancelled. Needless to say that in case the said respondents apply for regular bail, the same would be considered in accordance with law. With the aforesaid observations, appeals stand disposed of.

N.J. Appeals disposed of.

BHUSHAN POWER AND STEEL LTD. AND ORS.
v.
STATE OF ORISSA AND ANR.
(Civil Appeal No. 2790 of 2012)

MARCH 14, 2012

[ALTAMAS KABIR AND SURINDER SINGH NIJJAR, JJ.]

Mines and Minerals - Mineral Concession Rules, 1960 - Rule 59 - Proposed integrated steel plant - Application for grant of lease for mining of iron ore for use in the plant - Rejection of, by the State Government - Validity - Appellant-company with the intention of setting up an integrated steel plant, entered into discussions with respondent-State Government and inter alia applied for grant of lease for mining of iron ore for use in the proposed plant - Memorandum of Understanding (MOU) dated 15th May, 2002 entered into between the parties wherein respondent-State Government agreed to recommend to Central Government grant of iron ore mines to appellant for its use in the proposed plant - However, upon subsequent re-organisation and restructuring of the Bhushan group (of which appellant-company was a member), respondent-State Government informed appellant company that the earlier MOU dated 15th May, 2002 had ceased to exist and that a fresh MOU was required to be entered into between the appellants and the State Government - Application of appellant company for mining lease in respect of iron ore rejected on various grounds - most significantly on the ground that the area in question came within the relinquished area of a mining lease which was not thereafter thrown open for re-allotment under Rule 59 of the Mineral Concession Rules and the application of appellant was therefore premature - Writ petition filed by appellant dismissed by High Court - Whether the MOU dated 15th May, 2002, continued to subsist in favour of the appellants; whether

the State Government was obliged to make recommendations for the grant of iron ore mines in terms of the stipulations contained in the MOU dated 15th May, 2002,and whether in respect of the areas which had not been notified under Rule 59(1), the State Government could make a recommendation for relaxation of Rule 59(1)under Rule 59(2) - Held: Despite having allotted land and granted sanction to appellant company to take steps for construction of the said plant, to now turn around and take a stand that the application made by appellant company was premature, is not only unreasonable, but completely unfair to appellant company, who have already invested large sums of money in setting up the plant - The State Government had, on its own volition, entered into the MOU with appellant company on 15th May, 2002 - Whatever differences that may have resulted on account of the dispute within the Bhushan Group, which could have led to rethinking on the part of the State Government, have now been laid to rest by virtue of a settlement - The action taken by the State Government appears to be highly unreasonable and arbitrary and also attracts the doctrine of legitimate expectation - Appellants have altered their position to their detriment in accordance with the MOU dated 15th May,2002 which continued to be in existence and remained operative - The State Government appears to have acted arbitrarily in requiring appellant company to enter into a separate MOU, notwithstanding the existence of the MOU dated 15th May, 2002, which had been acted upon by the parties - Since the State Government has already made allotments in favour of others in relaxation of the Mineral Concession Rules, under Rule 59(2) thereof, no cogent ground made out on behalf of the State to deny the said privilege to the appellants as well - Judgment of the High Court and also the decision of the State Government rejecting the appellant's claim for grant of mining lease set aside - State Government directed to take appropriate steps to act in terms of the MOU dated 15th May, 2002, as also its earlier commitments to recommend the case of the appellants to the

Central Government for grant of adequate iron ore reserves to meet the requirements of the appellants in their steel plant - Doctrines - Doctrine of legitimate expectation.

Appellant-company [Bhushan Limited (now Bhushan Power & Steel Ltd. - BPSL)], with the intention of setting up an integrated steel plant in the State of Orissa, entered into discussions with the respondent-State Government and inter alia applied for grant of lease for mining of iron ore for use in the proposed plant. A Memorandum of Understanding (MOU) dated 15th May, 2002 was entered into between the parties wherein the respondent-State Government agreed to recommend to Central Government grant of iron ore mines to appellant for its use in the proposed plant. However, upon subsequent re-organisation and restructuring of the Bhushan Group [of which appellant-company was a member], the respondent-State Government addressed letter to the appellant company stating that the earlier MOU dated 15th May, 2002 had ceased to exist and that accordingly a fresh MOU was required to be entered into between the appellants and the State Government. The application of appellant company for mining lease in respect of iron ore was rejected on various grounds - most significantly on the ground that the area in question came within the relinquished area of a mining lease which was not thereafter thrown open for re-allotment under Rule 59 of the Mineral Concession Rules, 1960 and that the application of the appellant was therefore premature. Having rejected the appellants' prayer for grant of mining lease, the State Government made recommendation to the Central Government to grant mining lease in favour of another applicant in relaxation of Rule 59(1) of the Rules, for a period of 30 years. Appellant filed writ petition which was dismissed by the High Court.

In the instant appeal, the appellants pointed out that

only two issues arose for consideration in the present case, namely - a)Whether the Memorandum of Understanding dated 15th May, 2002, continued to subsist in favour of the appellants and b) Whether the State Government was obliged to make recommendations for the grant of iron ore mines in terms of the stipulations contained in the MOU dated 15th May, 2002,and whether in respect of the areas which had not been notified under Rule 59(1) of the Mineral Concession Rules, 1960, the State Government could make a recommendation for relaxation of Rule 59(1)under Rule 59(2).

The appellants urged that during the pendency of the proceedings, the dispute between the members of the Bhushan Group had been settled and the parties had mutually agreed to withdraw all the allegations and claims relating to the MOU dated 15th May, 2002 and in the changed circumstances, the question of execution of a fresh MOU loses its relevance and the letter dated 31st December, 2005, calling upon the Appellants to execute a fresh MOU, is not required to be given effect to and consequently, the MOU dated 15th May, 2002, continues to be valid and subsisting between the State of Orissa and the appellant company. On the question of Rule 59 of the Mineral Concession Rules, which formed the basis of the State Government's decision to reject the appellants' application for being recommended to the Central Government for grant of a mining lease, the appellants submitted that such recommendations had been made by the State Government in favour of other applicants as well and therefore, there was no reason to deny the same benefits to the appellants as well.

Allowing the appeal, the Court

HELD: 1. Although, the MOU was entered into by the State Government with the Bhushan Group for setting up

a steel plant at Lapanga, at a later stage, Bhushan Power & Steel Ltd (BSSL) also laid claim under the MOU for setting up a separate steel plant at Mehramandali and a suggestion was also made for execution of a fresh MOU between the State Government and BSSL to this effect. The mutual settlement of the disputes between the members of the Bhushan Group has, however, altered the situation considerably, since BSSL has withdrawn its claim under the MOU dated 15th May, 2002, and has declared that the said MOU was and had always been executed by the State Government in favour of Bhushan Power & Steel Ltd., which had set up its steel plant at Lapanga. [Para 30] [34-B-D]

2. Pursuant to the MOU with Bhushan Limited, the State Government had not only allotted land for the setting up of the steel plant at Lapanga, it had even extended all help for the commissioning of the plant, which, in fact, had already started functioning. However, it is the claim made by BSSL under the MOU executed on 15th May, 2002, that had created obstructions in the setting up of the steel plant at Lapanga. Despite having allotted land and granted sanction to Bhushan Limited to take steps for construction of the said plant, it was subsequently contended that the application filed by Bhushan Limited was premature and could not, therefore, be acted upon. Specific steps were taken by the various departments in extending cooperation to Bhushan Limited to set up its steel plant at Lapanga. To now turn around and take a stand that the application made by Bhushan Limited was premature, is not only unreasonable, but completely unfair to Bhushan Limited, who have already invested large sums of money in setting up the plant. The State Government had, on its own volition, entered into the MOU with Bhushan Limited on 15th May, 2002, and had even agreed to request the Central Government to allot mining areas and coal blocks

for operating the steel plant. Whatever differences that may have resulted on account of the dispute within the Bhushan Group, which could have led to the rethinking on the part of the State Government, have now been laid to rest by virtue of the settlement arrived at between the Bhushan Limited (now BPSL) and BSSL. The State Government has also accepted the said position. In addition to the above, the action taken by the State Government appears to be highly unreasonable and arbitrary and also attracts the doctrine of legitimate expectation. There is no denying the fact that the Appellants have altered their position to their detriment in accordance with the MOU dated 15th May,2002. Whatever may have been the arrangement subsequently arrived at between the State Government and BSSL, the original MOU dated 15th May, 2002, continued to be in existence and remained operative. [Para 31] [34-D-H; 35-A-D]

3. The State Government appears to have acted arbitrarily in requiring Bhushan Limited to enter into a separate MOU, notwithstanding the existence of the MOU dated 15th May, 2002, which had been acted upon by the parties. [Para 32] [35-D-E]

4. The High Court erred in holding that it could not interfere with the decision of the State Government calling upon the Appellants to sign a fresh MOU with the Government, during subsistence of the earlier MOU. Since the State Government has already made allotments in favour of others in relaxation of the Mineral Concession Rules, 1960, under Rule 59(2) thereof, no cogent ground had been made out on behalf of the State to deny the said privilege to the Appellants as well. [Para 33] [35-F-D]

5. The judgment and order of the High Court and also the decision of the State Government dated 9th February, 2006, rejecting the Appellant's claim for grant

of mining lease are set aside. During the course of hearing, this Court was informed that Thakurani BlockA has large reserves of iron ore, in which the Appellants can also be accommodated. Accordingly, the State of Orissa is directed to take appropriate steps to act in terms of the MOU dated 15th May, 2002, as also its earlier commitments to recommend the case of the Appellants to the Central Government for grant of adequate iron ore reserves to meet the requirements of the Appellants in their steel plant at Lapanga.[Para 34] [35-G-H; 36-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2790 of 2012.

From the Judgment & Order dated 14.12.2007 of the High Court of Orissa at Cuttack in W.P. (C) No. 6646 of 2006.

Mukul Rohatgi, L.N. Rao, K.V. Vishwanathan, S.K. Bagaria, Mahesh Agrawal, Rishi Agrawal, E.C. Agrawala, Ninad Laud, Nakul Mohta, Santosh Krishnan, Rajat J.D., Sanjeev Kumar (for Khaitan & Co.) Rajat Jariwal, Abhishek Kaushik, Rahul Chandra (for Khaitan & Co.), Sunil Kumar Jain, Aneesh Mittal, Umesh Kumar, Jagmohan Sharma, K.P.S. Chani, Suresh Chandra Tripathy, Satya Mitra Garg, Sanjay Jain, Manjula Gupta, Shibashish Misra for the appearing parties.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. With the intention of setting up an integrated steel plant in the State of Orissa, Bhushan Limited, entered into discussions with the State Government in 2001 in that regard. Pursuant to such discussions, Bhushan Limited applied to the Industrial Development Corporation of India (IDCO) for acquisition of land measuring 1250 acres, for setting up the proposed plant in the identified villages of Thelkoloi, Dhubenchhabrar and Khariapalli (Lapanga) in the District of Sambalpur. On 13th November, 2001, Bhushan Limited applied

to the Industrial Promotion and Investment Corporation of Orissa Ltd. (IPICOL) for appraisal and recommendation for acquisition of land for the aforesaid purpose to IDCO. Bhushan Limited also addressed two letters to the Collector, Sundergarh and Collector, Keonjhar on 28th November, 2001, applying for grant of lease for mining of iron ore for use in the proposed plant. The applications were received in the Collector's office on 3rd December, 2001, 4th December, 2001 and 1st March, 2002. On the basis of such applications filed by Bhushan Limited, a meeting was held on 27th March, 2002, between the Chief Secretary, Government of Orissa and Bhushan Limited, in which the Government agreed to accord due priority to Bhushan Limited for grant of suitable iron ore areas and also agreed to recommend the proposal of Bhushan Limited to the Government of India for grant of a Coal Block.

3. Thereafter, meetings were held between Bhushan Limited and the representatives of the State Government and one such meeting was held on 24th April, 2002, under the Chairmanship of the Chief Minister, relating to the setting up of the steel plant at Lapanga. The said meeting was confirmed by IDCO and the Water Resources Department and it was decided to prepare a Memorandum of Understanding (MOU) to be signed by the parties for setting up of a 1.2 million tonnes steel plant under Phase-I and a 2.8 million tonnes steel plant in Phase-II in Lapanga, in the District of Sambalpur. The MOU contained the commitment of the State Government to recommend to the Central Government grant of iron ore mines to the Appellant for its use in the plant to be set up at Lapanga. As far as the grant of the iron ore mines is concerned, the State Government agreed to make the following recommendations to the Central Government:

(a) For grant of 96 million tonnes iron ore reserves in Joda Barbil Sector of Keonjhar (Thakurani area) for 50 years requirement of the plant.

(b) For additional 128 million tonnes of iron ore reserves in Keora, District Sundergarh, to meet a requirement of 1.6 million tonnes for 50 years.

The total requirement of 200 million tonnes was split up into two parts, i.e., 96 million tonnes and 128 million tonnes respectively, and the same were to be met from the Thakurani mines situated in the Joda Barbil sector and from the Keora area of Sundergarh District.

4. Pursuant to the aforesaid understanding, on 16th May, 2002, the Government of Orissa addressed two letters to the Government of India, in its Ministry of Steel and Ministry of Coal, for allotment of Jamkhani and Bijahan Coal Blocks to Bhushan Limited. In aid of the decision to set up the steel plant, the Department of Energy issued a No Objection Certificate (NOC) for setting up of a power plant at Thelkoloi in the name of Bhushan Limited and, on 5th July, 2002, the State Government conveyed its approval for acquisition of 632.28 acres of private land and 634.94 acres of Government land in identified villages under Rengali Tehsil of Sambalpur District, for establishment of the steel plant. Several meetings took place between the Principal Secretary and the representatives of Bhushan Limited, where even the Joint Secretary of Mines was present and assurances were given to Bhushan Limited to send the proposal for grant of mining lease in favour of Bhushan Limited to the State Government by the first week of September, 2002. On 22nd October, 2002, even the State Pollution Control Board gave its approval in principle for setting up the plant in the selected sites.

5. On 8th November, 2002, the Director, Mines, furnished his report on the application made by the Appellant on 4th December, 2001, for grant of mining lease over the Thakurani Block area. In the said report it was recorded that Thakurani Block A and Block B mines had been leased in favour of the Sharda's in 1934, by the Ex-Ruler of Keonjhar and that the Thakurani Block A mines had been extensively mined by the original lessee from 1934 onwards. The report also disclosed

that in 1998, the matter was settled in this Court between the State, the Sharda's and the Centre. It was agreed that Thakurani Block A would be relinquished in favour of the State and the mining lease of Block B would be renewed in favour of the Sharda's. Accordingly, in terms of the settlement, the Thakurani Block A became available with the State. It is on the aforesaid basis that the Appellant had been advised to apply to the State Government for this area, and the same was done in December, 2001. The report also indicated that a mining licence could be granted to Bhushan Limited in relaxation of Rule 59(2) of the Mineral Concession Rules, 1960, hereinafter referred to as the "MC Rules", in view of the fact that the Thakurani Block A had been mined by the original lessee from 1934 onwards. The State Government was advised to recommend to the Centre for grant of relaxation under Rule 59(2) of the MC Rules.

6. On 19th February, 2003, the Orissa Electricity Regulatory Commission (OERC) passed an order granting permission for installation of a Captive Power Plant by Bhushan Limited.

7. It is at this stage that trouble began to brew. A decision had been taken to merge Bhushan Ltd. with Bhushan Steel and Strips Limited (BSSL) which had an identity which was separate from that of Bhushan Limited, though treated to be a family concern under the Bhushan family umbrella. On 21st February, 2003, the Government of Orissa was informed by Shri Brij Bhushan Singhal, Chairman of the Bhushan Group, that Bhushan Limited, the Appellant herein, would not be merging with BSSL, but that the papers were being processed in the name of Bhushan Limited, as a group. Accordingly, the State Government was requested not to process the papers for 2-3 months. On 17th March, 2003, BSSL wrote to the Chief Minister, informing him of the developments which had taken place and that two companies had decided not to merge, with

retrospective effect from 1st April, 2002, as had been decided earlier.

8. Thereafter, on 5th May, 2003, Shri Neeraj Singhal wrote to the Chief Minister on behalf of BSSL informing him that BSSL was unable to process the setting up of the steel plant at Lapanga and in order to minimize the friction between the two groups within the family, BSSL had decided to set up a separate steel plant at a different location in Mehramandali in the District of Dhankanal in respect whereof 1500 acres of land had been identified. On 17th June, 2003, the Water Resources Department, Government of Orissa, wrote to Bhushan Power & Steel Ltd. giving its approval of the layout for intake well for drawal of 100 cusec water for the integrated steel plant of the Company. This was followed by grant of a certificate by IDCO on 19th July, 2003, confirming sanction of land for lease measuring 488.08 acres in favour of Bhushan Limited comprising Thelkoloi, Dhubenchhapar and Khadiapalli, which had been identified in the MOU for establishment of the steel plant by Bhushan Limited.

9. The said sanctions were followed up by a meeting chaired by the Chief Minister of Orissa on 25h July, 2003, wherein the progress of the project was discussed and it was resolved that the application of Bhushan Limited for iron ore deposits would be recommended to the Government of India and that no fresh MOU was required to be filed. It was decided that the MOU executed earlier between the Bhushan Group and the State Government on 15th July, 2002, would remain undisturbed, since, the same had already been acted upon by both sides. It was also decided that the application of Bhushan Limited for iron ore deposits would be recommended to the Government of India in terms of the MOU, after the same was placed before the Screening Committee which was chaired by the Chief Secretary.

10. Further to the permission being granted to Bhushan Limited on 21st February, 2003, for installation of a Captive

Power Plant, OERC granted a "No Objection Certificate" to Bhushan Limited for setting up of a Captive Power Plant for increased capacity.

11. Subsequently, various other steps were taken for establishment of the power plant at Lapanga by Bhushan Power & Steel Ltd. On 10th February, 2004, the State Government wrote to Shri Sanjay Singhal, representing Bhushan Limited, that in view of the reorganization and restructuring of the Bhushan Group, the earlier MOU ceased to exist and had lost its force. Accordingly, a fresh MOU was required to be entered into between the Appellants and the State Government for speedy implementation of the project which was on the anvil. It is the case of the Appellants that this letter was never acted upon by either party, since, thereafter, the State allotted and granted possession of large tracts of land to the Appellants and other agreements, such as drawal of water were entered into, permission was given for connectivity with the Grid and other various other administrative sanctions, as also approval for acquisition of land, were made in favour of Bhushan Power & Steel Ltd., without any insistence for the execution of a fresh MOU. Simultaneously, Shri Neeraj Singhal of BSSL was also informed by the State that since they wanted to set up a separate steel plant at Mehramandali, a fresh MOU to this effect could be entered into between the State and BSSL.

12. Responding to the letter of 10th February, 2004, Bhushan Limited wrote back on 21st February, 2004, stating that no fresh MOU was required to be signed, since the earlier MOU was quite valid. On 11th March, 2004, the Government of Orissa, in its Department of Industries, informed IDCO that the Government had been pleased to advise for immediate transfer of acquired land, both Government and private, to Bhushan Limited, after observing all the necessary formalities. However, on 17th March, 2004, Shri Neeraj Singhal, Managing Director of BSSL, wrote to the Principal Secretary, Department of Steel and Mines, contending that Bhushan Limited, as also

BSSL, were entitled to the benefits of the MOU, which had been signed on 15th May, 2002.

13. Within a week thereafter, on 24th March, 2004, IDCO transferred the land for the project at Lapanga to Bhushan Limited and possession thereof was also made over on several dates. On 12th May, 2004, the Ministry of Environment and Forest, Government of India, gave clearance to the project at Rengali in the name of Bhushan Limited. The Chief Inspector of Factories and Boiler, gave approval to the Steam and Feed Water pipe line drawing for Bhushan Limited on 2nd July, 2004. On 3rd September, 2004, the Government of Orissa, in its Ministry of Environment and Forest, granted approval to Bhushan Limited for diversion of 59.16 hectares of forest land for establishment of the integrated steel plant and an agreement was also drawn up between the Government and Bhushan Limited on 17th September, 2004, for drawal of water from the Hirakud Reservoir for use in the proposed integrated steel plant at Lapanga. On 2nd February, 2005, the State Government wrote to Bhushan Limited, seeking the status report of the steel plant project and on 16th March, 2005, permission was granted for provisional energisation of 220 KV line issued by the Chief Electrical Inspector in favour of Bhushan Limited. Several other approvals were granted upto 9th August, 2005, and finally in March, 2005, Bhushan Limited (BPSL) commenced production at its steel plant. On 6th September, 2005, administrative approval was given for acquisition of additional private land for Lapanga plant, granted by the Steel and Mines Department to Bhushan Limited. Similar approval was given in respect of other lands on 28th September, 2005 and 6th February, 2006.

14. Simultaneously, with administrative approval being given for acquisition of private land for the Lapanga plant on 3rd November, 2005, an agreement was entered into between BSSL and the Government of Orissa for putting up the steel plant at Mehramandli. There was no mention of the MOU dated 15th May, 2002, in the said agreement. Within a matter of 10

days, the Directorate of Factories and Boilers wrote to Bhushan Limited granting permission under the Factories Act, 1948, to construct the steel plant at Lapanga.

15. Surprisingly, on 31st December, 2005, the Government of Orissa issued a letter to Bhushan Limited indicating that it had decided not to treat the MOU signed earlier with M/s Bhushan Group of Companies as place specific after the company had been divided into Bhushan Limited (BPSL) and M/s Bhushan Steel and Strips Ltd. (BSSL). The Bhushan Group was informed that the State Government had decided to deal with both the Companies separately and to sign two separate agreements for the purpose of acquiring land, allotting mines and providing other facilities for establishment and growth of steel plants in Orissa.

16. On 9th January, 2006, a letter was addressed by the Directorate of Factories and Boilers to Bhushan Steel Ltd. approving the draft of the steam pipe line and on 13th January, 2006, on the recommendation of the Government of Orissa, the Central Government allotted Bijahan Coal Block in the District of Sundergarh to Bhushan Limited as per the MOU.

17. Even more surprisingly, on 18th January, 2006, the Government of Orissa issued a Show-Cause Notice to Bhushan Limited to appear before the Joint Secretary on 17th February, 2006, for a personal hearing. Several deficiencies in the application for mining lease of iron ore dated 4th December, 2001, in respect of the Thakurani Block A, were also pointed out. Thereafter, the State Government informed the Appellants that their application dated 4th December, 2001, for mining lease over the Thakurani area could not be allowed on various grounds. However, the most significant ground was that the area in question came within the relinquished area of the mining lease of M/s Sharda which was not thereafter thrown open for re-allotment under Rule 59 of the aforesaid Rules. It was alleged that the application made by Bhushan Limited was, therefore, premature. Having rejected the Appellants' prayer for grant of

mining lease, on 9th February, 2006, the Government of Orissa made a recommendation to the Central Government to grant mining lease in favour of M/s Neepaz Metallicks (P) Ltd. in relaxation of Rule 59(1) of the aforesaid Rules, for a period of 30 years.

18. On 28th February, 2006, Bhushan Limited altered its name to Bhushan Power & Steel Ltd. (BPSL).

19. On 8th May, 2006, Bhushan Limited filed Writ Petition No.6646 of 2006 before the Orissa High Court. On the next day, the State Government issued a reminder to Bhushan Limited in regard to its letter dated 31st December, 2005, by which the State Government had asked for a separate MOU from Bhushan Limited, inspite of the MOU already existing between the parties, which had also been acted upon till as late as 26th April, 2006. On 15th May, 2006, the High Court passed an interim order granting status-quo with regard to the applications for mining lease. On 5th September, 2006, an intervention application was filed by BSSL, which was allowed on 6th December, 2006.

20. During the course of hearing of the Writ Petition, the High Court passed an interim order and directed that the problems relating to the Show-Cause Notice dated 18th January, 2006, should be resolved, keeping in view the commitments of the State. On 26th June, 2007, the High Court directed circulation of the order dated 18th June, 2007, and liberty was given to Bhushan Limited to challenge the same by filing an affidavit in the writ proceedings.

21. Such affidavit was duly filed on 10th July, 2007, and the order impugned in the present appeal came to be passed by the High Court on 14th December, 2007, dismissing the aforesaid Writ Petition No.6646 of 2006. The substance of the order of the High Court while dismissing the Writ Petition is :-

(a) The Court cannot set aside the communication of

the State Government asking the Appellants to sign a fresh MOU with the Government as early as possible.

(b) The Appellants' application for grant of mining lease dated 4th December, 2001, should be considered afresh by the appropriate authorities of the State Government in accordance with law, along with other similarly placed applicants.

(c) The Appellants would be at liberty to challenge the subsequent report of the Director of Mines dated 31st May, 2007, in the hearing which would be afforded to the Appellants by the appropriate authority of the State.

(d) The Appellants would be at liberty to challenge the order dated 18th June, 2007, on merits, but it was also submitted that the application for mining lease of the Appellants would be considered after it executed a fresh MOU with the State Government.

22. As indicated hereinbefore, on 21st April, 2008, this Court passed an interim order in the Special Leave Petition filed by Bhushan Limited directing the parties to maintain status-quo with regard to the lands indicated in the application filed by the Appellants for grant of mining lease. However, one of the most significant developments that subsequently took place was that on 15th November, 2011, Shri B.B. Singhal and Shri Neeraj Singhal, Vice-Chairman and Managing Director of Bhushan Steel and Strips Ltd. filed affidavits withdrawing all their claims and rights in the MOU dated 15th May, 2002, executed between the State Government and Bhushan Limited and declaring that the said MOU was and had always been in favour of Bhushan Power & Steel Ltd. The above-named persons also prayed for deletion of their names from the array of parties.

23. Appearing for the Appellants, Mr. Mukul Rohatgi, learned Senior Advocate, pointed out that only two issues arise for the consideration of this Court in the present case, namely -

(a) Whether the Memorandum of Understanding dated 15th May, 2002, continues to subsist in favour of the Appellants?

(b) Whether the State Government is obliged to make recommendations for the grant of iron ore mines in terms of the stipulations contained in the aforesaid MOU dated 15th May, 2002, and whether in respect of the areas which had not been notified under Rule 59(1), the State Government can make a recommendation for relaxation of Rule 59(1) under Rule 59(2)?

24. Mr. Rohatgi submitted that having entered into a Memorandum of Understanding with the Appellant Company and having acted thereupon and having also caused the Appellants to change their position to their detriment, it was not open to the State Government to call upon the Appellants to execute a fresh MOU, during the subsistence of the MOU dated 15th May, 2002.

25. Mr. Rohatgi also submitted that notwithstanding the State Government's requirement that the Appellants should enter into a fresh MOU, the State Government continued to act under the MOU dated 15th May, 2002. Despite the communications dated 10th February, 2004, and 31st December, 2005, above recorded, the State Government went on further to hold that all the steps required to be taken for installation of the steel plant at Lapanga, had been taken, except that it did not comply with the obligations of making recommendations to the Central Government for grant of iron ore mines. Mr. Rohatgi urged that during the pendency of the proceedings, the dispute between the members of the Bhushan Group had been settled and the parties had mutually agreed to withdraw all the allegations and claims relating to the MOU

dated 15th May, 2002. Incidentally, by filing I.A.No.13, BSSL confirmed that Bhushan Power & Steel Ltd. was the sole beneficiary under the MOU dated 15th May, 2002, and withdrew all its claims under the MOU dated 15th May, 2002.

26. Mr. L. Nageshwar Rao, learned Senior Advocate, appearing for the State of Orissa, has also very fairly stated that in view of the settlement of disputes between the members of the Bhushan Group, the issue relating to the MOU did not survive and, since, the State Government had already performed its obligation under the MOU, the only thing remaining to be done by the State is to make recommendations to the Central Government for grant of iron ore mines to the Bhushan Power & Steel Ltd.

27. Mr. Rohatgi submitted that in the changed circumstances, the question of execution of a fresh MOU loses its relevance and the letter dated 31st December, 2005, calling upon the Appellants to execute a fresh MOU, is not required to be given effect to. Consequently, it may be held that the MOU dated 15th May, 2002, continues to be valid and subsisting between the State of Orissa and Bhushan Power & Steel Ltd.

28. On the question of Rule 59 of the MC Rules, which formed the basis of the State Government's decision to reject the Appellants' application for being recommended to the Central Government for grant of a mining lease, Mr. Rohatgi submitted that such recommendations had been made by the State Government in favour of other applicants as well, such as M/s. S.M.C. Power Generation Ltd., M/s. Neepaz Metalics, M/s. Sree Metaliks and M/s. Deepak Steel & Power. Therefore, there was no reason to deny the same benefits to the Appellants as well.

29. Appearing for the Intervener, M/s. Jindal Steels Ltd., Mr. K.V. Vishwanathan, learned Senior Advocate, submitted that so long as any allotment made in favour of the Appellants did not impinge on the allotment made in favour of M/s. Jindal

Steels Ltd., it could have no grievance against a separate allotment being made in favour of the Appellants.

30. The mutual settlement of the disputes between the members of the Bhushan Group has altered the situation considerably, since BSSL has withdrawn its claim under the MOU dated 15th May, 2002, and has declared that the said MOU was and had always been executed by the State Government in favour of Bhushan Power & Steel Ltd., which had set up its steel plant at Lapanga. As indicated hereinbefore, although, the MOU was entered into by the State Government with the Bhushan Group for setting up a steel plant at Lapanga, at a later stage, BSSL also laid claim under the MOU for setting up a separate steel plant at Mehramandali and a suggestion was also made for execution of a fresh MOU between the State Government and BSSL to this effect.

31. Pursuant to the MOU with Bhushan Limited, the State Government had not only allotted land for the setting up of the steel plant at Lapanga, it had even extended all help for the commissioning of the plant, which, in fact, had already started functioning. However, it is the claim made by BSSL under the MOU executed on 15th May, 2002, that had created obstructions in the setting up of the steel plant at Lapanga. Despite having allotted land and granted sanction to Bhushan Limited to take steps for construction of the said plant, it was subsequently contended that the application filed by Bhushan Limited was premature and could not, therefore, be acted upon. Specific instances have been mentioned hereinabove of the steps taken by the various departments in extending cooperation to Bhushan Limited to set up its steel plant at Lapanga. To now turn around and take a stand that the application made by Bhushan Limited was premature, is not only unreasonable, but completely unfair to Bhushan Limited, who have already invested large sums of money in setting up the plant. The State Government had, on its own volition, entered into the MOU with Bhushan Limited on 15th May, 2002,

and had even agreed to request the Central Government to allot mining areas and coal blocks for operating the steel plant. Whatever differences that may have resulted on account of the dispute within the Bhushan Group, which could have led to the rethinking on the part of the State Government, have now been laid to rest by virtue of the settlement arrived at between the Bhushan Limited (now BPSL) and BSSL. The State Government has also accepted the said position. In addition to the above, the action taken by the State Government appears to us to be highly unreasonable and arbitrary and also attracts the doctrine of legitimate expectation. There is no denying the fact that the Appellants have altered their position to their detriment in accordance with the MOU dated 15th May, 2002. Whatever may have been the arrangement subsequently arrived at between the State Government and BSSL, the original MOU dated 15th May, 2002, continued to be in existence and remained operative.

32. The State Government appears to have acted arbitrarily in requiring Bhushan Limited to enter into a separate MOU, notwithstanding the existence of the MOU dated 15th May, 2002, which, as mentioned hereinabove, had been acted upon by the parties.

33. In the light of the above, the High Court erred in holding that it could not interfere with the decision of the State Government calling upon the Appellants to sign a fresh MOU with the Government, during subsistence of the earlier MOU. Since the State Government has already made allotments in favour of others in relaxation of the Mineral Concession Rules, 1960, under Rule 59(2) thereof, no cogent ground had been made out on behalf of the State to deny the said privilege to the Appellants as well.

34. Accordingly, we allow the appeal and set aside the judgment and order of the High Court of Orissa and also the decision of the State Government dated 9th February, 2006, rejecting the Appellant's claim for grant of mining lease. During

the course of hearing, we have been informed that Thakurani Block A has large reserves of iron ore, in which the Appellants can also be accommodated. We, accordingly, direct the State of Orissa to take appropriate steps to act in terms of the MOU dated 15th May, 2002, as also its earlier commitments to recommend the case of the Appellants to the Central Government for grant of adequate iron ore reserves to meet the requirements of the Appellants in their steel plant at Lapanga.

35. There will be no order as to costs.

B.B.B. Appeal allowed

BHAJJU @ KARAN SINGH
v.
STATE OF M.P.
(Criminal Appeal No. 301 of 2008)

MARCH 15, 2012

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

Penal Code, 1860 - s.302 - Murder - Prosecution case that appellant poured kerosene oil on his wife, and set her ablaze with the help of a match stick - Appellant's wife taken to the hospital where she subsequently died - Dying declaration recorded by Executive Magistrate-cum-Tehsildar - Conviction of appellant by Courts below - Challenge to - Held: The dying declaration had been recorded by the competent officer of the executive, duly attested by the doctor and the cross-examination of both these witnesses did not bring out any legal or substantial infirmity in the dying declaration, which could render it inadmissible or unreliable - The statements of the doctor, PW9 and the Investigating Officer, PW10 and the Exhibits including the site plan, post-mortem report etc., which are admissible pieces of substantive evidence, fully corroborated the dying declaration - If deceased had poured kerosene oil on herself, then in the normal course; a) there could not be bleeding wounds on her body, b) broken bangles could not have been recovered from the site, in question and c) she could not have suffered injuries on her hands and arms - All these factors show struggle before death and this indication is further strengthened by the fact that lower part of her body had suffered greater burn injury, than the upper part - Conviction accordingly confirmed.

Evidence Act, 1872 - s.32 - Dying declaration - Appreciation of - Held: If the dying declaration has been recorded in accordance with law, is reliable and gives a cogent

and possible explanation of the occurrence of the events, then the dying declaration can certainly be relied upon by the Court and could form the sole piece of evidence resulting in the conviction of the accused - The first attempt of the court has to be, to rely upon the dying declaration, whether corroborated or not, unless it suffers from certain infirmities, is not voluntary and has been produced to overcome the laches in the investigation of the case - There has to be a very serious doubt or infirmity in the dying declaration for the courts to not rely upon the same - If it falls in that class of cases, the dying declaration cannot form the sole basis of conviction.

Evidence Act, 1872 - s.32 - Dying declaration - Appreciation of - Distinction between principles governing evaluation of a dying declaration under the English law and the Indian law - Held: Under the English law, credence and relevancy of a dying declaration is only when the person making such a statement is in hopeless condition and expecting an imminent death - So under the English law, for its admissibility, the declaration should have been made in the actual danger of death and when the declarant should have had a full apprehension that his death would ensue - However, under the Indian law, the dying declaration is relevant, whether the person who makes it was or was not under expectation of death at the time of such declaration.

Witness - Hostile witness - Admissibility of evidence of such witness - Held: Evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident - The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence - But the court will always have to take a very cautious decision while referring to the statements of such witnesses who turn hostile or go back from their earlier statements recorded, particularly,

under Section 164 Cr.P.C. - What value should be attached and how much reliance can be placed on such statement is a matter to be examined by the Courts with reference to the facts of a given case.

The prosecution case was that appellant poured kerosene oil on his wife when she was cleaning the kitchen, and set her ablaze with the help of a match stick. The appellant's wife was admitted in the hospital with 60 % burn injuries where she subsequently died. Her dying declaration was recorded by the Executive Magistrate-cum-Tehsildar (PW5). The trial court disbelieved the defence plea of the appellant-accused that his wife had accidentally caught fire and got burnt while she was preparing food, and convicted him under Section 302 IPC and awarded him rigorous imprisonment for life. The High Court affirmed the conviction and sentence.

In the instant appeal, the primary contention raised on behalf of the accused was that the dying declaration, Ex. P4 being the sole piece of evidence, could not be relied upon; that there was no evidence corroborating Ex.P4 and as such, the concurrent judgments of conviction were unsustainable.

Dismissing the appeal, the Court

HELD: 1. It is a matter of common prudence that a person who had been burnt and was having 60 per cent burn injuries would not be able to go to the hospital on her own and somebody must have taken her to the hospital. According to the prosecution, PW3 and PW2, had reached the spot and had taken the deceased to the hospital. Thus, they were the first persons whom the deceased met and as per the case of the prosecution, she had told them that the appellant had poured kerosene on her and set her ablaze. At the hospital, she was examined by Dr. PW9, who in his statement had

recorded that he had examined the deceased and she had as many as 10 injuries on her body and that some wounds on her body were bleeding. According to the said doctor, these injuries could have been caused by a Kada or some sharp object. The burn injuries were found to be 60 per cent. The person was burnt with kerosene oil. Lower parts of her body were burnt. Her left hand was burnt, right hand and arm were also burnt. He further stated that the statement of the deceased was recorded by the Tehsildar, on which she had put her thumb impression and that the dying declaration also had been written by the doctor declaring that she was in full senses to make the statement. In his cross-examination, this witness clearly stated that the blouse that deceased was wearing was smelling of kerosene oil. Thus, the doctor is a witness to the dying declaration as well as to the condition and cause of death of the deceased. [Para 4] [53-D-H; 54-A-B]

2. PW5 is the Tehsildar who recorded the dying declaration of the deceased. When he appeared as a witness, he admitted to having recorded the dying declaration of the deceased, which bore his signatures at A to A of Exhibit P4 and recording was in his hand-writing of what was stated by deceased and that he added or subtracted nothing from what she had stated. Nothing material could be brought out during the lengthy cross-examination of this witness. Thus, the dying declaration had been recorded by the competent officer of the executive, duly attested by the doctor and the cross-examination of both these witnesses did not bring out any legal or substantial infirmity in the dying declaration of the deceased, which could render it inadmissible or unreliable. [Para 5] [54-B-D]

3. The post mortem of the body of the deceased was performed by Dr. PW10, and his report is Exhibit P15

which confirms the burn injuries and the death being due to these injuries. There is evidence which clearly shows that she tried to fight before she succumbed to the burn assault by the appellant/accused. In that process, her bangles were broken which were recovered vide Exhibit P6 from the site and she also suffered injuries which were bleeding when she was examined by PW9. Other recoveries were also made from the site, which evidences that the occurrence took place in the manner as stated by the deceased. It is a common behaviour that if a person is pouring kerosene on herself then the maximum kerosene will be poured on the head, face and upper parts of the body and lesser amount will reach the lower parts of the body and clothes. Contrary to this, the lower half of the body of the deceased had received more burn injuries than her upper part. [Para 6] [54-F-H; 55-A]

4. The incident in question is stated to have occurred on 12th September, 1995. Exhibit D1 is the affidavit stated to have been sworn by the deceased on 30th September, 1995 while she died on 17th October, 1995. In this affidavit, which is the backbone of the defence, it was stated that at the time of swearing-in of the affidavit in the Medical College, the deceased was more or less healthy in all respects. If one has to even remotely believe that Exhibit D1 could be executed by her, then on the photograph annexed to it, not even a single burn injury on her face and upper part of the body is visible. If this photograph is of a date prior to the incident then there was no occasion for the appellant/accused or the Oath Commissioner attesting the affidavit to affix this photograph on this affidavit. This document, thus, appears to have been created and is, thus, incapable of being relied upon by the Court. [Paras 2, 3, 6] [51-F; 53-A-B; 55-A-C]

5. Besides recording of Exhibit P4, two other

statements of the deceased were also recorded. Both of them were recorded by the Police Officers on different occasions. Firstly, Exhibit P16 was the statement recorded immediately after the occurrence on 12th September, 1995, on the basis of which FIR, Ext. P-17, was registered and thereafter Exhibit P18, the statement of the deceased under Section 161 of the Cr. P.C. was recorded, that too, on 12th September, 1995. Exhibit P16 and P18 may, by themselves, not carry much evidentiary value but they definitely have the same version as was recorded by PW11, the Tehsildar in Exhibit P4, the dying declaration, which is not only admissible in evidence but is reliable, coherent and in conformity with the requirements of law. [Para 7] [55-D-F]

6. This is not a case where the dying declaration, Ex.P4, is the only evidence against the appellant/accused or that whatever is stated in it, is not partially or otherwise supported by other evidence given the fact that there is no dispute to the occurrence in question, the statements of the doctor, PW9 and the Investigating Officer, PW10 and the Exhibits including the site plan, post-mortem report etc., which are admissible pieces of substantive evidence, fully corroborate the dying declaration. If the deceased had poured kerosene oil on herself, then in the normal course; a) there could not be bleeding wounds on her body, b) broken bangles could not have been recovered from the site, in question and c) she could not have suffered injuries on her hands and arms. All these factors show struggle before death and this indication is further strengthened by the fact that lower part of her body had suffered greater burn injury, than the upper part. [Para 9] [55-G-H; 56-A-C]

7.1. The law is very clear that if the dying declaration has been recorded in accordance with law, is reliable and gives a cogent and possible explanation of the

occurrence of the events, then the dying declaration can certainly be relied upon by the Court and could form the sole piece of evidence resulting in the conviction of the accused. This Court has clearly stated the principle that Section 32 of the Indian Evidence Act, 1872 is an exception to the general rule against the admissibility of hearsay evidence. Clause (1) of Section 32 makes the statement of the deceased admissible, which is generally described as a 'dying declaration'. The 'dying declaration' essentially means the statement made by a person as to the cause of his death or as to the circumstances of the transaction resulting into his death. The admissibility of the dying declaration is based on the principle that the sense of impending death produces in a man's mind, the same feeling as that the conscientious and virtuous man under oath. The dying declaration is admissible upon the consideration that the declaration was made in extremity, when the maker is at the point of death and when every hope of this world is gone, when every motive to file a false suit is silenced in the mind and the person deposing is induced by the most powerful considerations to speak the truth. Once the Court is satisfied that the declaration was true and voluntary, it undoubtedly can base its conviction on the dying declaration, without requiring any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated by other evidence. [Para 10] [56-D-H; 57-A-B]

7.2. There is a clear distinction between the principles governing the evaluation of a dying declaration under the English law and the Indian law. Under the English law, credence and relevancy of a dying declaration is only when the person making such a statement is in hopeless condition and expecting an imminent death. So under the English law, for its admissibility, the declaration should have been made when in the actual danger of death and

that the declarant should have had a full apprehension that his death would ensue. However, under the Indian law, the dying declaration is relevant, whether the person who makes it was or was not under expectation of death at the time of such declaration. The dying declaration is admissible not only in the case of homicide but also in civil suits. The admissibility of a dying declaration rests upon the principle of nemo meritorious praesumuntur mentiri (a man will not meet his maker with a lie in his mouth) [Para 11] [57-B-E]

7.3. The law is well-settled that a dying declaration is admissible in evidence and the admissibility is founded on the principle of necessity. A dying declaration, if found reliable, can form the basis of a conviction. A Court of facts is not excluded from acting upon an uncorroborated dying declaration for finding conviction. The dying declaration, as a piece of evidence, stands on the same footing as any other piece of evidence. It has to be judged and appreciated in light of the surrounding circumstances and its weight determined by reference to the principle governing the weighing of evidence. If in a given case a particular dying declaration suffers from any infirmity, either of its own or as disclosed by the other evidence adduced in the case or the circumstances coming to its notice, the Court may, as a rule of prudence, look for corroboration and if the infirmities are such as would render a dying declaration so infirm that it pricks the conscience of the Court, the same may be refused to be accepted as forming basis of the conviction. [Para 12] [57-E-H; 58-A]

7.4. Another consideration that may weigh with the Court, of course with reference to the facts of a given case, is whether the dying declaration has been able to bring a confidence thereupon or not, is it trust-worthy or is merely an attempt to cover up the latches of investigation. It must allure the satisfaction of the Court

that reliance ought to be placed thereon rather than distrust. [Para 13] [58-B-C]

7.5. The first attempt of the court has to be, to rely upon the dying declaration, whether corroborated or not, unless it suffers from certain infirmities, is not voluntary and has been produced to overcome the latches in the investigation of the case. There has to be a very serious doubt or infirmity in the dying declaration for the courts to not rely upon the same. Of course, if it falls in that class of cases, the dying declaration cannot form the sole basis of conviction. However, that is not the case here. [Para 17] [61-E-F]

Ravikumar @ Kutti Ravi v. State of Tamil Nadu **(2006) 9 SCC 240;** *Vikas and Others v. State of Maharashtra,* **(2008) 2 SCC 516 : 2008 (1) SCR 933;** *Kishan Lal v. State of Rajasthan* **(2000) 1 SCC 310 : 1999 (1) Suppl. SCR 517;** *Laxmi (Smt.) v. Om Prakash & Ors.* **(2001) 6 SCC 118 : 2001 (3) SCR 777;** *Panchdeo Singh v. State of Bihar* **(2002) 1 SCC 577 : 2001 (5) Suppl. SCR 503;** *Jaishree Anant Khandekar v. State of Maharashtra* **(2009) 11 SCC 647 : 2009 (4) SCR 992 and** *Muthu Kutty and Another v. State by Inspector of Police, T.N.* **(2005) 9 SCC 113 : 2004 (6) Suppl. SCR 222 - relied on.**

Munnu Raja and Another v. The State of Madhya Pradesh **- (1976) 3 SCC 104: 1976 (2) SCR 764 - referred to.**

8.1. It was also vehemently argued that the two main witnesses PW2 and PW3 as well as the brother of the deceased PW4, had turned hostile and, therefore, the case of the prosecution has no legs to stand, much less that they have proved their case beyond any reasonable doubt. This submission is without any merit. Firstly, there is no witness to the dying declaration who has turned hostile. None of the witnesses, i.e. PW2 to PW4, were

witnesses to or were even remotely involved in the recording of the three different dying declarations, i.e. Ex.P4, P16 and P18. None of the witnesses or the authorities involved in the recording of the dying declaration had turned hostile. On the contrary, they have fully supported the case of the prosecution and have, beyond reasonable doubt, proved that the dying declaration is reliable, truthful and was voluntarily made by the deceased. The dying declaration can be acted upon without corroboration and can be made the basis of conviction. [Para 18] [61-G-H; 62-A-B, C-D]

8.2. Normally, when a witness deposes contrary to the stand of the prosecution and his own statement recorded under Section 161 of the Cr.P.C., the prosecutor, with the permission of the Court, can pray to the Court for declaring that witness hostile and for granting leave to cross-examine the said witness. If such a permission is granted by the Court then the witness is subjected to cross-examination by the prosecutor as well as an opportunity is provided to the defence to cross-examine such witnesses, if he so desires. In other words, there is a limited examination-in-chief, cross-examination by the prosecutor and cross-examination by the counsel for the accused. It is admissible to use the examination-in-chief as well as the cross-examination of the said witness in so far as it supports the case of the prosecution. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. Section 154 of the Act enables the Court, in its discretion, to permit the person, who calls a witness, to put any question to him

which might be put in cross-examination by the adverse party. The view that the evidence of the witness who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The Courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now a settled cannon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution. [Para 19] [63-A-G]

8.3. PW2 and PW3 were the persons who had met the deceased first after she was put on fire. They were not the eye-witnesses to the occurrence. It is an admitted case that they were the first persons to meet the deceased after she suffered the burn injuries and had taken her to the hospital. This was their consistent version when stated before the police and even before the court. Contrary to their statement made to the Investigating Agency, in the Court, they made a statement that the deceased had told them that she had caught fire by chimney and her burn injuries were accidental. This was totally contrary to their version given to the police where they had stated that she had told them that the appellant had poured kerosene on her and put her on fire. To the extent that their earlier version is consistent with the story of the prosecution, it can safely be relied upon by the prosecution and court. The later part of their statement, in cross-examination done either by the accused or by the prosecution, would not be of any advantage to the case of the prosecution. However, the accused may refer thereto. But the court will always have to take a very cautious decision while referring to the statements of such witnesses who turn hostile or go back from their earlier statements recorded, particularly, under Section 164 of the Cr.P.C. What value should be attached

and how much reliance can be placed on such statement is a matter to be examined by the Courts with reference to the facts of a given case. [Para 20] [64-B-G]

8.4. PW4, brother of the deceased, is another witness who has made an attempt to help the accused. He stated that deceased had died and appellant was his brother-in-law and she got burnt while cooking food and that deceased had told him that appellant used to keep her nicely. Firstly, it must be noticed that all these witnesses who had turned hostile or attempted to support the accused are the neighbours or close relations of the deceased and also that of the appellant/accused. Their somersault appears to be founded on the consideration of saving a relation from receiving punishment at the hands of justice. They appear to have lied before this Court, more out of sympathy for the appellant/accused. The very opening part of the statement of PW4, where he says "Medabai mari ja chuki hai" and "Medabai ko khana pakate samay aag lagi thi" is sufficient indicator of his sympathy and the fact that his sister has already died and that he would not like to lose his brother-in-law and secondly, that it is also not clear from his statement as to who told him that deceased had caught fire while cooking. [Para 21] [64-G-H; 65-A-C]

8.5. These are matters of serious consequences and render the statement of all these three witnesses unreliable and undependable. Thus, these statements this Court would refer and rely (examination-in-chief) only to the extent they support the case of the prosecution and are duly corroborated, not only by other witnesses but even by the dying declaration and the medical evidence. [Para 22] [65-D-E]

Koli Lakhmanbhai Chanabhai v. State of Gujarat **(1999) 8 SCC 624;** *Prithi v. State of Haryana* **- (2010) 8 SCC 536 : 2010 (9) SCR 33;** *Sidhartha Vashisht @ Manu Sharma v.*

State (NCT of Delhi) **- (2010) 6 SCC 1 : 2010 (4) SCR 103;** *Ramkrushna v. State of Maharashtra* **-(2007) 13 SCC 525 : 2007 (5) SCR 818- relied on.**

9. Coming to the credibility of the defence witnesses, Ex.D1 is a document created by the defence just to escape the punishment under law. If that is what the deceased wanted to say, she had a number of opportunities to say so, freely and voluntarily. However, in presence of the Tehsildar and twice in presence of the Police, she made the same statement implicating her husband appellant of pouring kerosene oil on her and putting her on fire. Where was the necessity of typing an affidavit and getting the same thumb-marked by the deceased when she was suffering 60% burn injuries. If the version given in this affidavit was true, there is no reason why the deceased should have stated before the police and the Tehsildar what she did. The two defence witnesses, namely DW1 and DW2, were examined by the defence to prove its innocence. DW1, the Notary Public, does not state as to where, when and at whose instance the affidavit was typed. This witness has completely failed to explain as to why the photograph of the deceased was fixed on the affidavit. If it was the requirement of law, then why the photograph of a date prior to the date on which the affidavit was sworn and attested, was affixed on the affidavit. This witness also admitted in his cross-examination that he knew that the affidavit was being sworn for belying a statement made earlier, but he made no enquiries from the deceased or from any other proper quarters to find out what was the previous statement of the deceased. It will not be safe for the Court to rely on the statement of this witness. A Notary Public is expected to maintain better professional standards rather than act at the behest of a particular party.

DW2, is the person who had typed the affidavit,

Ex.D1. He knew the deceased. According to this witness, the contents were typed on the basis of what deceased had stated. There are contradictions between the statements of DW1 and DW2. It cannot be said that these witnesses are reliable and their statements are trustworthy. [Para 23] [65-E-H; 66-A-D]

Case Law Reference:

(2006) 9 SCC 240	**relied on**	**Para 14**
2008 (1) SCR 933	**relied on**	**Para 14**
1999 (1) Suppl. SCR 517	**relied on**	**Para 14**
2001 (3) SCR 777	**relied on**	**Para 14**
2001 (5) Suppl. SCR 503	**relied on**	**Para 14**
2009 (4) SCR 992	**relied on**	**Para 15**
2004 (6) Suppl. SCR 222	**relied on**	**Para 16**
1976 (2) SCR 764	**referred to**	**Para 18**
(1999) 8 SCC 624	**relied on**	**Para 19**
2010 (9) SCR 33	**relied on**	**Para 19**
2010 (4) SCR 103	**relied on**	**Para 19**
2007 (5) SCR 818	**relied on**	**Para 19**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 301 of 2008.

From the Judgment & Order dated 7.8.2007 of the High Court of Madhya Pradesh at Jabalpur in CRLA No. 634 of 1998.

S.K. Choudhary, Daya Krishan Sharma for the Appellant.

Vibha Datta Makhija for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The present appeal is directed against the judgment of conviction and order of sentence dated 9th February, 1998 passed by the Court of Sessions Judge, Tikamgarh and affirmed by the High Court of Madhya Pradesh, Bench at Jabalpur, vide its judgment dated 7th August, 2007.

2. The facts giving rise to the present appeal fall within a very narrow compass and are being stated at the very outset. Bhajju @ Karan Singh, the appellant herein, was married to Medabai, the deceased, and was living in Niwadi, District Tikamgarh, Madhya Pradesh. Bhajju had doubts about the chastity of his wife and often used to accuse her of having illicit relations with one Ramdas. According to the appellant, she also had a lose temper and on one occasion, she had left their one month old child on a platform and had gone to her parental house along with her son, Harendra, aged about four years. It is stated that he had even reported this incident at the Police Station, Niwadi, on 2nd September, 1995. On the other hand, the prosecution has alleged that besides accusing the deceased of having illicit relations, he used to ill-treat her and even question the paternity of the children born out of the wedlock. In fact, on the evening before the incident in question, he had beaten his wife with slipper. On 12th September, 1995, at about 7.00 a.m., when she was cleaning the kitchen, Bhajju poured kerosene oil on her and set her ablaze with the help of a match stick. She raised hue and cry. Ayub (PW3) and Pratap (PW2) from the neighbourhood reached the spot. They took her to the hospital in the taxi where she was examined by Dr. Suresh Sharma (PW9), vide report Exhibit 14. Dehati Nalishi, Exhibit P16 was recorded on the basis of which FIR Exhibit P14 was recorded and a case was registered under Section 307 of the Indian Penal Code, 1860 (IPC). She was admitted to the hospital and was found to be having 60 per cent burn injuries and her blouse was smelling of kerosene oil at that time. Her dying declaration was recorded by the Executive Magistrate-cum-Tehsildar at about 9.10 a.m. vide Exhibit P4.

She succumbed to the burn injuries and died on 17th October, 1995. A case under Section 302 IPC was registered against the appellant-accused. After registration of the case, the Investigating Officer prepared the inquest report. Post mortem was performed and the cause of death was opined to be extensive burn injuries. During the investigation, statements of other witnesses including Pratap, Ayub and Lakhanpal (PW-1) were recorded and the site plan was prepared. Certain items were recovered from the site like broken bangles, match box, half burnt match sticks, clothes of the deceased, kerosene oil container, etc. Based on the ocular and documentary evidence, the Investigating Officer filed the charge-sheet before the court of competent jurisdiction. The appellant-accused was committed to the Court of Sessions where he was tried. The appellant put up the defence that because of her illicit relationship with Ramdas, their neighbor, and her arrogant attitude, the deceased was a difficult person to live with. However, on 12.9.1995, she accidentally caught fire and got burnt while she was preparing the food. As a result, she died and the accused was innocent. Disbelieving the defence of the accused and forming an opinion that the prosecution has been able to prove its case beyond reasonable doubt, the learned Sessions Judge convicted the accused for the offence under Section 302 IPC and awarded him rigorous imprisonment for life vide his judgment dated 9th February, 1998. This was challenged before the High Court. The High Court affirmed the judgment of conviction and order of sentence passed by the learned trial court and dismissed the appeal of the appellant/ accused, giving rise to the present appeal.

3. Not only the facts of this case but also the legal issues involved herein fall in a narrow compass. It is for the reason that the incident in question is not disputed. Pratab (PW-2), Ayub (PW-3) and Lakhanpal (PW-1) , who were later declared hostile by the prosecution and subjected to cross-examination had stated that the deceased had got burnt accidentally while she was cooking food. They have denied any involvement of the

appellant/accused as well as the fact that the deceased had told them that the appellant/accused had burnt her by pouring kerosene oil on her. Furthermore, Exhibit D1 is the affidavit stated to have been sworn by the deceased on 30th September, 1995 while she died on 17th October, 1995. In this affidavit, which is the backbone of the defence, a similar stand has been taken by the deceased, Medabai. In this affidavit, it was stated that at the time of swearing-in of the affidavit in the Medical College, she was more or less healthy in all respects. The appellant/accused in his statement under Section 313 of the Criminal Procedure Code, 1973 (for short 'Cr.P.C.') has given the usual reply that he knows nothing and that he was not present at his residence at the time of the occurrence.

4. Before we comment upon this defence and the evidentiary value of Exhibit D1, it will be appropriate to examine the case of the prosecution. The FIR, Ext P-17 itself was registered on the basis of a statement made by the deceased referred as Dehati Nalishi, Exhibit P-16, and a case was registered under Section 307 IPC. It is a matter of common prudence that a person who had been burnt and was having 60 per cent burn injuries would not be able to go to the hospital on her own and somebody must have taken her to the hospital. According to the prosecution, PW3 and PW2, had reached the spot and had taken the deceased to the hospital. Thus, they were the first persons whom the deceased met and as per the case of the prosecution, she had told them that Bhajju had poured kerosene on her and set her ablaze. At the hospital, she was examined by Dr. Suresh Sharma, PW9, who in his statement had recorded that he has examined the deceased and she had as many as 10 injuries on her body and that some wounds on her body which were bleeding. According to the said doctor, these injuries could have been caused by a Kada or some sharp object. The burn injuries were found to be 60 per cent. The person was burnt with kerosene oil. Lower parts of her body were burnt. Her left hand was burnt, right hand and arm were also burnt. He further stated that the statement of the

deceased was recorded by the Tehsildar, on which she had put her thumb impression and that the dying declaration also had been written by the doctor declaring that she was in full senses to make the statement. In his cross-examination, this witness clearly stated that the blouse that Medabai was wearing was smelling of kerosene oil. Thus, the doctor is a witness to the dying declaration as well as to the condition and cause of death of the deceased.

5. PW5, Vijay Kumar is the Tehsildar who recorded the dying declaration of the deceased. When he appeared as a witness, he admitted to having recorded the dying declaration of the deceased, which bore his signatures at A to A of Exhibit P4 and recording was in his hand-writing of what was stated by Medabai and that he added or subtracted nothing from what she had stated. Nothing material could be brought out during the lengthy cross-examination of this witness. Thus, the dying declaration had been recorded by the competent officer of the executive, duly attested by the doctor and the cross-examination of both these witnesses did not bring out any legal or substantial infirmity in the dying declaration of the deceased, which could render it inadmissible or unreliable.

6. The post mortem of the body of the deceased was performed by Dr. S.K. Khare, PW10, and his report is Exhibit P15 which confirms the burn injuries and the death being due to these injuries. There is evidence which clearly shows that she tried to fight before she succumbed to the burn assault by the appellant/accused. In that process, her bangles were broken which were recovered vide Exhibit P6 from the site and she also suffered injuries which, as already noticed, were bleeding when she was examined by Dr. Suresh Sharma, PW9. Other recoveries were also made from the site, which evidences that the occurrence took place in the manner as stated by the deceased. It is a common behaviour that if a person is pouring kerosene on herself then the maximum kerosene will be poured on the head, face and upper parts of the body and lesser

amount will reach the lower parts of the body and clothes. Contrary to this, the lower half of the body of the deceased had received more burn injuries than her upper part and, in fact, if one has to even remotely believe that Exhibit D1 could be executed by her, then on the photograph annexed to it, not even a single burn injury on her face and upper part of the body is visible. If this photograph is of a date prior to the incident then there was no occasion for the appellant/accused or the Oath Commissioner attesting the affidavit to affix this photograph on this affidavit. This document, thus, appears to have been created and is, thus, incapable of being relied upon by the Court.

7. Besides recording of Exhibit P4, two other statements of the deceased were also recorded. Both of them were recorded by the Police Officers on different occasions. Firstly, as already noted, Exhibit P16 was the statement recorded immediately after the occurrence on 12th September, 1995, on the basis of which FIR, Ext. P-17, was registered and thereafter Exhibit P18, the statement of the deceased under Section 161 of the Cr. P.C. was recorded, that too, on 12th September, 1995. Exhibit P16 and P18 may, by themselves, not carry much evidentiary value but they definitely have the same version as was recorded by PW11, the Tehsildar in Exhibit P4, the dying declaration, which is not only admissible in evidence but is reliable, coherent and in conformity with the requirements of law.

8. The primary contention raised on behalf of the accused is that the dying declaration, Ex. P4 being the sole piece of evidence, cannot be relied upon by the courts. There is no evidence corroborating Ex.P4. As such, the concurrent judgments of conviction are unsustainable.

9. Firstly, we must notice that this is not a case where the dying declaration, Ex.P4, is the only evidence against the appellant/accused or that whatever is stated in it, is not partially or otherwise supported by other evidence given the fact that there is no dispute to the occurrence in question, the statements

of the doctor, PW9 and the Investigating Officer, PW10 and the Exhibits including the site plan, post-mortem report etc., which are admissible pieces of substantive evidence, fully corroborate the dying declaration. If the deceased had poured kerosene oil on herself, then in the normal course; a) there could not be bleeding wounds on her body, b) broken bangles could not have been recovered from the site, in question and c) she could not have suffered injuries on her hands and arms. All these factors show struggle before death and this indication is further strengthened by the fact that lower part of her body had suffered greater burn injury, than the upper part. Had that been the case, then alone the case of the defence could be considered by this Court, even as a remote probability. That certainly is not the situation in the present case.

10. The law is very clear that if the dying declaration has been recorded in accordance with law, is reliable and gives a cogent and possible explanation of the occurrence of the events, then the dying declaration can certainly be relied upon by the Court and could form the sole piece of evidence resulting in the conviction of the accused. This Court has clearly stated the principle that Section 32 of the Indian Evidence Act, 1872 (for short 'the Act') is an exception to the general rule against the admissibility of hearsay evidence. Clause (1) of Section 32 makes the statement of the deceased admissible, which is generally described as a 'dying declaration'. The 'dying declaration' essentially means the statement made by a person as to the cause of his death or as to the circumstances of the transaction resulting into his death. The admissibility of the dying declaration is based on the principle that the sense of impending death produces in a man's mind, the same feeling as that the conscientious and virtuous man under oath. The dying declaration is admissible upon the consideration that the declaration was made in extremity, when the maker is at the point of death and when every hope of this world is gone, when every motive to file a false suit is silenced in the mind and the person deposing is induced by the most powerful

considerations to speak the truth. Once the Court is satisfied that the declaration was true and voluntary, it undoubtedly can base its conviction on the dying declaration, without requiring any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated by other evidence.

11. There is a clear distinction between the principles governing the evaluation of a dying declaration under the English law and the Indian law. Under the English law, credence and relevancy of a dying declaration is only when the person making such a statement is in hopeless condition and expecting an imminent death. So under the English law, for its admissibility, the declaration should have been made when in the actual danger of death and that the declarant should have had a full apprehension that his death would ensue. However, under the Indian law, the dying declaration is relevant, whether the person who makes it was or was not under expectation of death at the time of such declaration. The dying declaration is admissible not only in the case of homicide but also in civil suits. The admissibility of a dying declaration rests upon the principle of *nemo meritorious praesumuntur mentiri* (a man will not meet his maker with a lie in his mouth)

12. The law is well-settled that a dying declaration is admissible in evidence and the admissibility is founded on the principle of necessity. A dying declaration, if found reliable, can form the basis of a conviction. A Court of facts is not excluded from acting upon an uncorroborated dying declaration for finding conviction. The dying declaration, as a piece of evidence, stands on the same footing as any other piece of evidence. It has to be judged and appreciated in light of the surrounding circumstances and its weight determined by reference to the principle governing the weighing of evidence. If in a given case a particular dying declaration suffers from any infirmity, either of its own or as disclosed by the other evidence adduced in the case or the circumstances coming to its notice,

the Court may, as a rule of prudence, look for corroboration and if the infirmities are such as would render a dying declaration so infirm that it pricks the conscience of the Court, the same may be refused to be accepted as forming basis of the conviction.

13. Another consideration that may weigh with the Court, of course with reference to the facts of a given case, is whether the dying declaration has been able to bring a confidence thereupon or not, is it trust-worthy or is merely an attempt to cover up the latches of investigation. It must allure the satisfaction of the Court that reliance ought to be placed thereon rather than distrust.

14. In regard to the above stated principles, we may refer to the judgments of this Court in the cases of *Ravikumar @ Kutti Ravi v. State of Tamil Nadu* (2006) 9 SCC 240, *Vikas and Others v. State of Maharashtra* (2008) 2 SCC 516, *Kishan Lal v. State of Rajasthan* (2000) 1 SCC 310, *Laxmi (Smt.) v. Om Prakash & Ors.* (2001) 6 SCC 118, *Panchdeo Singh v. State of Bihar* (2002) 1 SCC 577.

15. In the case of *Jaishree Anant Khandekar v. State of Maharashtra* (2009) 11 SCC 647, discussing the contours of the American Law in relation to the 'dying declaration' and its applicability to the Indian law, this Court held as under: -

> "24. Apart from an implicit faith in the intrinsic truthfulness of human character at the dying moments of one's life, admissibility of dying declaration is also based on the doctrine of necessity. In many cases victim is the only eyewitness to a crime on him/her and in such situations exclusion of the dying declaration, on hearsay principle, would tend to defeat the ends of justice.
>
> 25. American law on dying declaration also proceeds on the twin postulates of certainty of death leading to an intrinsic faith in truthfulness of human character and the

necessity principle. On certainty of death, the same strict test of English law has been applied in American jurisprudence. The test has been variously expressed as "no hope of recovery", "a settled expectation of death". The core concept is that the expectation of death must be absolute and not susceptible to doubts and there should be no chance of operation of worldly motives."

16. It will also be of some help to refer to the judgment of this Court in the case of *Muthu Kutty and Another v. State by Inspector of Police, T.N.,* (2005) 9 SCC 113 where the Court, in paragraph 15, held as under:-

"15. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of the deceased was not as a result of either tutoring, or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in *Paniben v. State of Gujarat* [(1992) 2 SCC 474 : 1992 SCC (Cri) 403 : AIR 1992 SC 1817] (SCC pp. 480-81, paras 18-19)

(i) There is neither rule of law nor of prudence that

dying declaration cannot be acted upon without corroboration. (See *Munnu Raja v. State of M.P.*)

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (See *State of U.P. v. Ram Sagar Yadav and Ramawati Devi v. State of Bihar.*)

(iii) The Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. (See *K. Ramachandra Reddy v. Public Prosecutor*)

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. (See *Rasheed Beg v. State of M.P.*)

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (See *Kake Singh v. State of M.P.*)

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (See *Ram Manorath v. State of U.P.*)

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (See *State of Maharashtra v. Krishnamurti Laxmipati Naidu.*)

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (See *Surajdeo Ojha v. State of Bihar.*)

(ix) Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying

declaration look up to the medical opinion. But where the eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. (See *Nanhau Ram v. State of M.P.*)

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (See *State of U.P. v. Madan Mohan.*)

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. (See *Mohanlal Gangaram Gehani v. State of Maharashtra.*)"

17. Learned counsel for the parties have relied upon the judgments in the case of *Ravikumar @ Kutti Ravi* (supra), *Kishan Lal* (supra); *Laxmi (Smt.)* (supra),; *Panchdeo Singh* (supra). These judgments do not set any other principle than what we have already spelt above. The first attempt of the court has to be, to rely upon the dying declaration, whether corroborated or not, unless it suffers from certain infirmities, is not voluntary and has been produced to overcome the latches in the investigation of the case. There has to be a very serious doubt or infirmity in the dying declaration for the courts to not rely upon the same. Of course, if it falls in that class of cases, we have no doubt in our minds that the dying declaration cannot form the sole basis of conviction. However, that is not the case here.

18. Then, it was also vehemently argued that the two main witnesses PW2 and PW3 as well as the brother of the deceased PW4, had turned hostile and, therefore, the case of the prosecution has no legs to stand, much less that they have proved their case beyond any reasonable doubt. This

submission looks to be attractive at the first glance but when examined in depth, is without any merit. Firstly, there is no witness to the dying declaration who has turned hostile. None of the witnesses, i.e. PW2 to PW4, were witnesses to or were even remotely involved in the recording of the three different dying declarations, i.e. Ex.P4, P16 and P18. Reliance by the learned counsel appearing for the appellant/accused upon the judgment of this Court in the case of *Munnu Raja and Another v. The State of Madhya Pradesh* (1976) 3 SCC 104 to contend that a dying declaration cannot be corroborated by the testimony of hostile witnesses is hardly of any help. As already noticed, none of the witnesses or the authorities involved in the recording of the dying declaration had turned hostile. On the contrary, they have fully supported the case of the prosecution and have, beyond reasonable doubt, proved that the dying declaration is reliable, truthful and was voluntarily made by the deceased. We may also notice that this very judgment relied upon by the accused itself clearly says that the dying declaration can be acted upon without corroboration and can be made the basis of conviction. Paragraph 6 of the said judgment reads as under:-

"6……It is well settled that though a dying declaration must be approached with caution for the reason that the maker of the statement cannot be subject to cross-examination, there is neither a rule of law nor a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated (see *Khushal Rao v. State of Bombay*). The High Court, it is true, has held that the evidence of the two eyewitnesses corroborated the dying declarations but it did not come to the conclusion that the dying declarations suffered from any infirmity by reason of which it was necessary to look out for corroboration."

19. Now, we shall discuss the effect of hostile witnesses as well as the worth of the defence put forward on behalf of the

appellant/accused. Normally, when a witness deposes contrary to the stand of the prosecution and his own statement recorded under Section 161 of the Cr.P.C., the prosecutor, with the permission of the Court, can pray to the Court for declaring that witness hostile and for granting leave to cross-examine the said witness. If such a permission is granted by the Court then the witness is subjected to cross-examination by the prosecutor as well as an opportunity is provided to the defence to cross-examine such witnesses, if he so desires. In other words, there is a limited examination-in-chief, cross-examination by the prosecutor and cross-examination by the counsel for the accused. It is admissible to use the examination-in-chief as well as the cross-examination of the said witness in so far as it supports the case of the prosecution. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. Section 154 of the Act enables the Court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party. The view that the evidence of the witness who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The Courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now a settled cannon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution. These principles have been encompassed in the judgments of this Court in the cases :

a. *Koli Lakhmanbhai Chanabhai v. State of Gujarat* (1999) 8 SCC 624

b. *Prithi v. State of Haryana* (2010) 8 SCC 536

c. *Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi)* (2010) 6 SCC 1

d. *Ramkrushna v. State of Maharashtra* (2007) 13 SCC 525

20. PW2 and PW3 were the persons who had met the deceased first after she was put on fire. They were not the eye-witnesses to the occurrence. It is an admitted case that they were the first persons to meet the deceased after she suffered the burn injuries and had taken her to the hospital. This was their consistent version when stated before the police and even before the court. Contrary to their statement made to the Investigating Agency, in the Court, they made a statement that the deceased had told them that she had caught fire by chimney and her burn injuries were accidental. This was totally contrary to their version given to the police where they had stated that she had told them that Bhajju had poured kerosene on her and put her on fire. To the extent that their earlier version is consistent with the story of the prosecution, it can safely be relied upon by the prosecution and court. The later part of their statement, in cross-examination done either by the accused or by the prosecution, would not be of any advantage to the case of the prosecution. However, the accused may refer thereto. But the court will always have to take a very cautious decision while referring to the statements of such witnesses who turn hostile or go back from their earlier statements recorded, particularly, under Section 164 of the Cr.P.C. What value should be attached and how much reliance can be placed on such statement is a matter to be examined by the Courts with reference to the facts of a given case.

21. PW4, brother of the deceased, is another witness who has made an attempt to help the accused. He stated that Medabai had died and Bhajju was his brother-in-law and she got burnt while cooking food and that Medabai had told him that

Bhajju used to keep her nicely. Firstly, we must notice that all these witnesses who had turned hostile or attempted to support the accused are the neighbours or close relations of the deceased and also that of the appellant/accused. Their somersault appears to be founded on the consideration of saving a relation from receiving punishment at the hands of justice. They appear to have lied before this Court, more out of sympathy for the appellant/accused. The very opening part of the statement of PW4, where he says "Medabai mari ja chuki hai" and "Medabai ko khana pakate samay aag lagi thi" is sufficient indicator of his sympathy and the fact that his sister has already died and that he would not like to lose his brother-in-law and secondly, that it is also not clear from his statement as to who told him that Medabai had caught fire while cooking.

22. These are matters of serious consequences and render the statement of all these three witnesses unreliable and undependable. Thus, these statements we would refer and rely (examination-in-chief) only to the extent they support the case of the prosecution and are duly corroborated, not only by other witnesses but even by the dying declaration and the medical evidence.

23. Coming to the credibility of the defence witnesses, we have already noticed that Ex.D1 is a document created by the defence just to escape the punishment under law. If that is what the deceased wanted to say, she had a number of opportunities to say so, freely and voluntarily. However, in presence of the Tehsildar and twice in presence of the Police, she made the same statement implicating her husband Bhajju of pouring kerosene oil on her and putting her on fire. Where was the necessity of typing an affidavit and getting the same thumb-marked by the deceased when she was suffering 60% burn injuries. If the version given in this affidavit was true, we see no reason why the deceased should have stated before the police and the Tehsildar what she did. The two defence witnesses, namely Prabhat Kumar Sharma, DW1 and Laxmi

Prasad Yadav, DW2, were examined by the defence to prove its innocence. DW1, the Notary Public, does not state as to where, when and at whose instance the affidavit was typed. This witness has completely failed to explain as to why the photograph of the deceased was fixed on the affidavit. If it was the requirement of law, then why the photograph of a date prior to the date on which the affidavit was sworn and attested, was affixed on the affidavit. This witness also admitted in his cross-examination that he knew that the affidavit was being sworn for belying a statement made earlier, but he made no enquiries from the deceased or from any other proper quarters to find out what was the previous statement of the deceased. It will not be safe for the Court to rely on the statement of this witness. DW2, is the person who had typed the affidavit, Ex.D1. He knew Medabai. According to this witness, the contents were typed on the basis of what Medabai had stated. There are contradictions between the statements of DW1 and DW2. We do not think that these witnesses are reliable and their statements are trustworthy. We would expect a Notary Public to maintain better professional standards rather than act at the behest of a particular party.

24. For these reasons, we find no ground to interfere in the concurrent judgments of conviction and order of sentence. The appeal is without merit and is dismissed accordingly.

B.B.B Appeal dismissed.

GOVINDARAJU @ GOVINDA
v.
STATE BY SRIRAMAPURAM P.S. & ANR.
(Criminal Appeal No. 984 of 2007)

MARCH 15, 2012

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

Penal Code, 1860 - s. 302/34 - Appellant and other accused charged with offence u/s. 302 r/w. 34 - Acquittal by the trial court - Leave to appeal filed before the High Court, granted only against the appellant - Conviction and sentence of appellant for commission of offence u/s. 302 by the High Court - Justification of - Held: High Court did not bring out as to how the trial court's judgment was perverse in law or in appreciation of evidence or whether the trial court's judgment suffered from some erroneous approach and was based on conjectures and surmises in contradistinction to facts proved by the evidence on record - Testimony of sole eye witness-police officer not reliable and worthy of credence - Eye-witnesses, seizure witnesses and the witness to the recovery of knife not supporting the prosecution case - Defect in the recovery - Non-examination of material witnesses as also persons from the forensic laboratory - Medical Evidence also not supporting the prosecution case - Thus, the case of the prosecution suffers from proven improbabilities, infirmities, contradictions - Appellant acquitted u/s. 302.

Evidence - Police officer as sole eye-witness - Evidentiary value of - Held: Testimony of police officer can be relied upon and form basis of conviction when such witness is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidences - It cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case - When his interest in the success of

the case is motivated by overzealousness to an extent of his involving innocent people; no credibility can be attached to the statement of such witness - Absence of some independent witness of the locality does not in any way affect the creditworthiness of the prosecution case - On facts, the police officer-sole eye witness was nearly 30 yards away from the place of incident and was on motor-cycle, equipped with a weapon - Police officer saw three accused chasing and then inflicting injuries upon the deceased - However, he was unable to stop the further stabbing and/or running away of the accused - He did not mention the names of the accused in the FIR or to the Investigating Officer - He could not find the name of the third accused - The statement of police officer implicating the accused did not find any corroboration by other witnesses or evidences - Thus, suffers from improbabilities, not free of suspicion and lacked credence and reliability - Conviction of the appellant on basis of the statement of the police officer not sustainable.

Evidence Act, 1872 - Section 27 - Recoveries of weapons - Whether in conformity with the provisions of Section - Held: Memos did not bear the signatures of the accused upon their disclosure statements - This is a defect in the recovery of weapons - Recovery witnesses turned hostile - Weapons of offence, recovered from the appellant did not contain any blood stain, whereas the knife recovered at the behest of the co-accused was blood-stained - However, no steps taken by prosecution to prove whether it was human blood and of the same blood group as the deceased.

Witness:

Witness - Material witness - Non-production - Effect of - Non-production of doctor (who performed the post mortem and examined the victim before he was declared dead) as well as of the Head Constable and the Constable who reached the site immediately upon the occurrence - Held: Creates a

reasonable doubt in the case of the prosecution - Court should also draw adverse inference against the prosecution for not examining the material witnesses - Applicability of the principle of 'adverse inference' pre-supposes that withholding was of such material witnesses who could have stated precisely and cogently the events as they occurred.

Material witness - Effect on prosecution case - Explained.

Hostile witness - Effect on prosecution case -Explained.

Code of Criminal Procedure, 1973 - s. 378 - Appeal against acquittal - Scope of - Held: Appellate court has every power to re-appreciate, review and reconsider the evidence before it, as a whole - There is presumption of innocence in favour of the accused and that presumption is reinforced by an order of acquittal recorded by the trial court - Court has to keep in mind that interference by the Court is justifiable only when a clear distinction is kept between perversity in appreciation of evidence and merely the possibility of another view - High Court should not merely record that the judgment of the trial court was perverse without specifically dealing with the facets of perversity relating to the issues of law and/or appreciation of evidence.

According to the prosecution, on the fateful day, when Sub-Inspector of Police-PW 1 was going back after finishing his duty, he saw three persons chasing another person. PW 1 was on his motor cycle. Thereafter, the three persons reached near the Bar, and the person who was being chased fell on the road. The three persons stabbed him on his chest. When PW1 was about to reach the spot, he heard 'GR' telling 'GV' that the police was coming and asked them to run away, whereafter they ran away from the spot. PW-1 chased them but they escaped. PW1 then came back to the spot and shifted the victim to the hospital where he was declared dead. PW1 checked the pockets of the victim and found an identity

card which disclosed the victim as 'S'. Thereafter, PW1 returned to the police station and lodged a complaint. On the basis thereof, PW11- Police Officer recorded FIR and conducted an investigation. The Investigating Officer examined a number of witnesses and recovered weapons of crime which were sent for examination to the Forensic Science Laboratory (FSL). Thereafter, PW 11 filed the charge-sheet against the accused under Section 302 r/w. s. 34 IPC. Only two accused faced the trial as the third accused was absconding. The trial court acquitted both the appellant-'GV' and 'GR' for an offence under Section 302 read with Section 34 IPC. The State preferred a leave to appeal before the High Court. The High Court declined the leave to appeal against the judgment of acquittal in favour of 'GV' and granted the leave to appeal against 'GR'. 'GR' was convicted under Section 302 IPC and sentenced to imprisonment for life and fine of Rs.10,000/-. Therefore, the appellant filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1 An appeal against an order of acquittal is also an appeal under the Code of Criminal Procedure, 1973 and an appellate court has every power to re-appreciate, review and reconsider the evidence before it, as a whole. It is no doubt true that there is presumption of innocence in favour of the accused and that presumption is reinforced by an order of acquittal recorded by the trial court. But that is the end of the matter. It is for the appellate court to keep in view the relevant principles of law to re-appreciate and reweigh the evidence as a whole and to come to its own conclusion on such evidence, in consonance with the principles of criminal jurisprudence. A very vital distinction which the court has to keep in mind while dealing with such appeals against the order of acquittal is that interference

by the Court is justifiable only when a clear distinction is kept between perversity in appreciation of evidence and merely the possibility of another view. It may not be quite appropriate for the High Court to merely record that the judgment of the trial court was perverse without specifically dealing with the facets of perversity relating to the issues of law and/or appreciation of evidence, as otherwise such observations of the High Court may not be sustainable in law. [Paras 5 and 10] [89-F-H; 99-G-H; 100-A-B]

Girja Prasad (Dead) By LRs. v. State of M.P. **(2007) 7 SCC 625: 2007 (9) SCR 483 - relied on.**

1.2 Besides the rules regarding appreciation of evidence, the Court has to keep in mind certain significant principles of law under the Indian Criminal Jurisprudence, i.e. right to fair trial and presumption of innocence, which are the twin essentials of administration of criminal justice. A person is presumed to be innocent till proven guilty and once held to be not guilty of a criminal charge, he enjoys the benefits of such presumption which could be interfered with by the courts only for compelling reasons and not merely because another view was possible on appreciation of evidence. The element of perversity should be traceable in the findings recorded by the court, either of law or of appreciation of evidence. The legislature in its wisdom, unlike an appeal by an accused in the case of conviction, introduced the concept of leave to appeal in terms of Section 378 Cr.P.C. This is an indication that appeal from acquittal is placed at a somewhat different footing than a normal appeal. But once leave is granted, then there is hardly any difference between a normal appeal and an appeal against acquittal. The concept of leave to appeal under Section 378 Cr.P.C. has been introduced as an additional stage between the order of acquittal and consideration of the judgment by

the appellate court on merits as in the case of a regular appeal. Sub-section (3) of Section 378 clearly provides that no appeal to the High Court under sub-sections (1) or (2) shall be entertained except with the leave of the High Court. This legislative intent of attaching a definite value to the judgment of acquittal cannot be ignored by the Courts. Under the scheme of the Cr.P.C., acquittal confers rights on an accused that of a free citizen. A benefit that has accrued to an accused by the judgment of acquittal can be taken away and he can be convicted on appeal, only when the judgment of the trial court is perverse on facts or law. Upon examination of the evidence before it, the appellate court should be fully convinced that the findings returned by the trial court are really erroneous and contrary to the settled principles of criminal law. [Para 6] [90-A-H; 91-A]

State of Rajasthan v. Shera Ram alias Vishnu Dutta **(2012) 1 SCC 602;** *C. Antony v. K.G. Raghavan Nair* **(2003) 1 SCC 1;** *Bhim Singh Rup Singh v. State of Maharashtra* **(1974) 3 SCC 762 - relied on.**

1.3 The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in a case, one pointing to the guilt of the accused and other to his innocence, the view which is favourable to the accused should be adopted. There are no jurisdictional limitations on the power of the appellate court but it is to be exercised with some circumspection. The paramount consideration of the court should be to avoid miscarriage of justice. A miscarriage of justice which may arise from the acquittal of guilty is no less than that from the conviction of an innocent. If there is miscarriage of justice from the acquittal, the higher court would examine the matter as a court of fact and appeal while correcting the errors of law and in appreciation of evidence as well. Then

the appellate court may even proceed to record the judgment of guilt to meet the ends of justice, if it is really called for. [Para 8] [98-D-F]

1.4 In the instant case, the trial court noticed a number of other weaknesses in the case of the prosecution, including the evidence of PW1 and had returned the finding of acquittal of both the accused. The judgment of the High Court, though to some extent, re-appreciates the evidence but has not brought out as to how the trial court's judgment was perverse in law or in appreciation of evidence or whether the trial court's judgment suffered from certain erroneous approach and was based on conjectures and surmises in contradistinction to facts proved by evidence on record. [Paras 9, 10] [99-B; F-G]

2.1 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. [Para 11] [100-C-D]

Lallu Manjhi and Anr. vs. State of Jharkhand **(2003) 2 SCC 401: 2003 (1) SCR 1;** *Joseph v. State of Kerala* **(2003) 1 SCC 465: 2002 (4) Suppl. SCR 439;** *Tika Ram v. State of Madhya Pradesh* **(2007) 15 SCC 760;** *Jhapsa Kabari and Ors. v. State of Bihar* **(2001) 10 SCC 94 - referred to.**

2.2 In the instant case, the sole eye-witness is stated to be a police officer i.e. P.W.-1. The entire case hinges upon the trustworthiness, reliability or otherwise of the testimony of this witness. It cannot be stated as a rule that a police officer can or cannot be a sole eye-witness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidences, then the

statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people; in that event, no credibility can be attached to the statement of such witness. [Paras 14 and 15] [101-G; 102-A-C]

2.3 Wherever, the evidence of the police officer, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable and preferably corroborated by other evidence on record, it can form the basis of conviction and the absence of some independent witness of the locality does not in any way affect the creditworthiness of the prosecution case. No infirmity is attached to the testimony of the police officers merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. [Para 17] [102-G-H; 103-A]

Girja Prasad (Dead) By LRs. v. State of M.P. **(2007) 7 SCC 625: 2007 (9) SCR 483;** *Aher Raja Khima v. State of Saurashtra* **AIR 1956 SC 217: 1955 SCR 1285;** *Tahir v. State (Delhi)* **(1996) 3 SCC 338: 1996 (3) SCR 757 - referred to.**

3. It is also not always necessary that wherever the witness turned hostile, the prosecution case must fail. Firstly, the part of the statement of such hostile witnesses that supports the case of the prosecution can always be taken into consideration. Secondly, where the sole witness is an eye-witness who can give a graphic account of the events which he had witnessed, with some precision cogently and if such a statement is corroborated by other evidence, documentary or otherwise, then such statement in face of the hostile

witness can still be a ground for holding the accused guilty of the crime that was committed. The Court has to act with greater caution and accept such evidence with greater degree of care in order to ensure that justice alone is done. The evidence so considered should unequivocally point towards the guilt of the accused. [Para 20] [104-B-D]

4.1 The prosecution cited PW-7, PW-9 and PW-10 as eye-witnesses to the occurrence but they denied the entire case of the prosecution case. However, PW-7 and PW-9 were not confronted with their statement under Section 161 Cr.P.C. PW-8 was a witness to the recovery of the knife. He, in his statement, admitted his signature on the recovery memo, but stated that he did not know why the Police had obtained his signatures. Even the other three witnesses-PW-2, PW-4 and PW-6 were witnesses to seizure memos vide which recoveries were effected, including the knife and clothes of the deceased. PW-2 was a material witness of the prosecution. He denied that he had ever seen the accused and had gone to make any complaint in the Police Station in regard to any incident that had happened in his shop. [Para 21, 22] [104-E-F; 105-B-D]

4.2 According to the PW-1 (complainant and police officer), he was nearly 30 yards away from the place where the victim fell on the ground and he saw the accused persons chasing the victim from about a distance of 75 feet. As per his statement in cross-examination, he was on a motor cycle. It is not understandable why he could not increase the speed of his motor cycle so as to cover the distance of 30 yards before the injuries were inflicted on the deceased by the accused. Surely, seeing the police at such a short distance, the accused, if they were involved in the crime, would not have the courage of stabbing the victim (deceased) in front of a police officer who was carrying

a gun. In the FIR, he did not mention the names of the accused. He did not even mention to PW-11 (Investigating Officer) as to who the assailants were. In the post-mortem report, it was recorded that as per police requisition the victim was said to have been assaulted with knife by some miscreants and he was pronounced dead on arrival to the hospital. [Paras 25 and 26] [106-C-F]

4.3 In furtherance to the proceedings taken out under Section 174 Cr.P.C, the brother of the deceased had identified the body of the deceased and made a statement before the Police saying that at the midnight of 7th December, 1998, wife of the deceased had come and informed him that her husband was killed by some goons. Before this, a man named 'GR' and the deceased had lodged Police complaint that there was a fight between them. This itself shows that 'GR' had approached the Police. Thus, it is quite unbelievable that he would indulge in committing such a heinous crime. Furthermore, the entire record did not reflect the name of the third accused, who was stated to be absconding. This certainly is a circumstance not free of doubt. PW1 had seen three accused chasing and then inflicting injuries upon the deceased. It is quite strange to note that PW11 as well as PW1 could not even find the name of the third accused who was involved in the crime. Once the court critically analyses and cautiously examines the prosecution evidence, the gaps become more and more widened and the lacunae become more significant. This clearly shows that not only PW-1 was unaware of the names and identity of the assailants, but PW-11 was equally ignorant. PW-1 was carrying a weapon and he could have easily displayed his weapon and called upon the accused to stop inflicting injuries upon the deceased or to not run away. But for reasons best known to PW-1, nothing of this sort was done by him. [Paras 27, 28] [106-G-H; 107-A-D]

4.4 There was no explanation on record as to how PW-1 came to know the name of the accused, 'GR' as also the name of the third accused who had been absconding and in whose absence the trial proceeded. The statement of PW-1 implicating the accused does not inspire confidence. The statement of PW-1 did not find any corroboration. According to PW-1, the accused fell on the ground in front of the Bar. PW-7, the crucial eye-witness who as per the version of the prosecution, is stated to have been claimed that he was standing in front of the Bar and had seen the occurrence, not only denied that he knew the deceased and the accused, but also that he had made any statement to the police. Thus, the evidence of PW-7 completely destroyed the evidence of PW-1 in regard to the most crucial circumstance of the prosecution evidence. Besides this, all other witnesses-PW-2, PW-3, PW-7, PW-9 and PW-10, according to the prosecution, had seen the accused committing the crime completely turned hostile and in no way supported the case of the prosecution. The statement of PW-1 therefore, suffers from improbabilities and is not free of suspicion. Its non-corroboration by other witnesses or evidences adds to the statement of PW-1 lacking credence and reliability. [Paras 29 and 30] [107-E-H; 108-A-C]

4.5 In relation to PW-11, the Investigating Officer, there are certain lurking doubts. Certain very important witnesses were not examined or got examined by this investigating officer. The doctor who had performed the post mortem and prepared the Post Mortem Report was not produced before the court. The Head Constable who had come to the help of PW-1 for taking the deceased to the hospital and was present immediately after the occurrence was also not examined. The Forensic Science Laboratory Report was placed on record, however, no person from the FSL, Bangalore or Calcutta was examined in the case, again for reasons best known

to the Investigating Officer/prosecution. It is recorded in the report of the FSL, Bangalore that the specimen cuttings/scrapings were referred to Serologist Calcutta for its origin and grouping results. As and when the report would be received from Bangalore, the same would be forwarded to the Court, which never happened. The items included clothes, blood clots, one chaku were found to be blood stained here and there on the blade etc. No other finding in this regard was recorded in the FSL Report though it was stated to be a result of the analysis. Thus, the report of the FSL was been of no help to the prosecution. [Paras 31, 32, 33 and 34] [108-C; F-H; 109-A-D]

4.6 The recoveries of weapons were made not in conformity with the provisions of Section 27 of the Evidence Act, 1872. The memos did not bear the signatures of the accused upon their disclosure statements. This is a defect in the recovery of weapons and all the recovery witnesses have turned hostile, thus, creating a serious doubt in the said recovery. According to the prosecution witnesses, nothing was recovered from the appellant 'GR' and from or at the behest of 'GV'. The weapon of offence, recovered from 'GR' did not contain any blood stain, whereas the knife that was recovered from the conservancy at the behest of the accused, 'GV' was blood-stained. The report of the FSL, shows that 'one chaku' was blood-stained. However, the prosecution took no steps to prove whether it was human blood, and if so, then was it of the same blood group as the deceased or not. Certainly, it does not mean that a police officer by himself cannot prove a recovery, which he has affected during the course of an investigation and in accordance with law. However, in such cases, the statement of the investigating officer has to be reliable and so trustworthy that even if the attesting witnesses to the seizure turns hostile, the same can still

be relied upon, more so, when it is otherwise corroborated by the prosecution evidence, which is certainly not there in the instant case. [Paras 35, 36] [109-D-H; 110-A-C]

4.7 From a bare reading of the post-mortem report, it is clear that there were as many as 10 injuries on the person of the deceased. The doctor further opined that death was due to shock and hemorrhage as a result of stab injuries found on the chest. The High Court noticed that according to PW-1, the victim was not able to talk. The post mortem report clearly establishes injuries by knife. It takes some time to cause so many injuries, that too, on the one portion of the body i.e. the chest. If the statement of PW1 is to be taken to its logical conclusion, then it must follow that when the said witness saw the incident, the accused 'GR' was not stabbing the deceased but, was watching the police coming towards them and had called upon one of the other accused, 'GV' to run away as the police was coming. Obviously, it must have also taken some time for the accused to inflict so many injuries upon the chest of the deceased. Thus, this would have provided sufficient time to PW1 to reach the spot, particularly when, according to the said witness he was only at a distance of 30 yards and was on a motorcycle. At this point of time, stabbing had not commenced as the accused were alleged to be chasing the victims. Despite of all this, PW-1 was not able to stop the further stabbing and/or running away of the accused, though he was on a motor cycle, equipped with a weapon and in a place where there were shops such as the Bar and also nearby the conservancy area, which pre-supposes a thickly populated area. Thus, the statement of PW-1 does not even find corroboration from the medical evidence on record. Having regard to the time and place, it was quite possible, at least for the persons working in the Bar, to know what exactly had happened. With this object, PW-7 was produced who, unfortunately, did not support the

case of the prosecution. Thus, the reasons given by the High Court to disturb the finding of acquittal recorded by the trial court cannot be appreciated. [Para 38, 39] [111-B-H; 112-A-B]

4.8 As per the statement of PW 1, Head Constable and Police Constable had come on the spot. It was with their help that he had shifted the victim to the Hospital. It is not understandable as to why he could not send the body of the victim to the hospital with one of them and trace the accused in the conservancy where they had got lost, along with the help of the Constable/Head Constable, as the case may be. This is an important link which is missing in the case of the prosecution, as it would have given definite evidence in regard to the identity of the accused as well as would have made it possible to arrest the accused at the earliest. [Para 40] [112-C-E]

4.9 The observation of the High Court, while setting aside the judgment of acquittal in favour of the appellant that it might not have been possible for the PW-1 to notice the details explained in the complaint while riding a motor bike, is without any foundation. PW-1 himself could have stated so, either before the Court or in the complaint. As per his own statement, his distance was only 75 feet when he noticed the accused chasing the victim and only 30 feet when the victim fell on the ground. Thus, nothing prevented an effective and efficient police officer from precluding the stabbing. If this version of the PW-1 is to be believed then nothing prevented him from stopping the commission of the crime or at least immediately arresting, if not all, at least one of the accused, since he himself was carrying a weapon and admittedly the accused were unarmed, that too, in a public place like near the Bar. [Para 41] [112-F-H; 113-A]

4.10 The observation by the High Court that PW-1 noticed when victim was being chased by assailants,

suggests that there must have been something else earlier to that event, some injuries might have been caused to the victim. On the other hand, it indicates that victim was aware of some danger to his life at the hands of the assailants. Therefore, he was running away from them but the assailants were chasing him holding the weapons in their hands. The High Court, therefore, convicted the appellant on the presumption that he must have stabbed him. It is a settled canon of appreciation of evidence that a presumption cannot be raised against the accused either of fact or in evidence. Equally true is the rule that evidence must be read as it is available on record. It was for PW-1 to explain and categorically state whether the victim had suffered any injuries earlier or not because both, the accused and the victim, were within the sight of PW-1 and the former were chasing the latter. This presumption cannot be raised as it is based on no evidence. The case would have been totally different, if PW-2, PW-7, PW-9 and PW-10 had supported the case of the prosecution. Once, all these witnesses turned hostile and the statement of PW-1 is found to be not trustworthy, it would be very difficult for any court to return a finding of conviction in the facts and circumstances of the case. [Para 42, 43] [113-B-F]

4.11 Non-production of material witnesses like the doctor, who performed the post mortem and examined the victim before he was declared dead as well as of the Head Constable and the Constable who reached the site immediately upon the occurrence and the other two witnesses turning hostile, creates a reasonable doubt in the case of the prosecution and the court should also draw adverse inference against the prosecution for not examining the material witnesses. There is deficiency in the prosecution case as it should have proved its case beyond reasonable doubt with the help of these witnesses, which it chose not to produce before the

Court, despite their availability. [Para 44] [113-G-H; 114-A-B]

Takhaji Hiraji v. Thakore Kubersing Chamansing and Ors. **(2001) 6 SCC 145 - relied on.**

4.12 The applicability of the principle of 'adverse inference' pre-supposes that withholding was of such material witnesses who could have stated precisely and cogently the events as they occurred. Without their examination, there would remain a vacuum in the case of the prosecution. The doctor was a cited witness but was still not examined. The name of the Head Constable and the Constable appears in the Police investigation but still they were not examined. In their absence the post mortem report and FSL report were exhibited and could be read in evidence. But still the lacuna in the case of the prosecution remains unexplained and the chain of events unconnected. For instance, the Head Constable could have described the events that occurred right from the place of occurrence to the death of the deceased. They could have well explained as to why it was not possible for one Police Officer, one Head Constable and one Constable to apprehend all the accused or any of them immediately after the occurrence or even make enquiry about their names. Similarly, the doctor could have explained whether inflicting of such injuries with the knife recovered was even possible or not. The expert from the FSL could have explained whether or not the weapons of offence contained human blood and, if so, of what blood group and whether the clothes of the deceased contained the same blood group as was on the weapons used in the commission of the crime. The uncertainties and unexplained matters of the FSL report could have been explained by the expert. There is no justification on record as to why these witnesses were not examined despite their availability. Material witness is one who

would unfold the genesis of the incident or an essential part of the prosecution case and by examining such witnesses the gaps or infirmities in the case of the prosecution could be supplied. If such a witness, without justification, is not examined, inference against the prosecution can be drawn by the Court. The fact that the witnesses who were necessary to unfold the narrative of the incident and though not examined, but were cited by the prosecution, certainly raises a suspicion. When the principal witnesses of the prosecution become hostile, greater is the requirement of the prosecution to examine all other material witnesses who could depose in completing the chain by proven facts. [Para 45] [115-D-H; 116-A-E]

Takhaji Hiraji v. Thakore Kubersing Chamansing and Ors. **(2001) 6 SCC 145;** *Yakub Ismailbhai Patel v. State of Gujarat* **(2004) 12 SCC 229: 2004 (3) Suppl. SCR 978 - relied on.**

4.13 It does not mean that despite all this, the statement of the Police Officer for recovery and other matters could not be believed and form the basis of conviction but where the statement of such witness is not reliable and does not aspire confidence, then the accused would be entitled to the benefit of doubt in accordance with law. Mere absence of independent witnesses when the Investigating Officer recorded the statement of the accused and the article was recovered pursuant thereto, is not a sufficient ground to discard the evidence of the Police Officer relating to recovery at the instance of the accused. Similar would be the situation where the attesting witnesses turn hostile, but where the statement of the Police Officer itself is unreliable then it may be difficult for the Court to accept the recovery as lawful and legally admissible. The official acts of the Police should be presumed to be regularly performed and

there is no occasion for the courts to begin with initial distrust to discard such evidence. [Para 46] [116-E-H; 117-A-B]

State Government of NCT of Delhi v. Sunil & Anr. **(2001) 1 SCC 652: 2000 (5) Suppl. SCR 144 - relied on.**

4.15 On a cumulative reading and appreciation of the entire evidence on record, the trial court had not fallen in error of law or appreciation of evidence in accordance with law. The High Court appears to have interfered with the judgment of acquittal only on the basis that 'there was a possibility of another view'. The prosecution must prove its case beyond any reasonable doubt. Such is not the burden on the accused. The High Court acted on certain legal and factual presumptions which cannot be sustained on the basis of the record and the principle of laws. Thus, the case of the prosecution, suffers from proven improbabilities, infirmities, contradictions and the statement of the sole witness, PW1, is not reliable and worthy of credence. The appellant is acquitted of the offence under Section 302 IPC. [Para 47, 49] [117-B-E-G]

Case Law Reference:

2007 (9) SCR 483	**Referred to**	**Para 5**
(2012) 1 SCC 602	**Referred to**	**Para 6**
(2003) 1 SCC 1	**Referred to**	**Para 7**
(1974) 3 SCC 762	**Relied on**	**Para 7**
2003 (1) SCR 1	**Relied on**	**Para 11**
2002 (4) Suppl. SCR 439	**Referred to**	**Para 12**
(2007) 15 SCC 760	**Referred to**	**Para 13**
(2001) 10 SCC 94	**Referred to**	**Para 17**
1955 SCR 1285	**Referred to**	**Para 17**

1996 (3) SCR 757	**Referred to**	**Para 18**
(2001) 6 SCC 145	**Referred to**	**Para 44**
2004 (3) Suppl. SCR 978	**Referred to**	**Para 45**
2000 (5) Suppl. SCR 144	**Referred to**	**Para 46**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 984 of 2007.

From the Judgment & Order dated 29.11.2006 of the High Court of Karnataka at Bangalore in Crl. Appeal No. 889 of 2000.

Rajesh Mahale, Krutin R. Joshi of the Appellant.

Anitha Shenoy, Hetu Arora for the Respondents.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The present appeal is directed against the judgment of conviction and order of sentence recorded by the High Court of Karnataka at Bangalore dated 29th November, 2006, setting aside the judgment of the trial court dated 9th March, 2000 acquitting all the accused for an offence under Section 302 read with Section 34 of the Indian Penal Code, 1860 (for short 'IPC'). In short the case of the prosecution is that on 7th December, 1998, Sub-Inspector of Police (Law & Order) Shri Veerabadhraiah of the Sriramapuram Police Station, PW1, was proceeding towards his house from duty on his motor cycle at about 10.45 p.m. When he reached the 6th Cross Road, 7th Main, he saw three persons chasing another person and when they reached near VNR Bar, the person who was being chased fell on the road. One of the three person who were chasing the victim, stabbed him on his chest thrice with knife. Thereafter, the other two persons also stabbed him on the chest. When the said PW1 was about to reach the spot, he saw the accused Govindaraju @ Govinda addressing one of the other two persons as

Govardhan and telling them that the Police was coming and asked them to run away, whereafter they ran away from the spot. An attempt was made by PW-1 to follow them but the same proved to be in vain because they went into a Conservancy and disappeared into darkness. After this unsuccessful attempt, PW1 returned to the spot and saw the victim bleeding with injuries. With the help of a Constable, he shifted the victim to K.C.General Hospital, Malleswaram, where the victim was declared dead by the doctors. Upon search of the body of the deceased, his identity card was found on which his name and address had been given. The name of the deceased was found to be Santhanam. Thereafter, PW1 went back to the Police Station and lodged a complaint, Ex.P1, on the basis of which FIR Ex.P2 was recorded by PW11, another Police Officer, who then investigated the case. The Investigating Officer, during the course of investigation, examined a number of witnesses, collected blood soaked earth and got recovered the knives with which the deceased was assaulted. Having recovered the weapons of crime, the Investigating Officer had sent these weapons for examination to the Forensic Science Laboratory (FSL) at Bangalore. However, that Laboratory had, without giving any detailed report, vide its letter dated 28th October, 1999, Ex.P15, informed the Commissioner of Police, Malleswaram, Bangalore, that the stains specimen cuttings/ scraping was referred to Serologist at Calcutta for its origin and grouping results, which on receipt would be dispatched from that office. In all, eight articles were sent to the FSL including the blood clots, one pant, one *kacha*, one pair of socks and one *chaku*. No efforts were made to produce and prove the final report from the FSL, Calcutta and also no witness even examined from the FSL. It appears from the record that the weapons of offence were not sent to the FSL, Bangalore at all.

2. After completing the investigation, PW11 filed the charge-sheet before the Court of competent jurisdiction. The matter was committed to the Court of Sessions. The two accused faced the trial as the third accused was absconding

and was not traceable at the time of filing of the charge-sheet or even subsequent thereto. The learned Sessions Judge had framed the charge against the accused under Section 302 read with Section 34 IPC vide its order dated 20th November, 1999. The learned trial Court, vide its judgment dated 9th March, 2000, acquitted both the appellant namely, Govindaraju @ Govinda and Govardhan @ Gunda.

3. Against the said judgment of acquittal passed by the learned trial court, the State preferred a leave to appeal before the High Court. The High Court declined the leave to appeal against the judgment of acquittal in favour of Govardhan @ Gunda and granted the leave to appeal against Govindaraju @ Govinda vide its order dated 3rd November, 2000. Finally, as noticed above, the High Court vide its judgment dated 29th November, 2006 found Govindaraju guilty of the offence under Section 302 IPC and sentenced him to civil imprisonment for life and fine of Rs.10,000/- in default to undergo rigorous imprisonment for a period of one year. Aggrieved from the said judgment of the High Court, the accused Govindaraju @ Govinda has filed the present appeal.

Points on which reversal of the judgment of acquittal by the High Court is challenged:

(i) The judgment of the High Court is contrary to the settled principles of criminal jurisprudence governing the conversion of order of acquittal into one that of conviction.

(ii) The judgment of the High Court suffers from palpable errors of law and appreciation of evidence. All the witnesses had turned hostile and the conviction of the appellant could not be based upon the sole testimony of a Police Officer, who himself was an interested witness. It is contended that the appellant Govindaraju @ Govinda has been falsely implicated in the case.

(iii) No independent or material witnesses were examined by the prosecution. Recovery of the alleged weapons of crime have not been proved in accordance with the provisions of Section 27 of the Indian Evidence Act, 1872 (hereafter referred to as "the Act").

(iv) No seizure witness was examined and the statement of the Police Officer cannot by itself be made the basis for holding that there was lawful recovery, admissible in evidence, from the appellant.

(v) The ocular evidence is not supported by the medical evidence, even in regard to the injuries alleged to have been caused and found on the body of the deceased. The story put forward by PW1 is not only improbable but is impossible of being true.

(vi) The case of the prosecution is not supported by any scientific evidence.

(vii) Lastly, it is the contention of the appellant that they were charged with an offence under Section 302 read with Section 34 IPC. The trial court acquitted them. Leave to appeal preferred by the State *qua* one of the accused, i.e. Govardhan @ Gunda was not granted. Thus, the acquittal of the said accused attained finality. Once the accused Govardhan @ Gunda stands acquitted and the role attributable to the appellant-Govindaraju is lesser compared to that of Govardhan, the present appellant was also entitled to acquittal. The judgment of the High Court, thus, suffers from legal infirmities.

4. Contra to the above submissions, the learned counsel appearing for the State contended that, as argued, it is not a

case of false implication. The area fell within the jurisdiction of PW1, who was the eye-witness to the occurrence. As per the records, the events took place as - At 10.55 p.m. the incident took place, 11.45 p.m. the First Information Report (hereinafter referred to as "FIR") was registered and at 1.40 a.m., the copy of the FIR was placed before the Magistrate, which was duly initialed by the Duty Magistrate. This proved the truthfulness of the case of the prosecution. The weapons of offence were recovered from the house of the appellant. The *panchas* have admitted their signatures, even though they have turned hostile. On the basis of the collective evidence, both documentary and ocular, the prosecution has been able to prove its case beyond any reasonable doubt and thus, the judgment of the High Court does not call for any interference.

5. Keeping in view the submissions made by learned counsel appearing for the appellant and the State, now we may proceed to examine the first contention. In the present case, the trial Court had acquitted both the accused. As already noticed, against the judgment of acquittal, the State had preferred application for leave to appeal. The leave in the case of the present appellant, Govindaraju was granted by the High Court while it was refused in the case of the other accused, Govardhan. Thus, the judgment of acquittal in favour of Govardhan attained finality. We have to examine whether the High Court was justified in over turning the judgment of acquittal in favour of the appellant passed by the Trial court on merits of the case. The law is well-settled that an appeal against an order of acquittal is also an appeal under the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') and an appellate Court has every power to re-appreciate, review and reconsider the evidence before it, as a whole. It is no doubt true that there is presumption of innocence in favour of the accused and that presumption is reinforced by an order of acquittal recorded by the trial Court. But that is the end of the matter. It is for the Appellate Court to keep in view the relevant principles of law to re-appreciate and reweigh the evidence as a whole and to

come to its own conclusion on such evidence, in consonance with the principles of criminal jurisprudence. {Ref. *Girja Prasad (Dead) By LRs.* v. *State of M.P.* [(2007) 7 SCC 625]}.

6. Besides the rules regarding appreciation of evidence, the Court has to keep in mind certain significant principles of law under the Indian Criminal Jurisprudence, i.e. right to fair trial and presumption of innocence, which are the twin essentials of administration of criminal justice. A person is presumed to be innocent till proven guilty and once held to be not guilty of a criminal charge, he enjoys the benefits of such presumption which could be interfered with by the courts only for compelling reasons and not merely because another view was possible on appreciation of evidence. The element of perversity should be traceable in the findings recorded by the Court, either of law or of appreciation of evidence. The Legislature in its wisdom, unlike an appeal by an accused in the case of conviction, introduced the concept of leave to appeal in terms of Section 378 Cr.P.C. This is an indication that appeal from acquittal is placed at a somewhat different footing than a normal appeal. But once leave is granted, then there is hardly any difference between a normal appeal and an appeal against acquittal. The concept of leave to appeal under Section 378 Cr.P.C. has been introduced as an additional stage between the order of acquittal and consideration of the judgment by the appellate Court on merits as in the case of a regular appeal. Sub-section (3) of Section 378 clearly provides that no appeal to the High Court under sub-sections (1) or (2) shall be entertained except with the leave of the High Court. This legislative intent of attaching a definite value to the judgment of acquittal cannot be ignored by the Courts. Under the scheme of the Cr.P.C., acquittal confers rights on an accused that of a free citizen. A benefit that has accrued to an accused by the judgment of acquittal can be taken away and he can be convicted on appeal, only when the judgment of the trial court is perverse on facts or law. Upon examination of the evidence before it, the Appellate

Court should be fully convinced that the findings returned by the trial court are really erroneous and contrary to the settled principles of criminal law. In the case of *State of Rajasthan* v. *Shera Ram alias Vishnu Dutta* [(2012) 1 SCC 602], a Bench of this Court, of which one of us (Swatanter Kumar, J.) was a member, took the view that there may be no grave distinction between an appeal against acquittal and an appeal against conviction but the Court has to keep in mind the value of the presumption of innocence in favour of the accused duly endorsed by order of the Court, while the Court exercises its appellate jurisdiction. In this very case, the Court also examined various judgments of this Court dealing with the principles which may guide the exercise of jurisdiction by the Appellate Court in an appeal against a judgment of acquittal. We may usefully refer to the following paragraphs of that judgment:

> "8. The penal laws in India are primarily based upon certain fundamental procedural values, which are right to fair trial and presumption of innocence. A person is presumed to be innocent till proven guilty and once held to be not guilty of a criminal charge, he enjoys the benefit of such presumption which could be interfered with only for valid and proper reasons. An appeal against acquittal has always been differentiated from a normal appeal against conviction. Wherever there is perversity of facts and/or law appearing in the judgment, the appellate court would be within its jurisdiction to interfere with the judgment of acquittal, but otherwise such interference is not called for.
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> 9. We may refer to a recent judgment of this Court in the case of *State of Rajasthan, Through Secretary, Home Department v. Abdul Mannan* [(2011) 8 SCC 65], wherein this Court discussed the limitation upon the powers of the appellate court to interfere with the judgment of acquittal and reverse the same.

11. This Court referred to its various judgments and held as under:-

> "12. As is evident from the above recorded findings, the judgment of conviction was converted to a judgment of acquittal by the High Court. Thus, the first and foremost question that we need to consider is, in what circumstances this Court should interfere with the judgment of acquittal. Against an order of acquittal, an appeal by the State is maintainable to this Court only with the leave of the Court. On the contrary, if the judgment of acquittal passed by the trial court is set aside by the High Court, and the accused is sentenced to death, or life imprisonment or imprisonment for more than 10 years, then the right of appeal of the accused is treated as an absolute right subject to the provisions of Articles 134(1)(a) and 134(1)(b) of the Constitution of India and Section 379 of the Code of Criminal Procedure, 1973. In light of this, it is obvious that an appeal against acquittal is considered on slightly different parameters compared to an ordinary appeal preferred to this Court.
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> 13. When an accused is acquitted of a criminal charge, a right vests in him to be a free citizen and this Court is very cautious in taking away that right. The presumption of innocence of the accused is further strengthened by the fact of acquittal of the accused under our criminal jurisprudence. The courts have held that if two views are possible on the evidence adduced in the case, then the one favourable to the accused, may be adopted by the court. However, this principle must be applied keeping in view the facts and circumstances of a case and the thumb rule is that whether the prosecution has proved its case beyond reasonable doubt. If the prosecution has

succeeded in discharging its onus, and the error in appreciation of evidence is apparent on the face of the record then the court can interfere in the judgment of acquittal to ensure that the ends of justice are met. This is the linchpin around which the administration of criminal justice revolves.

14. It is a settled principle of criminal jurisprudence that the burden of proof lies on the prosecution and it has to prove a charge beyond reasonable doubt. The presumption of innocence and the right to fair trial are twin safeguards available to the accused under our criminal justice system but once the prosecution has proved its case and the evidence led by the prosecution, in conjunction with the chain of events as are stated to have occurred, if, points irresistibly to the conclusion that the accused is guilty then the court can interfere even with the judgment of acquittal. The judgment of acquittal might be based upon misappreciation of evidence or apparent violation of settled canons of criminal jurisprudence.

15. We may now refer to some judgments of this Court on this issue. In *State of M.P. v. Bacchudas,* the Court was concerned with a case where the accused had been found guilty of an offence punishable under Section 304 Part II read with Section 34 IPC by the trial court; but had been acquitted by the High Court of Madhya Pradesh. The appeal was dismissed by this Court, stating that the Supreme Court's interference was called for only when there were substantial and compelling reasons for doing so. After referring to earlier judgments, this Court held as under: (SCC pp. 138-39, paras 9-10)

"9. There is no embargo on the appellate court

reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. (See Bhagwan Singh v. State of M.P.) The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference. These aspects were highlighted by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra, Ramesh Babulal Doshi v. State of Gujarat, Jaswant Singh v. State of Haryana, Raj Kishore Jha v. State of Bihar, State of Punjab v. Karnail Singh, State of Punjab v. Phola Singh, Suchand Pal v. Phani Pal and Sachchey Lal Tiwari v. State of U.P.*

10. When the conclusions of the High Court in the background of the evidence on record are tested on the touchstone of the principles set out above, the inevitable conclusion is that the High Court's judgment does not suffer from any infirmity to warrant interference."

16. In a very recent judgment, a Bench of this Court in *State of Kerala v. C.P. Rao* decided on 16-5-2011, discussed the scope of interference by this Court in an order of acquittal and while reiterating the view of a three-Judge Bench of this Court in *Sanwat Singh v. State of Rajasthan,* the Court held as under:

"13. In coming to this conclusion, we are reminded of the well-settled principle that when the court has to exercise its discretion in an appeal arising against an order of acquittal, the court must remember that the innocence of the accused is further re-established by the judgment of acquittal rendered by the High Court. Against such decision of the High Court, the scope of interference by this Court in an order of acquittal has been very succinctly laid down by a three-Judge Bench of this Court in *Sanwat Singh v. State of Rajasthan* 212. At SCR p. 129, Subba Rao, J. (as His Lordship then was) culled out the principles as follows:

'9. The foregoing discussion yields the following results: (1) an appellate court has full power to review the evidence upon which the order of acquittal is founded; (2) the principles laid down in Sheo Swarup case afford a correct guide for the appellate court's approach to a case in disposing of such an appeal; and (3) the different phraseology used in the judgments of this Court, such as (i) "substantial and compelling

reasons", (ii) "good and sufficiently cogent reasons", and (iii) "strong reasons", are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified'."

17. Reference can also be usefully made to the judgment of this Court in *Suman Sood v. State of Rajasthan,* where this Court reiterated with approval the principles stated by the Court in earlier cases, particularly, *Chandrappa v. State of Karnataka.* Emphasising that expressions like "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail the extensive powers of an appellate court in an appeal against acquittal, the Court stated that such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with the acquittal. Thus, where it is possible to take only one view i.e. the prosecution evidence points to the guilt of the accused and the judgment is on the face of it perverse, then the Court may interfere with an order of acquittal."

10. There is a very thin but a fine distinction between an appeal against conviction on the one hand and acquittal on the other**.** The preponderance of judicial opinion of this Court is that there is no substantial difference between an appeal against conviction and an appeal against acquittal

except that while dealing with an appeal against acquittal the Court keeps in view the position that the presumption of innocence in favour of the accused has been fortified by his acquittal and if the view adopted by the High Court is a reasonable one and the conclusion reached by it had its grounds well set out on the materials on record, the acquittal may not be interfered with. Thus, this fine distinction has to be kept in mind by the Court while exercising its appellate jurisdiction. The golden rule is that the Court is obliged and it will not abjure its duty to prevent miscarriage of justice, where interference is imperative and the ends of justice so require and it is essential to appease the judicial conscience.

11. Also, this Court had the occasion to state the principles which may be taken into consideration by the appellate court while dealing with an appeal against acquittal. There is no absolute restriction in law to review and re-look the entire evidence on which the order of acquittal is founded. If, upon scrutiny, the appellate court finds that the lower court's decision is based on erroneous views and against the settled position of law then the said order of acquittal should be set aside. {*See State (Delhi Administration) v. Laxman Kumar & Ors. [(1985) 4 SCC 476], Raj Kishore Jha v. State of Bihar & Ors. [AIR 2003 SC 4664], Inspector of Police, Tamil Nadu v. John David [JT 2011 (5) SC 1]*}

12. To put it appropriately, we have to examine, with reference to the present case whether the impugned judgment of acquittal recorded by the High Court suffers from any legal infirmity or is based upon erroneous appreciation of evidence.

13. In our considered view, the impugned judgment does not suffer from any legal infirmity and, therefore, does not call for any interference. In the normal course of events, we are required not to interfere with a judgment of acquittal."

7. The Court also took the view that the Appellate Court cannot lose sight of the fact that it must express its reason in the judgment, which led it to hold that acquittal is not justified. It was also held by this Court that the Appellate Court must also bear in mind the fact that the trial court had the benefit of seeing the witnesses in the witness box and the presumption of innocence is not weakened by the order of acquittal and in such cases if two reasonable conclusions can be reached on the basis of the evidence on record, the Appellate Court should not disturb the findings of the trial court. [See *C. Antony v. K.G. Raghavan nair* [(2003) 1 SCC 1]; and *Bhim Singh Rup Singh v. State of Maharashtra* [(1974) 3 SCC 762].

8. If we analyze the above principle somewhat concisely, it is obvious that the golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in a case, one pointing to the guilt of the accused and other to his innocence, the view which is favourable to the accused should be adopted. There are no jurisdictional limitations on the power of the Appellate Court but it is to be exercised with some circumspection. The paramount consideration of the Court should be to avoid miscarriage of justice. A miscarriage of justice which may arise from the acquittal of guilty is no less than that from the conviction of an innocent. If there is miscarriage of justice from the acquittal, the higher Court would examine the matter as a Court of fact and appeal while correcting the errors of law and in appreciation of evidence as well. Then the Appellate Court may even proceed to record the judgment of guilt to meet the ends of justice, if it is really called for.

9. In the present case, the High Court, in the very opening of its judgment, noticed that the prosecution had examined eleven witnesses, produced fifteen documents and three material objects. The witnesses of seizure had turned hostile. PW4 and PW5 were examined to establish the fact that the knife was seized vide Exhibit P5 at the instance of the appellant. They also turned hostile. PW6 and PW8 were

examined to establish the contents of Exhibit P6, another knife that was seized from the other accused, Govardhan. Even they did not support the case of the prosecution. PW7, the supplier at VNR Bar and an eye-witness, PW9, Mr. Thiruvengadam, the second eye-witness and PW10, Mr. Sheshidhar, the third eye-witness who were examined to corroborate the evidence of PW1 openly stated contrary to the case of the prosecution and did not support the version and statement of PW1. The trial Court noticed a number of other weaknesses in the case of the prosecution, including the evidence of PW1. It found that the statement of PW1 was not free of suspicion, particularly when there was no evidence to corroborate even his statement. The Court doubted the recovery and also the manner in which the recovery was made and sought to be proved before the Court in face of the fact that all the recovery witnesses had turned hostile and had bluntly denied their presence during the recovery of knives. The trial court also, while examining the statement of the doctor and the post-mortem report, Ex.P9, returned the finding that there were as many as ten injuries found on the body of the deceased and the opinion of the doctor was that the death of the deceased was due to shock and hemorrhage as a result of stab injuries sustained and even the medical evidence did not support the case of the prosecution. The accused had suffered certain injuries upon his hand and fingers. Referring to these observations, the trial court had returned the finding of acquittal of both the accused.

10. The judgment of the High Court, though to some extent, reappreciates the evidence but has not brought out as to how the trial court's judgment was perverse in law or in appreciation of evidence or whether the trial court's judgment suffered from certain erroneous approach and was based on conjectures and surmises in contradistinction to facts proved by evidence on record. A very vital distinction which the Court has to keep in mind while dealing with such appeals against the order of acquittal is that interference by the Court is justifiable only when a clear distinction is kept between perversity in appreciation

of evidence and merely the possibility of another view. It may not be quite appropriate for the High Court to merely record that the judgment of the trial court was perverse without specifically dealing with the facets of perversity relating to the issues of law and/or appreciation of evidence, as otherwise such observations of the High Court may not be sustainable in law.

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.

14. In the present case, the sole eye-witness is stated to be a police officer i.e. P.W.-1. The entire case hinges upon the trustworthiness, reliability or otherwise of the testimony of this witness. The contention raised on behalf of the appellant is that the police officer, being the sole eye-witness, would be an interested witness, and in that situation, the possibility of a police officer falsely implicating innocent persons cannot be ruled out.

15. Therefore, the first question that arises for consideration is whether a police officer can be a sole witness. If so, then with particular reference to the facts of the present case, where he alone had witnessed the occurrence as per the case of the prosecution. It cannot be stated as a rule that a police officer can or cannot be a sole eye-witness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidences, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people; in that event, no credibility can be attached to the statement of such witness.

16. This Court in the case of *Girja Prasad* (supra) while particularly referring to the evidence of a police officer, said that it is not the law that Police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption applies as much in favour of a police officer as any other person. There is also no rule of law which lays down that no conviction can be recorded on the testimony of a police officer even if such evidence is otherwise reliable and trustworthy. The rule of prudence may require more careful scrutiny of their evidence. If such a presumption is raised against the police officers without exception, it will be an attitude which could neither do credit to the magistracy nor good to the public, it can only bring down the prestige of the police administration.

17. Wherever, the evidence of the police officer, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form the basis of conviction and the absence of some independent witness of the locality does not in any way affect the creditworthiness of the prosecution case. The courts have also expressed the view that no infirmity

attaches to the testimony of the police officers merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. Such reliable and trustworthy statement can form the basis of conviction. Rather than referring to various judgments of this Court on this issue, suffices it to note that even in the case of *Girja Prasad* (supra), this Court noticed the judgment of the Court in the case of *Aher Raja Khima v. State of Saurashtra* AIR 1956 SC 217, a judgment pronounced more than half a century ago noticing the principle that the presumption that a person acts honestly applies as much in favour of a police officer as of other persons and it is not a judicial approach to distrust and suspect him without good grounds therefor. This principle has been referred to in a plethora of other cases as well. Some of the cases dealing with the aforesaid principle are being referred hereunder.

18. In *Tahir v. State (Delhi)* [(1996) 3 SCC 338], dealing with a similar question, the Court held as under:-

> "6. … .In our opinion no infirmity attaches to the testimony of the police officials, merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. The Rule of Prudence, however, only requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case."

19. The obvious result of the above discussion is that the statement of a police officer can be relied upon and even form the basis of conviction when it is reliable, trustworthy and preferably corroborated by other evidence on record.

20. It is also not always necessary that wherever the witness turned hostile, the prosecution case must fail. Firstly, the part of the statement of such hostile witnesses that supports the case of the prosecution can always be taken into consideration. Secondly, where the sole witness is an eye-witness who can give a graphic account of the events which he had witnessed, with some precision cogently and if such a statement is corroborated by other evidence, documentary or otherwise, then such statement in face of the hostile witness can still be a ground for holding the accused guilty of the crime that was committed. The Court has to act with greater caution and accept such evidence with greater degree of care in order to ensure that justice alone is done. The evidence so considered should unequivocally point towards the guilt of the accused.

21. Now, let us revert to the facts of the present case in light of the above principles. As already noticed, the prosecution had examined as many as 11 witnesses, out of which six witnesses were the material witnesses. The prosecution had cited PW-7, PW-9 and PW-10 as eye-witnesses to the occurrence. PW-7, Ganesh denied that he had made any statement to the Police. The prosecutor was granted permission to cross-examine him after having been declared hostile. He denied the entire case of the prosecution, however, strangely he was not confronted with his statement under Section 161 Cr.P.C. for the reasons best known to the prosecutor. PW-9 was cited as another eye-witness, who completely denied the case of the prosecution. Again, as it appears from the record, he was not confronted with his statement under Section 161 Cr.P.C., though a vague suggestion to that effect was made by the prosecutor. PW-10 is the third eye-witness who was cited. He denied that he made

any statement to the police on 7th December, 1998 and said that he never told the police that the accused had come chasing one person near the VNR Bar. He denied any knowledge of the incident.

22. PW-8, Ganesha, was a witness to the recovery of the knife vide Ext. P-6. He, in his statement, admitted his signature on the recovery memo, but stated that he did not know why the Police had obtained his signatures. Even the other three witnesses i.e. PW-2 - PW-4 and PW-6 were witnesses to seizure memos vide which recoveries were effected, including the knife and clothes of the deceased. PW-3, who admitted his signatures on Ex. P4, stated that his signatures were obtained in the Police Station. PW-2 was a material witness of the prosecution. He denied that he had ever seen the accused and had gone to make any complaint in the Police Station, Srirampur in regard to any incident that had happened in his shop. He denied that anything was seized in his presence. Ext. P4, blood stained pant, is stated to have been recovered in his presence.

23. Now, we are left with two witnesses PW-1 and PW-11. PW-1 is the complainant and is a police officer. PW-11 is the Investigating Officer.

24. PW-1 had stated that while he was going back after finishing his duty on 7th December, 1998 at about 10.45 p.m. at 5th Cross, he saw three persons chasing another person. The person, who was being chased fell in front of the VNR Bar and the accused Govindaraju was one of the three persons who were chasing the victim. When he was about to reach the spot, he heard the accused Govindaraju telling one of the other persons Govardhan, to run away as the Police were coming. PW-1 stopped his bike and started chasing those assailants who were running away in a Conservancy, but they escaped. PW-1 came back to the spot. Thereafter, a Police Constable and a Head Constable came there and with their assistance, he shifted the victim to the K.C.G. Hospital. The doctors after

examining the victim declared him 'brought dead'. PW-1, on checking the pockets of the victim, found his identity card from which he got his details. He returned to the police station, rang up the higher officers and registered a case *suo-moto* in Criminal Appeal No. 358 of 1998 whereafter an FIR was registered. Ext. P-1, bore his signature at Ext. P-1(a) and the same was later handed over for further investigation to PW-11.

25. The first and foremost point that invites the attention of this Court is that according to the PW-1, he was nearly 30 yards away from the place where the victim fell on the ground and he saw the accused persons chasing the victim from about a distance of 75 feet.

26. As per his statement in cross-examination, he was on a motor cycle. It is not understandable why he could not increase the speed of his motor cycle so as to cover the distance of 30 yards before the injuries were inflicted on the deceased by the accused. Surely, seeing the police at such a short distance, the accused, if they were involved in the crime, would not have the courage of stabbing the victim (deceased) in front of a police officer who was carrying a gun. In the FIR (Ex. P-2) he had not mentioned the names of the accused. He did not even mention to PW-11 as to who the assailants were. On the contrary, in the post-mortem report, Ex. P-9, it has been recorded that as per police requisition in Forms 14(i) and (ii) the victim was said to have been assaulted with knife by some miscreants on 7th December, 1998 and he was pronounced dead on arrival to the hospital.

27. In furtherance to the proceedings taken out under Section 174 of the Cr.P.C, it may be noticed that the brother of the deceased Shri Ananda had identified the body of the deceased and made a statement before the Police saying that at the midnight of 7th December, 1998, wife of the deceased had come and informed him that her husband was killed by some goons at Srirampur. Before this, a man named Govindaraju and the deceased had lodged Police complaint

that there was a fight between them. This itself shows that Govindaraju had approached the Police. Thus, it is quite unbelievable that he would indulge in committing such a heinous crime. Furthermore, the entire record before us does not reflect the name of the third accused, who is stated to be absconding. This certainly is a circumstance not free of doubt. PW1 had seen three accused chasing and then inflicting injuries upon the deceased. It is quite strange to note that PW11 as well as PW1 could not even find the name of the third accused who was involved in the crime. Once the Court critically analyses and cautiously examines the prosecution evidence, the gaps become more and more widened and the lacunae become more significant.

28. This clearly shows that not only PW-1 was unaware of the names and identity of the assailants, but PW-11 was equally ignorant. It is not disputed that PW-1 was carrying a weapon and he could have easily displayed his weapon and called upon the accused to stop inflicting injuries upon the deceased or to not run away. But for reasons best known to PW-1, nothing of this sort was done by him.

29. There is no explanation on record as to how PW-1 came to know the name of the accused, Govindaraju. Similar is the situation with regard to the name of the third accused who had been absconding and in whose absence the trial proceeded. As it appears, the statement of PW-1 implicating the accused does not inspire confidence. Another aspect is that all the witnesses who were stated to be eye-witnesses like PW-2, PW-3, PW-7, PW-9 and PW-10 turned hostile and have not even partially supported the case of the prosecution. Thus, the statement of PW-1 does not find any corroboration. For instance, according to PW-1, the accused fell on the ground in front of the VNR Bar. PW-7 is the crucial eye-witness who, as per the version of the prosecution, is stated to have been claimed that he was standing in front of VNR Bar and had seen the occurrence.

30. He not only denied that he knew the deceased and the accused, but also that he had made any statement to the police. Thus, the evidence of PW-7 completely destroys the evidence of PW-1 in regard to the most crucial circumstance of the prosecution evidence. Besides this, all other witnesses who, according to the prosecution, had seen the accused committing the crime completely turned hostile and in no way supported the case of the prosecution. The statement of PW-1 therefore, suffers from improbabilities and is not free of suspicion. Its non-corroboration by other witnesses or evidences adds to the statement of PW-1 lacking credence and reliability.

31. PW-11 is the Investigating Officer. He verified the FIR, went to the hospital and after deputing a Constable to take care of the dead body, he left for the scene of occurrence. Upon reaching there, he prepared a Spot Mahazar in presence of the witnesses, collected blood stains in plastic and sealed it. At about 15 feet away from the place of occurrence, he found a pair of *chappal* and a car belonging to the deceased which was also seized by him. He had recorded statements of various witnesses. Goverdhan had made a voluntary statement and got recovered the blood stained knife alongwith blood stained clothes, which were taken in to custody. The post mortem report Ext. P-9 was also received by him. The blood stained clothes were sent to the FSL for opinion and the report thereof was received as Ext. P-15. The weapons were produced before the doctor and his opinion was sought.

32. Even in relation to this witness (PW-11), there are certain lurking doubts. Firstly, it may be noticed that certain very important witnesses were not examined or got examined by this investigating officer. The doctor who had performed the post mortem and prepared the Post Mortem Report, Ext. P-9, was not produced before the Court. The Head Constable who had come to the help of PW-1 for taking the deceased to the hospital and was present immediately after the occurrence was also not examined. The Forensic Science Laboratory (for short "the FSL") Report, Ext. P-15, was placed on record, however,

no person from the FSL, Bangalore or Calcutta was examined in this case, again for reasons best known to the Investigating Officer/prosecution.

33. At the cost of repetition, we may refer to the contents of Ex.P15, the report of the FSL, Bangalore. It is recorded therein that the specimen cuttings/scrapings were referred to Serologist Calcutta for its origin and grouping results. As and when the report would be received from Bangalore, the same would be forwarded to the Court, which never happened.

34. The items at Sr. no. 1 to 8, which included clothes, blood clots, one *chaku* were found to be blood stained here and there on the blade etc. No other finding in this regard was recorded on Ext. P-15, though it was stated to be a result of the analysis. None was even examined from the FSL. Thus, the report of the FSL has been of no help to the prosecution.

35. Now, we will come to the recoveries which are stated to have been made in the present case, particularly the weapon of crime. Firstly, these recoveries were made not in conformity with the provisions of Section 27 of the Indian Evidence Act, 1872. The memos do not bear the signatures of the accused upon their disclosure statements. First of all, this is a defect in the recovery of weapons and secondly, all the recovery witnesses have turned hostile, thus creating a serious doubt in the said recovery. According to PW4 and PW5, nothing was recovered from the appellant Govindaraju. According to PW6 and PW8, nothing was recovered from or at the behest of the accused, Goverdhan.

36. Ex.Mo1 was the knife recovered from Govindaraju while Mo2 and Mo3 were the knife and the blood-stained shirt recovered from the accused, Goverdhan. Ex.Mo1, the weapon of offence, did not contain any blood stain. Ex.Mo2, the knife that was recovered from the conservancy at the behest of the accused, Goverdhan was blood-stained. Ex.P15, the report of the FSL, shows that item no.7 'one *chaku*' was blood-stained. However, the prosecution has taken no steps to prove whether

it was human blood, and if so, then was it of the same blood group as the deceased or not. Certainly, we should not be understood to have stated that a police officer by himself cannot prove a recovery, which he has affected during the course of an investigation and in accordance with law. However, it is to be noted that in such cases, the statement of the investigating officer has to be reliable and so trustworthy that even if the attesting witnesses to the seizure turns hostile, the same can still be relied upon, more so, when it is otherwise corroborated by the prosecution evidence, which is certainly not there in the present case.

37. Ext. P-9 is the post mortem report of the deceased. The injuries on the body of the deceased have been noticed by the doctor as follows:-

"(1) Horizontally placed stab wound present over front and right side of chest situated 9 cms to the right of midline and lower border of right nipple measuring 3.5cm x 1.5cms x chest cavity deep. Margins are clear cut, inner end pointed outer end blunt.

(2) Obliquely placed stab wound present over front of left side chest, situated over the left nipple, it is placed 11 cms to the left of mid line, measuring 2.5 cms x 1cm x chest cavity deep, margins are clear cut, upper inner end is pointed, lower outer end is blunt.

(3) Horizontally placed stab wound present over front and outer aspect of left side of chest, situated 5 cms below the level of left nipple, 17 cms to the left of mid line measuring 4 cm x 1.5 cms x 5 cms, directed upwards and to the right in the muscle plane, inner end is pointed, outer end is blunt, margins are clean cut.

(4) Superficially incised wound present over front of left side chest, horizontally placed measuring 6 cm x 1 cms.

(5) Obliquely placed stab wound present over front and

right side of chest, situated 1 cm to the right of mid-line and 4 cm below the level of right nipple measuring 2 cm X 1 cm X 3 cms, directed upwards, backwards to the left in the muscle plane, margins are clean out. Upper inner end is pointed and lower outer end is blunt.

38. From a bare reading of the above post-mortem report, it is clear that there were as many as 10 injuries on the person of the deceased. The doctor had further opined that death was due to shock and hemorrhage as a result of stab injuries found on the chest.

39. The injuries were piercing injuries between the intercasal space and the stab injuries damaged both the heart and the lungs. It has been noticed by the High Court that according to PW-1, the victim was not able to talk. The post mortem report clearly establishes injuries by knife. But the vital question is who caused these injuries. It takes some time to cause so many injuries, that too, on the one portion of the body i.e. the chest. If the statement of PW1 is to be taken to its logical conclusion, then it must follow that when the said witness saw the incident, the accused Govindaraju was not stabbing the deceased but, was watching the police coming towards them and had called upon one of the other accused, Goverdhan, to run away as the police was coming. Obviously, it must have also taken some time for the accused to inflict so many injuries upon the chest of the deceased. Thus, this would have provided sufficient time to PW1 to reach the spot, particularly when, according to the said witness he was only at a distance of 30 yards and was on a motorcycle. At this point of time, stabbing had not commenced as the accused were alleged to be chasing the victims. Despite of all this, PW-1 was not able to stop the further stabbing and/or running away of the accused, though he was on a motor cycle, equipped with a weapon and in a place where there were shops such as the VNR Bar and also nearby the conservancy area, which pre-supposes a thickly populated area. Thus, the statement of PW-1 does not even find corroboration from the medical evidence

on record. The High Court in its judgment has correctly noticed that the place of incident in front of VNR Bar of Sriramapuram was not really in dispute and having regard to the time and place, it was quite possible, at least for the persons working in the Bar, to know what exactly had happened. With this object, PW-7 was produced who, unfortunately, did not support the case of the prosecution. Having noticed this, we are unable to appreciate the reasons for the High Court to disturb the finding of acquittal recorded by the learned trial Court.

40. There is still another facet of this case which remains totally unexplained by PW-1. As per his statement Head Constable 345 and Police Constable 5857 had come on the spot. It was with their help that he had shifted the victim to the KCG Hospital. It is not understandable as to why he could not send the body of the victim to the hospital with one of them and trace the accused in the conservancy where they had got lost, along with the help of the Constable/Head Constable, as the case may be. This is an important link which is missing in the case of the prosecution, as it would have given definite evidence in regard to the identity of the accused as well as would have made it possible to arrest the accused at the earliest.

41. The High Court, while setting aside the judgment of acquittal in favour of the appellant Govindaraju, has also noticed that it may not have been possible for the PW-1 to notice the details explained in the complaint Ext. P-1, while riding a motor bike. This observation of the High Court is without any foundation. Firstly, PW-1 himself could have stated so, either before the Court or in Ext. P-1. Secondly, as per his own statement, his distance was only 75 feet when he noticed the accused chasing the victim and only 30 feet when the victim fell on the ground. Thus, nothing prevented an effective and efficient police officer from precluding the stabbing. If this version of the PW-1 is to be believed then nothing prevented him from stopping the commission of the crime or at least

immediately arresting, if not all, at least one of the accused, since he himself was carrying a weapon and admittedly the accused were unarmed, that too, in a public place like near VNR Bar.

42. The High Court has also observed that "PW-1 noticed when victim was being chased by assailants. This suggests that there must have been something else earlier to that event, some injuries might have been caused to the victim. On the other hand, it indicates that victim was aware of some danger to his life at the hands of the assailants. Therefore, he was running away from them but the assailants were chasing him holding the weapons in their hands". The High Court, therefore, convicted the appellant on the presumption that he must have stabbed him. It is a settled canon of appreciation of evidence that a presumption cannot be raised against the accused either of fact or in evidence. Equally true is the rule that evidence must be read as it is available on record. It was for PW-1 to explain and categorically state whether the victim had suffered any injuries earlier or not because both, the accused and the victim, were within the sight of PW-1 and the former were chasing the latter.

43. We are unable to contribute to this presumption as it is based on no evidence. The case would have been totally different, if PW-2, PW-7, PW-9 and PW-10 had supported the case of the prosecution. Once, all these witnesses turned hostile and the statement of PW-1 is found to be not trustworthy, it will be very difficult for any court to return a finding of conviction in the facts and circumstances of the present case.

44. There is certainly some content in the submissions made before us that non-production of material witnesses like the doctor, who performed the post mortem and examined the victim before he was declared dead as well as of the Head Constable and the Constable who reached the site immediately upon the occurrence and the other two witnesses turning hostile, creates a reasonable doubt in the case of the

prosecution and the court should also draw adverse inference against the prosecution for not examining the material witnesses. We have already dwelled upon appreciation of evidence at some length in the facts and circumstances of the present case. There is deficiency in the case of the prosecution as it should have proved its case beyond reasonable doubt with the help of these witnesses, which it chose not to produce before the Court, despite their availability. In this regard, we may refer to the judgment of this Court in the case of *Takhaji Hiraji v. Thakore Kubersing Chamansing and Ors.* [(2001) 6 SCC 145] wherein this Court held as under:-

> "19. So is the case with the criticism levelled by the High Court on the prosecution case finding fault therewith for non-examination of independent witnesses. It is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself — whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse

inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses. In the present case we find that there are at least 5 witnesses whose presence at the place of the incident and whose having seen the incident cannot be doubted at all. It is not even suggested by the defence that they were not present at the place of the incident and did not participate therein. The injuries sustained by these witnesses are not just minor and certainly not self-inflicted. None of the witnesses had a previous enmity with any of the accused persons and there is apparently no reason why they would tell a lie. The genesis of the incident is brought out by these witnesses. In fact, the presence of the prosecution party and the accused persons in the chowk of the village is not disputed……."

45. The applicability of the principle of 'adverse inference' pre-supposes that withholding was of such material witnesses who could have stated precisely and cogently the events as they occurred. Without their examination, there would remain a vacuum in the case of the prosecution. The doctor was a cited witness but was still not examined. The name of the Head Constable and the Constable appears in the Police investigation but still they were not examined. It is true that in their absence the post mortem report and FSL report were exhibited and could be read in evidence. But still the lacuna in the case of the prosecution remains unexplained and the chain of events unconnected. For instance, the Head Constable could have described the events that occurred right from the place of occurrence to the death of the deceased. They could have well explained as to why it was not possible for one Police Officer, one Head Constable and one Constable to apprehend all the accused or any of them immediately after the occurrence or even make enquiry about their names. Similarly, the doctor could have explained whether inflicting of such injuries with the

knife recovered was even possible or not. The expert from the FSL could have explained whether or not the weapons of offence contained human blood and, if so, of what blood group and whether the clothes of the deceased contained the same blood group as was on the weapons used in the commission of the crime. The uncertainties and unexplained matters of the FSL report could have been explained by the expert. There is no justification on record as to why these witnesses were not examined despite their availability. This Court in the case of *Takhaji Hiraji* (supra) clearly stated that material witness is one who would unfold the genesis of the incident or an essential part of the prosecution case and by examining such witnesses the gaps or infirmities in the case of the prosecution could be supplied. If such a witness, without justification, is not examined, inference against the prosecution can be drawn by the Court. The fact that the witnesses who were necessary to unfold the narrative of the incident and though not examined, but were cited by the prosecution, certainly raises a suspicion. When the principal witnesses of the prosecution become hostile, greater is the requirement of the prosecution to examine all other material witnesses who could depose in completing the chain by proven facts. This view was reiterated by this Court in the case of *Yakub Ismailbhai Patel* v. *State of Gujarat* [(2004) 12 SCC 229].

46. We are certainly not indicating that despite all this, the statement of the Police Officer for recovery and other matters could not be believed and form the basis of conviction but where the statement of such witness is not reliable and does not aspire confidence, then the accused would be entitled to the benefit of doubt in accordance with law. Mere absence of independent witnesses when the Investigating Officer recorded the statement of the accused and the article was recovered pursuant thereto, is not a sufficient ground to discard the evidence of the Police Officer relating to recovery at the instance of the accused. {See *State Government of NCT of Delhi v. Sunil & Anr.* [(2001) 1 SCC 652]}. Similar would be the situation where the attesting

witnesses turn hostile, but where the statement of the Police Officer itself is unreliable then it may be difficult for the Court to accept the recovery as lawful and legally admissible. The official acts of the Police should be presumed to be regularly performed and there is no occasion for the courts to begin with initial distrust to discard such evidence.

47. In the present case, on a cumulative reading and appreciation of the entire evidence on record, we are of the considered view that the learned trial Court had not fallen in error of law or appreciation of evidence in accordance with law. The High Court appears to have interfered with the judgment of acquittal only on the basis that 'there was a possibility of another view'. The prosecution must prove its case beyond any reasonable doubt. Such is not the burden on the accused. The High Court has acted on certain legal and factual presumptions which cannot be sustained on the basis of the record before us and the principle of laws afore-noticed. The case of the prosecution, thus, suffers from proven improbabilities, infirmities, contradictions and the statement of the sole witness, the Police Officer, PW1, is not reliable and worthy of credence.

48. For the reasons afore-recorded and the view that we have taken, it is not necessary for us to deal with the legal question before us as to what would be the effect in law of the acquittal of Govardhan attaining finality, upon the case of the present appellant Govindaraju. We leave the question of law, Point No.7 open.

49. For the reasons afore-stated, we allow the present appeal acquitting the appellant of the offence under Section 302 IPC. He be set at liberty forthwith and his bail and surety bonds shall stand discharged.

N.J. Appeal allowed.

N. SURESH

v.

YUSUF SHARIFF & ANR.

(Civil Appeal No. 2942 of 2012)

MARCH 19, 2012

[G.S. SINGHVI AND SUNDHANSU JYOTI MUKHOPADHAYA, JJ.]

Motor Vehicles Act, 1988: s.166 - Compensation - Motor accident of victim riding a moped due to rash and negligent driving of lorry - Victim aged 32 years suffered 90% permanent disability in his right leg which had to be amputated and also 50% to 60% disability of mouth and other parts of the body - Tribunal applied multiplier of 16 and awarded total compensation of Rs.4.17 lacs by taking his monthly income as Rs.2000 - High Court enhanced compensation to Rs.7.26 lacs by taking salary as Rs.3000 - On appeal, held: The evidence on record showed that victim was earning Rs.8500 per month prior to the accident - Victim was 32 years of age at the time of accident, therefore, tribunal rightly applied multiplier of 16 to determine the compensation - Once income is assessed at Rs.8500 p.m. annual income would by Rs.1,02,000 p.a. - 90% of same would be Rs.91,800 and same multiplied by 16 would come to Rs.1468800 towards loss of future earnings - The nature of injuries and treatment taken by appellant showed that victim must not have been able to work for minimum of 6 months - Rs.51,000 awarded towards loss of income during treatment - The amount towards medical bills was Rs.1,86,000 - Amount awarded by High Court is modified and respondent-insurance company is directed to pay Rs.19,75,800 with 6% interest to the victim.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2942 of 2012.

From the Judgment & Order dated 28.09.2010 of the High Court of Karnataka at Bangalore in M.F.A. No. 11865 of 2010.

Sharana Gouda N. Patil, Ashok Kumar Gupta II for the Appellant.

The order of the Court was delivered

O R D E R

1. Delay condoned.

2. Leave granted.

3. Feeling dissatisfied with the nominal enhancement granted by the High Court in the amount of compensation awarded by the Motor Accident Claim Tribunal, Maddur (Karnataka) in M.V.C.No.106/2003, the appellant has filed this appeal.

4. The appellant, who has suffered 90% permanent disability in his right leg which is paralysed and 50% to 60% disability of mouth and other parts of the body due to an accident which occurred on 28th February, 2003, filed a petition under Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as 'the Act') for award of compensation of Rs.21,50,000/- with interest.

5. The case of the appellant is that on 28th February, 2003 at about 11.30 a.m., he along with his wife-Savitha was travelling on a TVS Moped bearing Registration No.KA-01/ H4236 on the left side of the road. He was waiting near T. Ballekere cross to take turn to go to Koppa. At that time, a lorry bearing Registration No.CNT/7206 driven by its driver in a rash and negligent manner with high speed came to the extreme left side of the road and dashed into the vehicle of the appellant and caused the accident. Due to the accident, the appellant fell down and sustained grievous injuries. He was shifted to the hospital and in course was given treatment at different

hospitals. The appellant contended that he was aged about 32 years on the date of accident and was earning more than Rs.8,000/- per month. After the accident, he has suffered permanent disability and, therefore, he is not in a position to work as before. During the course of treatment in different hospitals, he had incurred medical expenses to the tune of Rs.4,50,000/- so far. After the accident, he was immediately taken to the Government Hospital, Koppa. Thereafter he was shifted to Mandya General Hospital and then he was taken to J.S.S. Hospital, Mysore and from there he was further shifted to Mallige Hospital, Bangalore. Lastly, he was taken to St. John Medical College Hospital, Bangalore where he was treated as indoor patient and underwent an operation of the right leg mandible, right hip, left leg, stomach and jaw(face). In the said accident, the appellant lost all his teeth except 7 teeth in the upper jaw and 5 teeth in the lower jaw. After the operation he has become permanently disabled and will have to spend a huge amount towards medical expenses. The Doctor has assessed the disability at 90% in his right leg which has permanently paralysed; 50% to 60% disability of his mouth and 20% to 25% disability of his whole body. There was amputation below the knee of the right leg.

6. The owner of the lorry did not contest the case before the Tribunal. The 2nd respondent, the New India Assurance Co.Ltd. (hereinafter referred to as Assurance Company) disputed the claim and denied the allegations made by the appellant. However, it is admitted that the lorry was insured with the 2nd respondent, the Assurance Co. The Assurance Co. took a plea that the accident occurred due to the negligent driving of the TVS Moped by the appellant himself, who without giving any signal and without noticing the vehicle coming from the right side, dashed into the lorry and caused the accident. The Assurance Co. also denied the quantum of amount spent in the treatment of the appellant.

7. On hearing the parties the Tribunal framed the following issues:

"1. Whether the petitioner proves accident was solely due to rash and negligent driving of the driver of the offending vehicle as alleged ?

2. Whether petitioner proves that he sustained injuries due to impact of the vehicle as alleged?

3. Whether the petitioner is entitled to get compensation? If so, to what amount and from whom?

4. To what order or relief the petitioner is entitled?"

8. In order to prove his case, the appellant examined eight witnesses including PW.2- N.K. Narayanashetty, Sales Manager in Adiswara Marketing Company where the appellant was working since two and a half years, PW.3- Dr. N. Sundar, Parlour Surgeon of St. John Medical College and Hospital and PW.7-Dr. Natashekara M., Assistant Professor of Kempegowda Dental College and Hospital, PW.6- Y.M. Thimmaiah, Postman in Haralekere Post Office and PW.8-N.V. Santosh, Manager of Adiswara Marketing Company. He also produced 27 exhibits including medical bills, discharge summary of the hospital, salary certificate/ vouchers, vouchers of commission, etc.

9. The Tribunal on hearing both the parties and appreciation of evidence on record answered the first issue in affirmative in favour of the appellant and held that the appellant sustained injuries due to the impact of vehicle as alleged. The second issue relating to the entitlement of compensation was also decided in affirmative in favour of the appellant but while deciding the issue Nos.3 and 4, the Tribunal awarded total compensation of Rs.4,17,000/- with interest at the rate of 6% per annum against the following heads:

1.	Towards pain and sufferings	= Rs. 50,000/-
2.	Towards loss of future earnings	= Rs.1,55,000/-
3.	Towards medical expenses and other Incidental charges	= Rs.2,00,000/-
4.	Towards loss of income during treatment	= Rs. 12,000/-
	Total	= Rs.4,17,000/-

10. The High Court by impugned order dated 28th September, 2010 nominally enhanced the amount against different heads along with 6% interest as shown hereunder:

1.	Towards pain and sufferings	= Rs.1,00,000/-
2.	Towards medical expenses	= Rs.1,50,000/-
3.	Towards conveyance, nourishing food and attendant charges	= Rs. 40,000/-
4.	Towards loss of income during laid-up Period	= Rs. 18,000/-
5.	Towards loss of amenities	= Rs.1,00,000/-
6.	Towards loss of future income	= Rs.2,88,000/-
7.	Towards future medical expenses	= Rs. 30,000/-
	Total	= Rs.7,26,000/-

11. Learned counsel appearing on behalf of the appellant contended that the High Court has failed to appreciate the income of the appellant by calculating it to Rs.3,000/- though there was evidence on record to show that the earning of the appellant was much more than Rs.8,000/- per month. The High

Court has failed to consider the permanent disability and loss of future income of the appellant who was working hard to earn the income of more than Rs.8,000/- per month.

12. It was further contended that taking into consideration the permanent disability of more than 90% of the leg and 60% disability of mouth, the High Court ought to have assessed permanent disability accordingly. Apart from this, the Tribunal and the High Court have also failed to grant appropriate amount towards medical expenses and other incidental charges apart from Rs.30,000/- towards future medical expenses as granted.

13. Inspite of the service of notice, nobody has appeared on behalf of the respondents to dispute the claim.

14. We have considered the arguments as advanced on behalf of the appellant and perused the record. The questions which arise for consideration in this case are :

(i) What was the earning of the appellant prior to the accident and the permanent disability incurred during accident to decide the quantum of loss of future earning and loss of income during the treatment/laid up period and

(ii) What amount the appellant is entitled towards medical expenses incurred, other incidental charges and future medical expenses.

15. The Tribunal has noticed and appreciated different evidence on record relating to earning and disability to decide the loss of future earning, the relevant portion of which reads as follows:

"(ii) *Towards loss of future earning capacity:* Petitioner contended that prior to accident he was hale and healthy aged about 32 years on the date of accident. *He was working as mail courier in Kowdle Post Office (DDSMC) and getting Rs.2,494/- p.m. since 1994.* Apart from that work he was working in Adiswara Market Company as

Deputy Sales Officer and getting commission of Rs.1,500/- to Rs.3,000/- p.m. along with salary of Rs.2,000/- p.m. He got 4th medal in the State. Apart from that he is working as agent in PGF Limited, Mandya getting Rs.2,000/- to 3,000/- p.m. From all he was earning Rs.8,000/- p.m. His wife, mother and children were depending upon his income. So there is loss of future earning capacity. In this connection he has been examined as P.W.1 and deposed about the services given by him. P.W.2 one N.K. Narayanashetty, who is Sales Manager in Adiswara Marketing Company deposed that Petitioner is working in their Company since 2-1/2 years and getting Rs.2,000/- p.m. apart from commission of Rs.1,500/- to 3,000/- p.m. Now he is not working there. *P.W.5 Chikkathimmaiah is Inspector in PGF Limited, Mandya deposed that Petitioner was working as Assistant Agent and getting Rs.2,000/- p.m. He has produced identity card at Ex.P-22. Commission vouchers were also produced at Ex.P-14. P.W.6 Thimmaiah, who is postman in Haralekere Post Office deposed that the Petitioner was working as Mail Courier since 10 years and getting income. P.W.8 Manager of Adiswara Marketing deposed that Petitioner was working in their company and getting Rs.2,000/- p.m. and also getting commission of Rs.4,000/- to 5,000/- p.m. He has issued certificates as per Ex.P-7. Now he is not working in the company, Ex.P-15 his salary vouchers. Some commission vouchers of Adiswara Marketing Limited were produced. Ex.P-13 is Postal Department Certificate stating that he was working as mail courier, Ex.P-11 is certificate of Post Department stated that from March 2003 to August 2003 they have not paid the salary. Ex.P-12 is salary certificate of PGF Limited stated that he was paid with Rs.2,000/- monthly income. Ex.P-13 shows that he was working as mail courier since 1994.* There is no specific details about his income. He was getting average commission. Looking to the nature of the works stated by the Petitioner if is not possible to do all

those works every day, he might have done work here and there. He has not stated from which time to which time he was working his particular job and whether they are continuous. Hence, considering all these aspects his income is considered at Rs.2,000/- p.m. He is suffering from permanent physical disability of 90% in his right leg and 50% to 60% in his mouth, his face become ugly and he could not open his mouth, he is suffering from fracture of mandible and maxilla. He inserted with plates and screws, his right leg is fractured, he cannot chew and he became weak. Doctor has stated he cannot work. P.W.3, Doctor deposed about the disability in right leg at 90%, not deposed what will be the disability comparing to whole body. P.W.7 dentist deposed that he was suffering from permanent physical disability of 50% to 60% in his face and comparing to whole body it come to 20% to 25%. Considering all these injuries his working capacity is reduced. Hence, it is found just and proper to consider disability remained with the Petitioner at 40%. He stated that he is aged about 32 to 33 years at the time of accident. He has not produced any age proof documents. Medical certificate shows his age is 32 years. If there is so the proper multiplier would be 16. If income is considered at Rs.2,000/- p.m. it comes to Rs.24,000/- p.a. 40% of the same comes to Rs.9,600/-. If same is multiplied by 16 it comes to Rs.1,53,600/-. It is found proper to award Rs.1,55,000/- under this head."

16. From the evidence as recorded, it is evident that prior to the accident the appellant used to earn the following amount:

1. Towards Salary from Adiswara Marketing Company = Rs.2,000/- p.m.
   (As deposed by PW-8. Manager, Adiswara Marketing Company, at Ex.P-15)
2. Commission from Adiswara Marketing Company (Rs.4,000/- to Rs.5,000/-) = Rs.4,500/-p.m (average)
   (as deposed by PW.8, Manager, Adiswara Marketing Ltd.)
3. Towads Salary as Assistant Agent from PGF Limited, Mandya = Rs.2,000/-p.m.
   (as deposed by PW.5, Chikkathimmaiah; Inspector, PGF Ltd. Mandya)
4. As mail courier of Kowdle Post Office = Rs.2,495/-p.m.
   (as deposed by appellant and corroborated by PW.6, Thimmaiah, Postman)

Total = Rs.10, 995/-

Therefore, it can safely be stated that the appellant was earning minimum Rs.8,500/- per month prior to the accident.

17. The PW.3, Doctor deposed that the right leg is 90% disabled and is permanently paralysed. The leg is amputated. Apart from this, his face has been deformed and is disabled to the extent of 50% to 60%, due to which he is not in a position to open his mouth fully. Therefore, it can safely be stated that the appellant is 90% permanently disabled to earn any income. The Tribunal and the High Court failed to appreciate the facts and fixed the disability at a lower level of 40% or 50%.

18. Admitted, the appellant was about 32 years of age at the time of the accident, therefore, the Tribunal was right in applying the multiplier of 16 to determine the compensation. Once the income is considered at Rs.8,500/- per month it comes to Rs.1,02,000/- per annum, 90% of the same comes to Rs.91,800/-. If the same is multiplied by 16 it comes to Rs.91,800/- x 16 = Rs.14,68,800/-. Therefore, it is proper to award Rs. 14,68,800/- towards "loss of future earning".

19. So far as loss of income during the treatment is concerned, the Tribunal has noticed the nature of injuries and treatment taken by the appellant to come to the conclusion that the appellant might not have worked at least for six months. Even if such minimum period for treatment is accepted as six months, the appellant is entitled for a just and proper award of Rs.51,000/- under the head of "loss of income during the treatment".

20. So far as medical expenses and other incidental charges are concerned, the Tribunal appreciated the different evidence and observed as follows:

"iii)Towards medical expenses and other incidental charges: Petitioner contended that he has taken treatment in several hospitals. Initially he was taken to Mandya General Hospital. Later in private car he was taken to JSS Hospital, Mysore. On the same day he was taken to Mahaveer Jain Hospital, Bangalore. He was operated on his right leg and discharged for higher treatment. He was admitted in Boring Hospital, Bangalore wherein he was paid Rs.5,000/-. From that hospital also he was discharged. Later he was admitted in St. John Hospital on 2.3.2003. He was operated on his hand, right leg, left leg, stomach. He was indoor patient for 2 months. Later he took treatment in Kempegowda Dental Hospital for mandible and he was indoor patient for 1 week. All his teeth were removed. He lost all teeth and left leg. He has become completely disabled. P.W.7 Doctor Natarajshekar of Kempegowda Hospital deposed that he treated his dental problems stated that on 9.7.2003 to 15.7.2003 he was indoor patient. All teeth were removed, decided to insert entire set. On 10.7.2003 he was operated and again on 4.9.2003 he was operated for 2nd time. In this connection he has produced Ex.P-5 wound certificate issued by St.John Medical Hospital, Bangalore, Ex.P-6 and P-7 is medical bills and Transporting charges. He has produced

medical bills worth of Rs.1,85,628/- rounded off to Rs.1,86,000/- and transportation charges worth of Rs.27,230. Ex.P-9 to 16 case sheet, patient record, discharge summary, Ex.P-17 is the case sheet of St.John Medical College Hospital, Bangalore for having taken treatment from 2.3.2003 to 28.4.2003 and also taken treatment from 2.3.2003 to 28.4.2003 and also taken treatment from 29.3.2003 to 20.4.2003. Others are ex-rays Ex.P-25 is KIMS Hospital records. He further produced Ex.P-26 cash bills worth of Rs.2,590/-. On going through records Ex.P-6 the petitioner has taken into consideration double of hospital bills, which ought to have been reduced, which comes to Rs.1,85,000/- and not 4,83,000/- as calculated. The bills are repeated as item No.8,18,19,34,36,60. The only final bill worth of Rs. 73,000/- is shown but he has considered the interval bills also including the final bills it comes to Rs.1,85,628/-. On going through all the medical bills some of them are not supported with prescriptions and not properly explained by the petitioner. Having regard to all the circumstances and treatment taken by him in different hospitals he might have spent for medical expenses. So it is better to consider medical expenses at Rs.1,50,000/-. On perusal of Ex.P-7 transportation charges receipts have been produced, but person who provide vehicle is not mentioned. However he might have spent something for transportation. It is proper to consider Rs.10,000/- for transportation. He was in hospital and taken treatment, he might have spent attendant expenses and special diet, it is found just and proper to award Rs.10,000/- for the same P.W.7 Doctor stated that he has to undergo in future operation of mandible by spending Rs.1,50,000/- for insertion of implant since all the sets removed. X-ray shows fracture of cants of left side. There is permanent disability in the mouth. Considering all these aspects it is found that he requires future medical expenses of Rs.30,000/-. Hence, Petitioner

is entitled for compensation under this head is Rs.2,00,000/-."

21. From the evidence on record the following amounts towards different medical bills are undisputed:

(1) The amounts paid during the treatment shows as interval bills and final bills = Rs.1,86,000/-

(2) Cash Bill (Ex.P26) = Rs. 2,590/-

In this background, the High Court and the Tribunal ought to have accepted the amount of Rs.1,86,000/- towards medical bills, apart from transportation charges.

22. If the aforesaid amount is taken into consideration towards the abovesaid heads, then as per High Court's calculation the break-up of amounts is as follows:

1. Towards pain and sufferings = Rs.1,00,000/- (as awarded by High Court)

2. Towards medical expenses = Rs.1,86,000/- (as determined above)

3. Towards conveyance, nourishing food and attendant charges = Rs. 40,000/- (as awarded by the High Court)

4. Towards loss of income during laid-up period = Rs. 51,000/- (as determined Above)

5. Towards loss of amenities = Rs.1,00,000/- by the High Court)

6. Towards loss of future income = Rs.14,68,800/- (as determined Above)

7. Towards future medical expenses = Rs. 30,000/- (as awarded by the High Court)

Total = Rs.19,75,800/-

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23. Accordingly, the appeal is allowed and the impugned judgment and award passed by the Tribunal in MVC No.106/2003 dated 9th September, 2005 and the High Court in MFA No.11865/2005 dated 28th September, 2010 stands modified, awarding compensation of Rs.19,75,800/- with interest at the rate of 6% per annum from the date of the petition till realisation. The 2nd respondent-The New India Assurance Co.Ltd. is directed to pay immediately to the appellant total amount of Rs.19,75,800/- with 6% interest, after deducting the amount already paid by them.

D.G. Appeal allowed.

RAJENDRA PRATAPRAO MANE & ORS.
v.
SADASHIVRAO MANDALIK K.T.S.S.K. LTD. & ORS.
(Civil Appeal Nos. 2990-2991 of 2012)

MARCH 22, 2012

[ALTAMAS KABIR AND J. CHELAMESWAR, JJ.]

Co-operative Societies:

Maharashtra Co-operative Societies Act, 1960 - s. 152 - Rules of Business - r. 6-A - Interpretation of - Statutory appeals filed before the State u/s. 152 - Competency of the Secretary of the Department to hear the appeals - On facts, controversy with regard to disqualification of 6617 voters found ineligible to be members of Sugarcane Factory by the regional Joint Director - Appeals filed before the State Government u/s. 152 - Due to allegations of bias, Minister for Co-operation transferred the cases to the Secretary, Department of Co-operation - Writ petition - High Court holding that the said power contained in r. 6-A would have to be exercised by the Chief Minister since the appeals were already pending before the State Government - Interference with - Held: Not called for - r.6-A does not contemplate the functions of a Minister being discharged by the Secretary of the Department or any other officer for that matter - Order passed by the Single Judge of the High Court was a pragmatic attempt to ensure that the elections were duly held and the same was within the parameters of r. 6-A, which indicates that if the Chief Minister was unable to discharge his functions for the reasons indicated, he could direct any other Minister to discharge all or any of his functions during his absence - Likewise, if any Minister was unable to discharge his functions, the Chief Minister could direct any other Minister to discharge all or any of the functions of the Minister during the absence of the said Minister.

Appellants filed an application before the Commissioner of Sugar alleging that respondent Sugar Factory had enrolled persons who did not fulfill the required criteria and were ineligible from becoming members of the factory. The Commissioner or his subordinates did not take any action. The appellants then filed a writ petition. The High Court ordered for an inquiry and submission of report. The Regional Joint Director (Sugar) found that 6617 persons did not satisfy the required criteria to become members of the respondent sugar factory and passed an order under Section 11 read with Section 11A of the Maharashtra Co-operative Societies Act, 1960. Thereafter, the respondent sugar factory and several of the members who were held to be ineligible from becoming members filed appeals before the State under Section 152 of the Act. Due to allegations of bias, Minister for Co-operation transferred the cases to the Secretary, Department of Co-operation. The respondent raised an objection to the same and also raised the said objection in the writ petition. The High Court held that the power contained in r. 6-A would have to be exercised by the Chief Minister since the appeals were already pending before the State Government and directed the Chief Minister to either hear the appeals himself or to appoint any other Minister to hear and decide the same by performing the function of the Minister for Co-operation. Thus, the instant appeals were filed.

Disposing of the appeals with directions, the Court

HELD: 1.1 Respondent Nos. 3, 4 and 5 who are likely to be affected by the order, should have been given notice before the impugned order was passed. Such being the position, the normal course would have been to remand the matter to the High Court for a fresh decision after hearing the appellants but nothing fruitful

would materialize if such an order was passed in view of the reasoning of the judge while making the impugned order. On the legal aspect of the question regarding the competence of the Secretary of the Department to hear the appeals in the light of Rule 6-A of the Rules of Business, the counsel for the appellant is heard. Any further hearing before the High Court on the said question would only amount to duplication and waste of judicial time. [Para 16] [139-C-F]

1.2 The order passed by the Single Judge of the High Court was a pragmatic attempt by the High Court to ensure that the elections to the Board of Directors of the Karkhana were duly held and the same was within the parameters of Rule 6-A of the Rules of Business, which indicates that if the Chief Minister was unable to discharge his functions for the reasons indicated, he could direct any other Minister to discharge all or any of his functions during his absence. Likewise, if any other Minister was unable to discharge his functions, the Chief Minister could direct any other Minister to discharge all or any of the functions of the Minister during the absence of the said Minister. Rule 6-A of the Rules of Business does not contemplate the functions of a Minister being discharged by the Secretary of the Department or any other officer for that matter. [Paras 17 and 18] [139-F-H; 140-A-B]

1.3 There is no reason to interfere with the order passed by the Single Judge of the High Court. So as not to delay the elections any further, the Chief Minister is requested to take immediate steps to have the appeals filed by the appellants under Section 152 of the M.C.S. Act, 1960, heard and disposed of within the stipulated period. In the event the Chief Minister is unable to hear the appeals himself and entrusts the hearing to one of the other Ministers, which would also include the Minister of State of the concerned Department, he should also

impress upon the said Minister the urgency of the matter since the elections to the Board of the Karkhana have not been held since 2007. [Para 19] [140-C-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2990-2991 of 2012.

From the Judgment & Order dated 29.2.2012 of the High Court of Judicature of Bombay in Writ Petition Nos. 1800 & 1801 of 2012.]

Mukul Rohatgi, Parag P. Tripathi, Shivaji M. Jadhav, Anish R. Shah, Jayant Bhatt for the Appellants.

Uday U. Lalit, Devdutt Kamat, Gaurav Agrawal, Rajesh Inamdar, Priyanka Telang, Sanjay Kharde for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. The facts of these appeals give rise to an interesting question of law regarding the interpretation of the Rules of Business framed by the Governor of Maharashtra in exercise of powers conferred under Article 166(2) and (3)of the Constitution of India. According to the said Rules of Business, statutory appeals filed under Section 152 of the Maharashtra Cooperative Societies Act, 1960, hereinafter referred to as "the M.C.S. Act, 1960", are to be heard by the Minister-in-charge of the concerned Department.

3. A few facts are required to be set out in order to appreciate the question which has been raised in these appeals.

4. On 30th June, 2011, the appellants filed an application before the Commissioner of Sugar, Maharashtra State, Pune, complaining about the unlawful manner in which persons had been enrolled by the respondent Karkhana, despite the fact that they did not fulfill the required criteria and were ineligible from

becoming members. As the Commissioner, or his subordinates, did not take any action on the application filed by the appellants they filed a writ petition, being W.P. No.7257 of 2011, before the Bombay High Court, for a writ in the nature of Mandamus upon the authorities under the M.C.S. Act, 1960, to conduct an inquiry into the allegations made by the appellants.

5. On 27th September, 2011, the Division Bench of the Bombay High Court passed an order on the statement made by the Regional Joint Director (Sugar), Kolhapur, to the effect that an inquiry team would look into the allegations made by the appellant. The Division Bench directed that the inquiry be completed within the stipulated time and the report be submitted before it. The order of the Division Bench was challenged by the respondent Karkhana by way of S.L.P.(C)No.28880 of 2011, which was dismissed by this Court and it was also indicated that the inquiry to be conducted would be one under Section 11 of the M.C.S. Act, 1960.

6. Writ Petition No. 7257 of 2011, and the connected Writ Petition No.10133 of 2011, were disposed of on a statement made by the Government Pleader that the inquiry into the complaint by the appellants would be completed within 15th February, 2012. While disposing of the Writ Petitions, the High Court directed that the previous list of voters for election to the Managing Committee of the respondent sugar factory should be published only after the inquiry was completed. In his report dated 10th February, 2012, the Regional Joint Director (Sugar), Kolhapur, found that a total number of 6617 persons did not satisfy the required criteria to become members of the respondent sugar factory and passed an order under Section 11 read with Section 11A of the Act.

7. Immediately, thereafter, the respondent sugar factory and several of the members, who were held to be ineligible from becoming members of the factory, challenged the order passed by the Regional Joint Director (Sugar), Kolhapur, by filing

appeals before the State of Maharashtra, under Section 152 of the M.C.S. Act, 1960. On 22nd February, 2012, the said appeals were listed for admission and interim orders before the Minister for Cooperation, State of Maharashtra, but in view of the allegations of bias made against him in W.P.No.1685 of 2012, the Minister recused himself from hearing the appeals and transferred the cases to the Secretary, Department of Cooperation, for hearing and disposal. The appellants appeared before the Secretary on 24.2.20121, but raised an objection to his jurisdiction to hear a substantive appeals under Section 152 of the M.C.S. Act, 1960. The order of the Joint Director (Sugar), Kolhapur was also challenged by the respondent sugar factory and some of the persons who were held to be ineligible, notwithstanding the pendency of their substantive appeals under Section 152 of the Act, challenging the very same order before the State of Maharashtra.

8. In the above-mentioned appeals assigned for hearing to the Secretary, Cooperation Department, an objection was raised on behalf of the Respondent No.2 that neither under the Maharashtra Cooperative Societies Act and Rules, nor under the provisions of the Rules of Business of the Government of Maharashtra, was the Secretary of the Department entitled to hear the appeals and that it was only the Minister in charge of the Department who could do so. The same objection was raised in the writ petitions also. The learned Single Judge of the High Court, while disagreeing with the said decision, and referring the matter for determination of the issue by a larger Bench, also observed that the judgment of the Bombay High Court in the case of *Ravindra V. Gaikwad & Ors. Vs. State of Maharashtra & Ors.* still held the field and, accordingly, attempted to work out a solution to solve the deadlock. The learned Single Judge was of the view that the answer to the question which had arisen, lay in Rules 6 and 6-A of the Rules of Business of the Government, which provides as follows :

"6. The Chief Minister and a Minister in consultation with

the Chief Minister may allot to a Minister of State or a Deputy Minister any business appertaining to a Department or part of a Department.

6-A. When the Chief Minister is unable to discharge his functions owing to absence, illness, or for any other cause, the Chief Minister may direct any other Minister to discharge all or any of his functions during his absence. When any Minister is likewise unable to discharge his functions, the Chief Minister may direct any other Minister to discharge all or any of the functions of the Ministers during the Minister's absence."

9. The learned Judge, after recording that the Minister for Cooperation had expressed his inability to hear and decide the appeals, felt that this was a case, where the Chief Minister could himself hear the appeals or direct any other Minister to exercise the function of the Minister for Cooperation for hearing the appeals. The learned Judge was of the view that the said power contained in Rule 6-A would have to be exercised by the Chief Minister. Since, the appeals were already pending before the State Government, the learned Single Judge directed the Chief Minister to either hear the appeals himself or to appoint any other Minister to hear and decide the same by performing the function of the Minister for Cooperation, in relation to the hearing of the above appeals.

10. The present appeals have been filed by the Respondent Nos.3, 4 and 5 on various grounds. The first ground, which has been urged by Mr. Mukul Rohatgi, learned Senior Advocate, appearing for the Appellants, is that the High Court was not justified in disposing of the writ petitions with directions, without giving the Appellants herein an opportunity of being heard.

11. The second ground taken for filing the appeals is whether the High Court could have directed the Chief Minister of Maharashtra to invoke the Rules of Business in terms of

Rules 6 and 6-A thereof and also whether the appeals could at all be heard by the Secretary of the Cooperation Department. Mr. Rohtagi contended that when the Minister of State for the Department of Cooperation was available, as were other Ministers who could decide the appeals in terms of Rule 6-A of the Rules of Business, there was no reason for having the appeals heard by the Secretary of the Department.

12. Yet another ground was taken as to whether the High Court was justified in hearing the writ petition of the Respondent, when its substantive appeal under Section 152 of the M.C.S. Act, 1960, in respect of the same order, was pending before the Government of Maharashtra. Mr. Rohatgi also urged that Rule 10 of the Rules of Business were probably overlooked by the High Court while passing the impugned order, since by virtue of the said Rule, it was the Minister in charge of the Department, who was to be primarily responsible for the disposal of the business of the Department.

13. On the other hand, Mr. Uday U. Lalit, learned Senior Advocate, urged that in view of the peculiar situation created by the Minister concerned and, thereafter, the Chief Minister who also recused himself from the hearing of the appeals, on account of the allegation of bias against them, the Court had no alternative but to work out a solution so that the elections to the Cooperative Societies could be held. The ground realities were such as to make it almost impossible to have the appeals heard out, unless the Secretary of the Department was directed to do so.

14. At this stage, it may be recalled that the entire controversy arose on account of the disqualification of 6617 voters, who were found ineligible to be members of Respondent No.1 Karkhana by the Regional Joint Director (Sugar), Kolhapur.

15. As indicated hereinbefore, the order passed under Section 11 read with Section 25A of the Maharashtra

Cooperative Societies Act, was challenged by the members of the said factory. The Appellants herein, who appeared before the Secretary, brought to his notice that in view of the decision of the Bombay High Court in the case of *Ravindra V. Gaikwad* (supra), he possibly did not have jurisdiction to hear the appeals under Section 152 of the said Act. It was, thereafter, that the writ petitions were filed and orders were passed by the learned Single Judge, whereby he directed the Chief Minister to exercise his powers under Rule 6-A of the Rules of Business.

16. The Writ Petitions were heard and disposed of by the learned Single Judge of the Bombay High Court by the order impugned in these appeals, at the very threshold, without issuing notice to the Respondent Nos.3, 4 and 5. In our view, the said Respondents, who are likely to be affected by the order, should have been given notice before the impugned order was passed. Such being the position, the normal course for us would have been to remand the matter to the High Court for a fresh decision after hearing the Appellants herein, but nothing fruitful will materialize if we were to pass such an order, in view of the reasoning of the learned Judge while making the impugned order. Apart from the above, we have heard Mr. Rohtagi on the legal aspect of the question regarding the competence of the Secretary of the Department to hear the appeals in the light of Rule 6-A of the Rules of Business. Any further hearing before the High Court on this question would only amount to duplication and waste of judicial time.

17. In our view, the order passed by the learned Single Judge, was a pragmatic attempt by the High Court to ensure that the elections were duly held and the same was within the parameters of Rule 6-A of the Rules of Business, which has been extracted hereinabove and indicates that if the Chief Minister was unable to discharge his functions for the reasons indicated, he could direct any other Minister to discharge all or any of his functions during his absence. Likewise, if any other Minister was unable to discharge his functions, the Chief

Minister could direct any other Minister to discharge all or any of the functions of the Minister during the absence of the said Minister.

18. The order of the learned Single Judge has been made within the framework of the aforesaid Rules and as indicated hereinabove, was a pragmatic attempt to break the impasse so that the elections to the Board of Directors of the Karkhana could be held. Rule 6-A of the Rules of Business does not contemplate the functions of a Minister being discharged by the Secretary of the Department or any other officer for that matter.

19. We, therefore, see no reason to interfere with the order passed by the learned Single Judge, and the appeals are, therefore, dismissed. So as not to delay the elections any further, we request the Chief Minister to take immediate steps to have the appeals filed by the Appellants herein under Section 152 of the M.C.S. Act, 1960, heard and disposed of as early as possible, but not later than 2 months from the date of communication of this judgment. In the event the Chief Minister is unable to hear the appeals himself and entrusts the hearing to one of the other Ministers, which, in our view, would also include the Minister of State of the concerned Department, he should also impress upon the said Minister the urgency of the matter since the elections to the Board of the Karkhana have not been held since 2007.

20. The appeals are accordingly disposed of with the aforesaid directions.

21. There will be no order as to costs.

N.J. Appeals disposed of.

SAROJ SCREENS PVT. LTD.
v.
GHANSHYAM AND OTHERS
(Civil Appeal Nos. 3107- 3108 of 2012)

MARCH 26, 2012

[G.S. SINGHVI AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

Municipalities - The City of Nagpur Corporation Act, 1948 - s.70(5) -Right/interest in public property - Alienation of - Resolution dated 28-8-1991 passed by Municipal Corporation of the City of Nagpur for renewal of lease in favour of appellant and sanction accorded by the State Government u/s.70(5) - Quashed by the High Court - Validity - Held: Resolution passed by the Corporation for renewal of lease in favour of appellant and consequential action taken for execution of lease deed dated 4-9-1991 were ex facie illegal - High Court did not commit any error by quashing the same because,(i) the earlier Resolution dated 29-10-1975 passed by the Corporation for renewal of lease in favour of 'P' had not been cancelled or rescinded and during subsistence of that resolution, neither the Corporation could have renewed the lease in favour of the appellant nor the State Government could have granted sanction u/s.70(5) for such renewal; (ii) before passing resolution for renewal of lease in favour of the appellant, the Corporation did not obtain sanction of the State Government, which was sine qua non for any such action/ decision; and (iii) the State Government accorded post facto sanction for renewal of the lease without realizing that alienation of any right or interest in a public property in favour of any person without following a procedure consistent with the doctrine of equality is impermissible - The Corporation holds the property as a trustee of the public and any alienation of such property or any right or interest therein otherwise than

by way of auction or by inviting bids would amount to breach of that trust - Also, the concept of the 'State' has undergone drastic change in recent years - Today, the State cannot be conceived of simply as a coercive machinery wielding the thunderbolt of authority - The Government cannot give or withhold largesse in its arbitrary discretion or according to its sweet-will - The Government cannot now say that it will transfer the property (land etc.) or will give jobs or enter into contracts or issue permits or licences only in favour of certain individuals - In the instant case, before granting 30 years' lease of the plot in question in favour of the appellant, the Corporation neither issued any advertisement nor followed any procedure consistent with the doctrine of equality so as to enable the members of the public to participate in the process of alienation of public property - Appellant directed to hand over possession of the plot to the Corporation - Corporation to alienate the same by sale, lease, or otherwise by auction or by inviting tenders and after following a procedure consistent with Article 14 of the Constitution - Constitution of India, 1950 - Article 14.

The High Court, vide the impugned judgment, quashed Resolution dated 28-8-1991 passed by Municipal Corporation of the City of Nagpur for renewal of lease in favour of the appellant in respect of a plot of land as also sanction accorded by the State Government under Section 70(5) of the City of Nagpur Corporation Act, 1948. The High Court held that during the subsistence of an earlier Resolution dated 29-10-1975 in favour of one 'P', the Municipal Corporation could not have granted lease in favour of the appellant and the State Government had no right to validate such grant.

The question which arose for consideration in the instant appeals was whether the High Court committed an error by quashing Resolution dated 28.8.1991 passed by the Corporation and the sanction accorded by the

State Government under Section 70(5) of the City of Nagpur Corporation Act, 1948.

Dismissing the appeals, the Court

HELD: 1. The resolution passed by the Corporation for renewal of lease in favour of the appellant and the consequential action taken for the execution of lease deed dated 4.9.1991 were ex facie illegal and the High Court did not commit any error by quashing the same because, (i) Resolution dated 29.10.1975 passed by the Corporation for renewal of lease in favour of 'P' for a period of 30 years had not been cancelled or rescinded and during the subsistence of that resolution, neither the Corporation could have renewed the lease in favour of the appellant for 30 years commencing from 16.3.1991 nor the State Government could have granted sanction under Section 70(5) of the Act for such renewal; (ii) Before passing the resolution for renewal of the lease in favour of the appellant for a period of 30 years, the Corporation did not obtain sanction of the State Government, which was sine qua non for any such action /decision; (iii)It,however, appears that by taking advantage of the fact that it continued to have possession of the plot, the appellant induced the functionaries of the Corporation to enter into a clandestine compromise for forwarding a proposal to the State Government to grant post facto sanction for renewal of the lease for 30 years from 16.3.1991 and the latter accorded sanction without realizing that alienation of any right or interest in a public property in favour of any person without following a procedure consistent with the doctrine of equality is impermissible. [Para 9] [165-A-G]

Damodhar Tukaram Mangalmurti v. State of Bombay **AIR 1959 SC 639: 1959 Suppl. SCR 130 - held inapplicable.**

D.F.O., South Kheri v. Ram Sanehi Singh **(1971) 3 SCC 864 and** *S.J.S. Enterprises (P) Ltd. v. State of Bihar* **(2004) 7 SCC 166: 2004 (3) SCR 56 - referred to.**

2. Section 70 of the City of Nagpur Corporation Act, 1948 contains provisions governing the disposal of municipal property or property vesting in or under the management of the Corporation. Though, the exercise of power by the Corporation under the aforesaid section is not hedged with any particular condition except that in a case like the present one, the alienation could not have been made without the previous sanction of the State Government, but in our constitutional scheme compliance of the doctrine of equality enshrined in Article 14 of the Constitution has to be read as a condition precedent for exercise of power by the State Government and the Corporation, more so, when it relates to alienation of public property or any right or interest therein. In this context, it is necessary to emphasise that the Corporation holds the property as a trustee of the public and any alienation of such property or any right or interest therein otherwise than by way of auction or by inviting bids would amount to breach of that trust. [Para 10] [165-G-H; 166-A; 168-D-F]

3. The concept of the 'State' as it was known before the commencement of the Constitution and as it was understood for about two decades after 26.1.1950 has undergone drastic change in recent years. Today, the State cannot be conceived of simply as a coercive machinery wielding the thunderbolt of authority. Now the Government is a regulator and dispenser of special services and provides to the large public benefits including jobs, contracts, licences, quotas, mineral rights etc. The law has also recognised changing character of the governmental functions and need to protect individual interest as well as public interest. The discretion of the

Government has been held to be not unlimited. The Government cannot give or withhold largesse in its arbitrary discretion or according to its sweet- will. The Government cannot now say that it will transfer the property (land etc.) or will give jobs or enter into contracts or issue permits or licences only in favour of certain individuals. [Para 11] [168-H; 169-A-C]

V. Punanan Thomas v. State of Kerala, **AIR 1969 Ker. 81 - referred to.**

4. The traditional view that the executive is not answerable in the matter of exercise of prerogative power has long been discarded. The question whether the State and/or its agency/instrumentality can transfer the public property or interest in public property in favour of a private person by negotiations or in a like manner has been considered and answered in negative in several cases. [Paras 12, 15] [169-E; 171-F-G]

Akhil Bhartiya Upbhokta Congress v. State of Madhya Pradesh **(2011) 5 SCC 29: 2011 (5) SCR 77 - relied on.**

S.G. Jaisinghani v. Union of India **AIR 1967 SC 1427: 1967 SCR 703;** *Ramana Dayaram Shetty v. International Airport Authority of India* **(1979) 3 SCC 489 : 1979 (3) SCR 1014;** *Erusian Equipment and Chemicals Ltd. v. State of W.B.* **(1975) 1 SCC 70: 1975 (2) SCR 674;** *Kasturi Lal Lakshmi Reddy v. Sta***te of J&K (1980) 4 SCC 1: 1980 (3) SCR 1338;** *Common Cause v. Union of India* **(1996) 6 SCC 530: 1996(6) Suppl. SCR 719;** *Shrilekha Vidyarthi v. State of U. P.* **(1991) 1 SCC 212: 1990 (1) Suppl. SCR 625;** *LIC v. Consumer Education & Research Centre* **(1995) 5 SCC 482 : 1995 (1) Suppl. SCR 349 and** *New India Public School v. HUDA* **(1996) 5 SCC 510: 1996 (3) Suppl. SCR 597 - referred to.**

Padfield v. Minister of Agriculture, Fishery and Food

(1968) A.C. 997 and *Breen v. Amalgamated Engineering Union* **(1971) 2 QB 175 - referred to.**

'Administrative Law' 6th Edition by Prof. H.W.R. Wade - referred to.

5. The factual matrix of the instant case shows that before granting 30 years' lease of the plot in favour of the appellant, the Corporation neither issued any advertisement nor followed any procedure consistent with the doctrine of equality so as to enable the members of the public to participate in the process of alienation of public property. Therefore, the conclusion reached by the High Court, though for different reasons, that Resolution dated 28.8.1991 and the sanction accorded by the State Government vide letter dated 12.6.2000 are legally unsustainable does not call for interference by this Court. [Para 16] [173-D-E]

6.1. However, even though the lease was renewed in favour of 'P' vide Resolution dated 29.10.1975, respondent Nos.1 and 2 cannot derive any benefit from the said renewal merely because the Corporation did not cancel or rescind the resolution. It was neither the pleaded case of respondent Nos.1 and 2 nor any material was produced by them before the High Court to show that 'P' had taken any action in furtherance of Resolution dated 29.10.1975 and fresh lease deed was executed in his favour. The only plea taken by them was that 'P' had filed an appeal under Section 397(3) read with Section 411 of the Act against increase in the ground rent and the imposition of penalty. However, nothing has been said about the fate of that appeal. If 'P', his heirs or respondent Nos.1 and 2 felt that the disposal of the appeal has been unduly delayed then they could have filed a writ for issue of a mandamus directing the appellate authority to decide the appeal within a specified period but no such step is shown to have been taken by either of them. Therefore,

Resolution dated 29.10.1975 had become redundant and the same can no longer be relied upon by respondent Nos.1 and 2 for claiming any right or interest in the plot. [Para 17] [173-E-H; 174-A-C]

6.2. The argument of the counsel for respondent Nos.1 and 2 that the Corporation is bound to renew the lease granted to his clients in terms of Section 116 of the Transfer of Property Act, 1882 because the plot in question remained in their possession through the appellant also merits rejection. The reason for this conclusion is that no evidence was produced before the High Court to show that the appellant was continuing in possession with the consent of 'P', his heirs or respondent Nos.1 and 2. Rather, it was their pleaded case that the appellant did not have any right to continue in possession. [Para 20] [175-G-H; 176-A]

6.3. Also, the Resolution dated 29.10.1975 though passed in consonance with Clause 10 of initial lease dated 28.10.1944, has to satisfy the test of reasonableness, equality and fairness. Though, the initial lease was granted before coming into force of the Constitution, while considering the issue of renewal of lease the Corporation was duty bound to take action and decision strictly in consonance with the constitutional principles and decision to renew the lease in favour of 'P' could not have been taken except after following a procedure consistent with the equality clause, which was not done. [Para 21] [176-A-C]

7. The appellant shall hand over possession of the plot to the Corporation within a period of three months. After taking possession of the plot, the Corporation shall alienate the same by sale, lease, or otherwise by auction or by inviting tenders and after following a procedure consistent with Article 14 of the Constitution. The Corporation shall pay market value of the structure, as

obtaining on the date of the order of the High Court to the appellant. [Para 22] [176-D-E]

Case Law Reference:

(1971) 3 SCC 864	**referred to**	**Para 3.17**
2004 (3) SCR 56	**referred to**	**Para 3.17**
1959 Suppl. SCR 130	**held inapplicable**	**Para 5**
AIR 1969 Ker. 81	**referred to**	**Para 11**
(1968) A.C. 997	**referred to**	**Para 13**
(1971) 2 QB 175	**referred to**	**Para 14**
2011 (5) SCR 77	**relied on**	**Para 15**
1967 SCR 703	**referred to**	**Para 15**
1979 (3) SCR 1014	**referred to**	**Para 15**
1975 (2) SCR 674	**referred to**	**Para 15**
1980 (3) SCR 1338	**referred to**	**Para 15**
1996 (6) Suppl. SCR 719	**referred to**	**Para 15**
1990 (1) Suppl. SCR 625	**referred to**	**Para 15**
1995 (1) Suppl. SCR 349	**referred to**	**Para 15**
1996 (3) Suppl. SCR 597	**referred to**	**Para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 3107-3108 of 2012.

From the Judgment & Order dated 16.10.2009 of the High Court of Judicature at Bombay, Napur Bench in Writ Petition No. 1613 of 1992 and Writ Petition No. 3661 of 2001.

Gagan Sanghi, Rameshwar Prasad Goyal for the Appellant.

Shekhar Naphade, Ashok Shrivastav, Manish Pitale, G.K. Sarda, Chander Shekhar, Ashri, Somnath Padhan, Satyajit A. Desai, Sanjay V. Kharde for the Respondents.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. Leave granted.

2. These appeals are directed against judgment dated 16.10.2009 of the Bombay High Court, Nagpur Bench whereby the writ petitions filed by respondent nos. 1 and 2 were partly allowed, Resolution dated 28.8.1991 passed by Municipal Corporation of the City of Nagpur (for short, 'the Corporation') for renewal of lease in favour of the appellant in respect of Plot No.5, Circle No.19/27, Division I, Old Sarai Road, Geeta Ground Layout, Nagpur as also sanction accorded by the State Government under Section 70(5) of the City of Nagpur Corporation Act, 1948 (for short, 'the Act') were quashed and a direction was issued to Civil Judge (Senior Division), Nagpur to decide Special Civil Suit No. 1135 of 1993 latest by 31.12.2010.

FACTS:

3. On an application made by Gopaldas Mohta (father of respondent No. 1 – Ghanshyam Mohta and father-in-law of respondent No. 2 – Smt. Kamla Devi), Municipal Committee of Nagpur (for short, 'the Committee') passed resolution dated 17.3.1944 for grant of lease to him in respect of the plot described herein above for a period of 30 years. In furtherance of that resolution, lease deed dated 28.10.1944 was executed in favour of Gopaldas Mohta. The tenure of lease commenced from 17.3.1944. For the sake of convenient reference, Clauses 6 and 8 of the lease deed are extracted below:

> "6. The lessee shall upon every assignment of the said land or any part thereof within a calendar month thereafter deliver to the lessor or to such person as he may appoint in this behalf a notice of such assignment putting forth the

> names and description of the parties thereto and the particulars and effect thereof.
>
> 8. The Municipal Committee i.e. the lessor will have the option to retake structure at end of the term of 30 years hereby granted by paying the then market value of the structure or to renew the lease on the revised ground rent, fair and equitable, for a further term of 30 years or more.
>
> Provided also that every such renewed lease of the land shall contain such of the covenants provisions and conditions in these presents contained as shall be applicable and shall always contain a covenant for further renewal of the lease."

3.1 After about 3 years, Gopaldas Mohta leased out the plot to the appellant for a period of 27 years (from 28.3.1947 to 16.3.1974). The relevant portions of deed dated 10.9.1947 executed between Gopaldas Mohta and the appellant read as under:

> "THIS DEED OF LEASE made on the 10th day of September, 1947, between DIWAN BAHADUR Seth Gopaldas Mohta, resident of Akola (hereinafter called the Lessor) of the ONE PART, and Messrs Saroj Screens Ltd., Amraoti, a joint stock company with limited liability, represented by Mr. Anandrao son of Yadararo, Managing Director, resident of Amraoti, Taluq and District Amraoti, (hereinafter called the Lessees) of the SECOND PART.
>
> WITNESSETH AS FOLLOWS:
>
> 1. The Lessor holds and is in possession of a plot of land, situated in the locality popularly known as "The Geeta Ground", in Sitabuldi of Nagpur city in the Central Provinces and more particularly described in the scheduled statement herewith below, which he holds under a lease dated 17th March, 1944, granted by the Municipal

Committee Nagpur, and on this plot, the Lessor has constructed a plinth for construction of a Cinema Theatre, as per plans, sanctioned and approved by the said Municipal Committee. Over this plot, certain building materials, such as sand, stones, metal and other iron and wooden material etc., belonging to the Lessor, have been collected and are lying. The Lessor hereby lessee the said plot including the plinth and above mentioned materials which have already been delivered into the possession of the Lessees by the Lessor), to the Lessees, for a period commencing from 28.3.1947 till 16th March, 1974, which is the entire unexpired period of the Lease which the Lessor holds under the Municipal Committee, Nagpur.

The main lease in favour of the lessor, contains a clause for renewal under which the lessor shall be entitled to have the lease renewed in his favour, for a further period on the expiry of the present lease. This right of the lessor, is however, retained by the lessor, for his own benefit and the lessees shall have no claim to the interest thereby created.

PROVIDED HOWEVER, if the lessees acquire the interests of the lessor, as provided in Clause (5) below, the lessees shall be entitled to all the rights and interest of the lessor under the said clause for renewal, together with all other interests which the lessor may have under the lease before mentioned, dated 17th March, 1944 including the right of renewal, therein mentioned.

5. The lessees shall have the option to pay to the lessor a sum of Rs. 90,000/- (Rupees Ninety Thousand only) at any time during the first five years of the lease and to purchase all the rights of the Lessor under said Head Lease from the Municipal Committee, Nagpur, together with his rights over the plinth and the material and on this amount being paid as per this conditions, the lessor shall be bound to execute the necessary assignment or other assurance in

favour of the lessees at the cost and expenses of the lessees. The lessees shall have also the option to acquire the said interest from the lessor at any time, on payment of the same price, namely Rs. 90,000/- only during the last year before the expiry of the lease by afflux of time.

10. On expiry of the lease in due course, the lessees shall hand over the possession of the premises leased together with the structures thereon to the lessor who shall thereupon be entitled to take over the structure after valuing them in the manner hereinbefore provided. In case, he pays the value of that part of the structure which the lessees have constructed to the lessees, then the entire structure will thereafter belong to the lessor. In case, the lessor does not elect to take over the materials and in case, the lessees fail to exercise the option of acquiring the leased premises from the lessor as provided, then in that event, the lessees may remove that part of the structure which he may have constructed at his cost within reasonable time of two months and on his failure to do so, the structure shall thereafter belong to the Lessor and the lessees will have no right to the same or price thereof."

3.2. In 1959, there was a partition in the family of Gopaldas Mohta and the plot in question came to the share of his wife Smt. Gangabai. She assigned the same to Parmanand Kisandas Mundhada of Calcutta by executing deed dated 12.8.1960. Thereafter, the name of Parmanand Mundhada was entered in the records of the Committee along with that of Smt. Gangabai. After 12 years, the appellant sent letter dated 15.1.1973 to Parmanand Mundhada indicating therein that it was ready to pay Rs.90,000/- and purchase the interest created in favour of Gopaldas Mohta vide lease deed dated 28.10.1944. The appellant also requested Parmanand Mundhada to approach the Corporation, which had succeeded the Committee, for renewal of the lease after 16.3.1974.

3.3. Parmanand Mundhada submitted application dated

7.3.1974 to the Corporation for renewal of lease for a period of 30 years. However, without waiting for the Corporation's response, the appellant filed Special Civil Suit No.96 of 1974 against Parmanand Mundhada, Gopaldas Mohta, Gangabai and the Corporation for the specific performance of agreement dated 10.9.1947 executed by Gopaldas Mohta. During the pendency of the suit, Parmanand Mundhada died and his legal representatives were brought on record.

3.4. The suit filed by the appellant was decreed by Civil Judge, Senior Division, Nagpur (hereinafter referred to as, 'the trial Court') vide judgment dated 28.4.1980 but the same was reversed by the High Court in First Appeal Nos. 95 of 1980 and 96 of 1980 filed by the heirs of Parmanand Mundhada and respondent No.2 and the Corporation respectively. The relevant portions of the High Court's judgment dated 25.7.1991 are extracted below:

"20. To this letter (Exh. 98) a reminder was sent on 15th February 1974 after a gap of one year. That letter is Exh. 99. That letter is addressed to defendant no. 1 Parmanand by the Counsel of the plaintiff. It makes an interest reading. It is hence extracted as a whole. It reads as under:-

Dear Sir,

Under instructions of my clients M/s Saroj Screens Pvt. Ltd., I have to invite your attention to their registered letter dated 15.1.1973 received by your on 19.1.1973. My client has not received any reply so far.

2. Please let me know whether you have applied to the Municipal Corporation, Nagpur for renewal of the lessor whether you want to apply for renewal of the lease. If you have applied, what is the result of your application.

3. My client has been ever ready and willing to perform

his part of the contract under the Indenture dated 10.9.1947 with Diwan Bahadur Seth Gopaldas Mohta, by which you are bound.

4. Please note that if you do not sent any satisfactory reply within ten days of the receipt of this letter, my client will take it that you do not want to get the lease dated 28.10.1944 renewed and to perform your part of the contract and thereby you have committed breach thereof. In that event my client will be free to take such steps as he may be advised and in the event of litigation you will be held liable for costs and consequences. Please take notice.

Yours faithfully,
Sd/-
Advocate
Counsel for M/s. Saroj Screens Pvt. Ltd.

The letter is self explanatory. It clearly calls upon the defendant no. 1 to get the legal renewed and on failure to perform that part of contract it would result in breach of the contract of his part. Therefore, the readiness or willingness on the part of the plaintiff was made subject to renewal of the lease which condition was never agreed upon. This is more glaring when we peruse the reliefs claimed in the plaint. In prayer clause (a) the plaintiff claimed a decree that the defendant no. 1 do obtain from the defendant no. 2 a renewed lease of the original (Exh. 120) on rent which is fair and equitable, and in clause (aa) the relief claimed was that on deposit of Rs. 79,000/- in Court the defendant no. 1 do execute in favour of the plaintiff a deed of transfer of all rights in the renewed lease granted to him by the defendant no. 2. The pleadings and the evidence are restricted to the allegations made in the two letters Exh. 98 and 99 only.

21. *Therefore, no doubt is left in our mind that the plaintiff came forward seeking implementation of a different*

contract than the one agreed between the parties. Apparently the plaintiff had no desire to pay the amount of Rs.90,000/- till such time the lease is renewed. There was neither readiness or willingness on the part of the plaintiff to implement the contract. We hence answer the point at issue in the negative. The learned Court below had completely misdirected itself in coming to a contrary conclusion not warranted by the facts on record."

(emphasis added)

3.5. During the pendency of the suit filed by the appellant, the Corporation passed Resolution No.162 dated 29.10.1975 for renewal of lease in favour of Parmanand Mundhada for a period of 30 years subject to the condition of payment of ground rent at the rate of Rs.13,120/- per annum and penalty of Rs.3,000/- for breach of the conditions embodied in lease deed dated 28.10.1944. The relevant portions of Resolution dated 29.10.1975 are reproduced below:

"Resolution No. 162: The term of the 30 years lease of plot no. 5 situated on Geeta Ground, Sitabuldi, where upon Anand Talkies is situate has expired on 16.3.1974. The present owner of that plot viz Shri Parmananddas Kisandas Mundhada, resident of 55/58 Isra Street, Calcutta, having made an application on 7.3.1974 for renewal or lease for further 30 years, the house took into consideration the said request.

xxx xxx xxx

With regard to the subject under consideration, the Hon'ble Members have made a request that the House should give information to them regarding the notes made by way of amendment by the Municipal Commissioner.

The Hon'ble Mayor has suggested that the Municipal Commissioner should clarify about the amended notes. Accordingly the Hon'ble Municipal Commissioner made

clarification about his notes made on 17.10.1975 in details.

xxx xxx xxx

After that discussion, as mentioned in the notes of the Hon'ble Municipal Commissioner dated 17.10.1975, the House has taken unanimous decision to renew the lease on other conditions for further 30 years by charging per year Rs. 13,120/- as ground rent, and the previous lease having committee breach of two minor conditions, by penalizing him Rs. 1500/- for each breach, total Rs. 3000/-, as shown in the concerned file.

The term of 30 years lease of Municipal Plot No. 5 situate in Geeta Ground, Sitabuldi, on which Anand Talkies is situate, having expire on 16.3.1974 and the present owner of the plot Parmananddas having his residence at 55/58 Isra Street, Calcutta having made an application for further renewal of the plot for further 30 years, as also considering the notes prepared by the Hon'ble Municipal Commissioner dated 17.10.1975 for the case has been renewed for further 30 'sanctioned', 'sanctioned', on the following conditions.

(1) Considering the fact that the present market price in comparison to old price, which is 10 times more, it being proper to enhance the ground rent in ratio by 10 times, it was suggested that the ground rent of that plot should be fixed at Rs. 13120/- per annum.

(2) The previous lessee of the lease deed have committed breach of two conditions, Rs.1500/- for each breach, total Rs. 3000/-should be recovered by way of fine from him.

(3) Other conditions will be as before."

3.6. Parmanand Mundhada is said to have filed an appeal under Section 397(3) read with Section 411 of the Act questioning the decision of the Corporation to increase the

ground rent and to impose penalty. However, the pleadings filed before this Court do not show whether Parmanand Mundhada and/or his heirs pursued the appeal and the same was decided by the Competent Authority.

3.7. After the judgment of the High Court, respondent nos.1 and 2 submitted application dated 1.8.1991 to the Commissioner of the Corporation for entering their names in the municipal records by asserting that the heirs of Parmanand Mundhada had assigned the leasehold rights of the plot in their favour by registered deeds dated 2.9.1985 and this fact had been brought to the notice of the Corporation vide letter dated 23.9.1985. However, instead of taking action on the request of respondent nos. 1 and 2, the Corporation passed Resolution No. 137 dated 28.8.1991 for renewal of lease in favour of the appellant for a period of 30 years commencing from 16.3.1991 subject to the condition of payment of ground rent at the rate of Rs.20,000/- per annum. That resolution reads as under:

> "Resolution No. 137: Since Messrs Saroj Screen Private Limited has been paying from time to time ground rent of the land and the land and building thereon are in possession of the Saroj Screen Private Limited, there should be no objection for mutation of the land in their name. Messrs Saroj Screen Private Limited, has by written letter guaranteed to pay Rs. 15,000/- per year by way of ground rent of the land. Therefore, as by way of resolution dated 29.10.1975, bearing no. 162, the Nagpur Municipal Corporation has fixed the ground rent at Rs. 13,120/- per year and Rs. 15,000/- by way of ground rent is being paid, which is more than ground rent of Rs. 13,120/- which is fixed, there will be no kind of financial loss of the Corporation. M/s Saroj Screen Private Limited had paid the amount of ground rent of Rs. 2,12,529.60 for the period 16.3.1984 to 25.3.1991. Therefore, the House has taken into consideration the resolution renewal of lease for 30 years from 16.3.1991 at the ground rent of Rs. 15,000/-

> per annum and as per resolution no. 162 dated 29.10.1975 fix the ground rent at Rs. 15,000/- after making recovery of arrears according to that resolution and recommended for acceptance. It also proposed that in stead of ground rent of Rs. 13,120/- in future ground rent of Rs. 20,000/- should be recovered, which suggestion was made by Hon'ble Member Shri Atalbahadur Singh. This suggestion was unanimously sanctioned by the voice of acceptance."

3.8. In furtherance of the aforesaid resolution, lease deed dated 4.9.1991 was executed between the Commissioner of the Corporation and the appellant.

3.9. Respondent Nos. 1 and 2 challenged the decision of the Corporation to grant lease to the appellant in Writ Petition No. 1613 of 1992 and prayed that Resolution dated 28.8.1991 may be quashed and a direction be issued for registration of lease deed in their favour because the heirs of Parmanand Mundhada had assigned leasehold rights in their favour. They pleaded that in view of Resolution dated 29.10.1975 vide which the Corporation renewed lease in favour of Parmanand Mundhada for a period of 30 years, the subsequent resolution was liable to be declared as nullity, more so, because while deciding First Appeal Nos. 95 and 96 of 1980, the High Court had found that the appellant was not ready and willing to perform its part of agreement dated 10.09.1947.

3.10. In the written statement filed by the appellant, it was pleaded that respondent nos. 1 and 2 do not have the *locus standi* to challenge Resolution dated 28.8.1991 because the plot had been assigned by Smt. Gangabai to Parmanand Mundhada. It was further pleaded that the assignment deeds dated 2.9.1985 executed by the heirs of Parmanand Mundhada had no sanctity in the eyes of law because tenure of the initial lease granted to Ghanshyam Mohta had ended in 1974. Another plea taken by the appellant was that Resolution dated 29.10.1975 passed by the Corporation for extending the term of lease in favour of Parmanand Mundhada had became

infructuous because he did not pay the enhanced ground rent and penalty.

3.11. In the written statement filed on behalf of the Corporation, an objection was taken to the maintainability of the writ petition on the ground that the issues raised therein are purely contractual and the same cannot be decided by the High Court under Article 226 of the Constitution. On merits, it was pleaded that assignment deeds dated 2.9.1985 are not binding on the Corporation because it had not been apprised about the transfer of leasehold rights by the heirs of Parmanand Mundhada in favour of respondent nos. 1 and 2.

3.12. At this stage, it will be appropriate to mention that during the pendency of Writ Petition No.1613 of 1992, respondent nos.1 and 2 filed Special Civil Suit No.1135 of 1993 for eviction of the appellant, possession of the suit property and recovery of damages by alleging that Resolution dated 28.8.1991 was illegal and without jurisdiction and lease deed dated 4.9.1991 executed in favour of the appellant did not create any rights in its favour.

3.13. After filing the written statement in Writ Petition No.1613 of 1992, the Corporation passed Resolution dated 22.7.1996 and cancelled the lease granted to the appellant on the ground that previous sanction of the State Government had not been obtained as per the requirement of Section 70(5) of the Act. The appellant questioned this action of the Corporation in Writ Petition No.1786 of 1996. By an interim order dated 14.8.1996, the High Court directed that *status quo* be maintained regarding possession of the plot. After 1 year and about 8 months, the Corporation sent letter dated 27.4.1998 to the appellant and gave an assurance for restoration of the lease subject to the condition that it shall have to withdraw the writ petition. Thereupon, the appellant filed an application dated 6.5.1998 with a prayer that it may be allowed to withdraw the writ petition. The same remained pending till 18.10.2001, on

which date the High Court dismissed Writ Petition No.1786 of 1996 as withdrawn.

3.14. In the meanwhile, the State Government accorded sanction for grant of lease to the appellant for a period of 30 years, i.e., from 16.3.1991 to 15.3.2021. This was communicated to the Corporation vide letter dated 12.6.2000.

3.15. On coming to know of the aforesaid decision of the State Government, respondent nos.1 and 2 filed Writ Petition No.3661 of 2001 and prayed that communication dated 12.6.2000 be quashed by contending that during the pendency of Writ Petition Nos.1613 of 1992 and 1786 of 1996, there was no justification for according sanction under Section 70(5) of the Act. Another plea taken by respondent nos.1 and 2 was that the decision of the State Government and the Corporation was violative of Article 14 of the Constitution inasmuch as public property was transferred to the appellant without conducting auction or inviting tenders so as to enable the members of public to participate in the process of grant of lease.

3.16. In its reply, the appellant controverted the allegation of favoritism and pleaded that respondent nos. 1 and 2 cannot question the sanction accorded by the State Government under Section 70(5) of the Act because their predecessor had not complied with the conditions incorporated in Resolution dated 29.10.1975. It was further pleaded that the sanction accorded by the State Government is not retrospective and the Corporation is required to execute a new lease which would be effective from 1991. Another plea taken by the appellant was that respondent nos. 1 and 2 had not come to the Court with clean hands inasmuch as they have suppressed the fact that the suit filed by them was pending before the Civil Court.

3.17. The Division Bench of the High Court overruled the preliminary objections raised by the appellant and the Corporation to the maintainability of the writ petition by relying

upon the judgments of this Court in *D.F.O., South Kheri v. Ram Sanehi Singh* (1971) 3 SCC 864 and *S.J.S. Enterprises (P) Ltd. v. State of Bihar* (2004) 7 SCC 166. The Division Bench held that when a public authority is said to have acted in violation of the statutory provisions, the Court can grant relief to the aggrieved person and the availability of the alternative remedy does not operate as a bar. The Division Bench further held that respondent nos. 1 and 2 cannot be held guilty of suppressing the factum of filing suit for eviction because the first writ petition had been instituted much before filing the suit. While dealing with the challenge to Resolution dated 28.8.1991 and the decision of the State Government to accord sanction under Section 70(5), the Division Bench opined that during the subsistence of Resolution dated 29.10.1975, the Corporation could not have granted lease in favour of the appellant and the State Government had no right to validate such grant. However, the prayer of respondent nos. 1 and 2 for issue of a direction to the Corporation to implement Resolution dated 29.10.1975 was rejected on the premise that the issue was pending consideration before the trial Court.

4. Shri Gagan Sanghi, learned counsel for the appellant argued that the reasons assigned by the High Court for nullifying the decision taken by the State Government and the Corporation to grant lease in favour of the appellant are legally unsustainable and the impugned judgment is liable to be set aside because Resolution dated 29.10.1975 passed by the Corporation for renewal of lease in favour of Parmanand Mundhada had not been acted upon. Learned counsel submitted that respondent nos. 1 and 2 had not produced any evidence before the High Court to substantiate their assertion that Parmanand Mundhada had filed an appeal under Section 397(3) read with Section 411 of the Act questioning Resolution dated 29.10.1975 to the extent of enhancement of ground rent and imposition of penalty and argued that even if such an appeal had been filed, the same did not entitle the beneficiary of the resolution to claim renewal of lease without fulfilling the

conditions incorporated therein. Learned counsel argued that the Corporation did not commit any illegality by passing Resolution dated 28.8.1991 and executing lease deed dated 4.9.1991 in favour of the appellant because Parmanand Mundhada and his heirs did not come forward for the execution of lease deed in terms of Resolution dated 29.10.1975. He further argued that sanction accorded by the State Government under Section 70(5) of the Act was legally correct and the High Court committed an error by nullifying the same on the specious ground that during the subsistence of Resolution dated 29.10.1975, the Corporation could not have granted lease to the appellant.

5. Shri Shekhar Naphade, learned senior counsel appearing for respondent nos. 1 and 2 referred to Clause 8 of lease deed dated 28.10.1944 executed between the Committee and Gopaldas Mohta and argued that the Corporation, which came to be constituted under the Act had no option but to renew the lease because the option available under that clause for resumption of the plot by paying market value of the structure had not been exercised and Parmanand Mundhada in whose favour Smt. Gangabai had executed assignment deed dated 12.8.1960 continued to enjoy the status of lessee. Learned senior counsel relied upon Section 116 of the Transfer of Property Act and the judgment of this Court in Damodhar Tukaram Mangalmurti v. State of Bombay AIR 1959 SC 639 and argued that failure of the Corporation to resume the plot after paying market value of the structure leads to an irresistible inference that the Corporation had decided to renew the lease and, as a matter of fact, Resolution dated 29.10.1975 was passed to that effect. Shri Naphade laid considerable emphasis on the fact that in terms of Clause 8 of lease deed dated 28.10.1944, the Corporation could have made fair and equitable revision of the ground rent and argued that there was no justification for 10 times increase in the ground rent necessitating filing of an appeal by Parmanand Mundhada.

6. Before dealing with the arguments of the learned

counsel, we consider it necessary to make the following observations:

(i) Although, the appellant has not disputed that in the partition, which took place in 1959 in the family of Gopaldas Mohta, the plot in question came to the share of his wife Smt. Gangabai and that she had executed assignment deed dated 12.8.1960 in favour of Parmanand Mundhada, it has not placed on record copies of the partition deed and assignment deed so as to enable the Court to appreciate the extent and magnitude of the right acquired by Parmanand Mundhada.

(ii) Before the High Court the appellant and the Corporation pleaded that neither of them had any knowledge about assignment deeds dated 2.9.1985 executed by the heirs of Parmanand Mundhada in favour of respondent nos. 1 and 2 but their denial is belied by the averments contained in paragraph 3 of C.A. No.1246 of 1991 filed by the appellant in First Appeal No. 95 of 1980, which reads as under:

> "3. However, during the pendency of the present appeal, it is learnt, that the appellants have assigned their lease hold rights in Plot no.5 in favour of one Shri Ghayanshamdas Mohta and Smt. Kamla Devi Mohta of Akola under a registered Indenture of Transfer dated 2nd September 1985 and as such the present appellants have no right, title or interest in the suit property. A communication dated 23.9.1985 received by the respondent no.2 from the said assignees is appended herewith."

That apart, what is most surprising is that neither party has produced copies of assignment deeds dated 2.9.1985.

7. With the aforesaid handicap, we shall proceed to consider whether the High Court committed an error by quashing Resolution dated 28.8.1991 passed by the Corporation and the sanction accorded by the State

Government under Section 70(5) of the Act.

8. A reading of lease deed dated 28.10.1944 shows that the Committee had leased out the plot to Gopaldas Mohta for a period of 30 years commencing from 17.3.1944 with a clear stipulation that at the end of 30 years' period it will have an option to retake the structure by paying the prevailing market value or renew the lease on revised ground rent for a further term of 30 years by incorporating the covenants, provisions and conditions contained in deed dated 28.10.1944 with a stipulation for further renewal of the lease. By lease deed dated 10.9.1947, Gopaldas Mohta transferred all the rights and interests vested in him including the one relating to renewal of the lease to the appellant, who was also given an option to pay to the lessor, i.e. Gopaldas Mohta a sum of Rs.90,000/- during the first five years of the lease and purchase all his rights from the Committee. An option was also given to the appellant to acquire the interest of the lessor on payment of the same price during the last year before expiry of the lease by efflux of time. The appellant did exercise option for renewal of lease by sending letter dated 15.1.1973 to Parmanand Mundhada subject to the condition of renewal of lease by the Corporation. After some time, the appellant filed Special Civil Suit No.96/1974 for specific performance, which was decreed by the trial Court vide judgment dated 28.4.1980. However, the appellant's joy proved to be short-lived because in the appeals filed by the heirs of Parmanand Mundhada and respondent No. 2 and the Corporation, the High Court reversed the judgment of the trial Court and dismissed the suit by observing that the appellant could not prove its readiness or willingness to implement the contract. The appellant did not challenge the judgment of the High Court by filing a petition under Article 136 of the Constitution. Therefore, the finding recorded by the High Court on the tenability of the appellant's claim, which was primarily founded on Clause 5 of lease deed dated 10.9.1947, will be deemed to have become final and the appellant cannot now rely upon the terms and conditions of lease deed dated

10.9.1947 for contending that the Corporation was bound to renew the lease in its favour for a period of 30 years.

9. The resolution passed by the Corporation for renewal of lease in favour of the appellant and the consequential action taken for the execution of lease deed dated 4.9.1991 were *ex facie* illegal and the High Court did not commit any error by quashing the same because,

(i) Resolution dated 29.10.1975 passed by the Corporation for renewal of lease in favour of Parmanand Mundhada for a period of 30 years had not been cancelled or rescinded and during the subsistence of that resolution, neither the Corporation could have renewed the lease in favour of the appellant for 30 years commencing from 16.3.1991 nor the State Government could have granted sanction under Section 70(5) of the Act for such renewal.

(ii) Before passing the resolution for renewal of the lease in favour of the appellant for a period of 30 years, the Corporation did not obtain sanction of the State Government, which was *sine qua non* for any such action /decision.

(iii) It, however, appears that by taking advantage of the fact that it continued to have possession of the plot, the appellant induced the functionaries of the Corporation to enter into a clandestine compromise for forwarding a proposal to the State Government to grant post facto sanction for renewal of the lease for 30 years from 16.3.1991 and the latter accorded sanction without realizing that alienation of any right or interest in a public property in favour of any person without following a procedure consistent with the doctrine of equality is impermissible.

10. The issue deserves to be considered from another angle. Section 70 of the Act which contains provisions governing the disposal of municipal property or property vesting in or under the management of the Corporation reads thus:

"**70. Provisions governing the disposal of municipal property or property vesting in or under the management of Corporation**.

(1) No nazul lands, streets, public places, drains or irrigation channels shall be sold, leased or otherwise alienated, save in accordance with such rules as the State Government may make in this behalf.

(2) Subject to the provisions of sub-section (1), -

(a) the Commissioner may, [in his discretion], grant a lease of any immovable property belonging to the Corporation including any right of fishing or of gathering and taking fruit, flowers and the like, of which the premium of rent, as the case may be, does not exceed [One Lakh] rupees for any period not exceeding twelve months at a time :

[Provided that every such lease granted by the Commissioner other than a lease of a class in respect of which the Standing Committee has by resolution exempted the Commissioner from compliance with the requirements of this proviso, shall be reported by him to the Standing Committee within fifteen days after the same has been granted;]

(b) With the sanction of the Standing Committee the Commissioner may dispose of by sale or otherwise, any such right as aforesaid, for any period not exceeding three years at a time of which the premium or rent or both, as the case may be, for any one year does not exceed [One lakh] rupees;

(c) With the sanction of the Corporation, the Commissioner may lease, sell or otherwise convey any immoveable property belonging to the Corporation.

(3) The Commissioner may -

[(a)…….]

(b) with the sanction of the Standing Committee, dispose of by sale or otherwise any moveable propertybelonging to the Corporation:

(c) with the sanction of the Corporation, sell or otherwise convey any moveable property belonging to the Corporation.

(4) The sanction of the Standing Committee or of the Corporation under sub-section (2) or sub-section (3) may be given either generally for any class of cases or specifically in any particular case.

(5) The foregoing provisions of this section shall apply to every disposal of property belonging to the Corporation made under, or for the purposes of this Act:

Provided that –

(i) no property vesting in the Corporation in a trust shall be leased, sold or otherwise conveyed in a manner that islikely to affect the trust subject to which such property is held;

(ii) no land exceeding [five lakh] rupees in value shall be sold, leased or otherwise conveyed without the previoussanction of the State Government and every sale, lease orother conveyance of property vesting in the Corporationshall be deemed to be subject to the conditions andlimitations imposed by this Act or by any otherenactment for the time being in force.

(6) Notwithstanding anything contained in this section the Commissioner may, with the sanction of the Corporation and with the approval of the State Government, grant a lease, for a period not exceeding

thirty years, of a land belonging to the Corporation which is declared as a slum area under the provisions of the Maharashtra Slum Area (Improvement, Clearance and Redevelopment) Act, 1971 to a co-operative society of slum dwellers, at such rent, which may be less than the market value of the premium, rent or other consideration, for the grant of such lease, and subject to such conditions as the Corporation may impose.

The approval of the State Government under this sub-section may be given either generally for any class of such lands or specially in any particular case of such land:

Provided that, the Commissioner may, in like manner renew, from time to time, the lease for such period and subject to such conditions as the Corporation may determine and impose."

Though, the exercise of power by the Corporation under the aforesaid section is not hedged with any particular condition except that in a case like the present one, the alienation could not have been made without the previous sanction of the State Government, but in our constitutional scheme compliance of the doctrine of equality enshrined in Article 14 of the Constitution has to be read as a condition precedent for exercise of power by the State Government and the Corporation, more so, when it relates to alienation of public property or any right or interest therein. In this context, it is necessary to emphasis that the Corporation holds the property as a trustee of the public and any alienation of such property or any right or interest therein otherwise than by way of auction or by inviting bids would amount to breach of that trust.

11. The concept of the 'State' as it was known before the commencement of the Constitution and as it was understood for about two decades after 26.1.1950 has undergone drastic change in recent years. Today, the State cannot be conceived of simply as a coercive machinery wielding the thunderbolt of

authority. Now the Government is a regulator and dispenser of special services and provides to the large public benefits including jobs, contracts, licences, quotas, mineral rights etc. The law has also recognised changing character of the governmental functions and need to protect individual interest as well as public interest. The discretion of the Government has been held to be not unlimited. The Government cannot give or withhold largesse in its arbitrary discretion or according to its sweet-will. The Government cannot now say that it will transfer the property (land etc.) or will give jobs or enter into contracts or issue permits or licences only in favour of certain individuals. In *V. Punanan Thomas v. State of Kerala* AIR 1969 Ker. 81, K.K. Mathew, J. (as he then was) observed: -

> "The Government is not and should not be as free as an individual in selecting recipients for its largesse. Whatever its activities, the Government is still the Government and will be subject to the restraints inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal."

12. The traditional view that the executive is not answerable in the matter of exercise of prerogative power has long been discarded. Prof. H.W.R. Wade in his work 'Administrative Law' 6th Edition highlighted distinction between the powers of public authorities and those of private persons in the following words:-

> "… The common theme of all the authorities so far mentioned is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, no absolutely - that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered

> governmental discretion is a contradiction in terms.
>
> The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.
>
> There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed. Nor is this principle an oddity of British or American law; it is equally prominent in French law. Nor is it a special restriction which fetters only local authorities: it applies no less to ministers of the Crown. Nor is it confined to the sphere of administration: it operates wherever discretion is given for some public purpose, for example where a judge has a discretion to order jury trial. It is only where powers are given for the personal benefit of the person empowered that the discretion is absolute. Plainly this can have no application in public law.
>
> For the same reasons there should in principle be no such thing as unreviewable administrative discretion, which should be just as much a contradiction in terms as unfettered discretion. The question which has to be asked is what is the scope of judicial review, and in a few special cases the scope for the review of discretionary decisions may be minimal. It remains axiomatic that all discretion is capable of abuse, and that legal limits to every power are to be found somewhere."

13. In *Padfield v. Minister of Agriculture, Fishery and Food* (1968) A.C. 997, the Court was called upon to decide whether the Minister had the prerogative not to appoint a Committee to investigate the complaint made by the members of the Milk Marketing Board that majority of the Board had fixed milk prices in a way which was unduly unfavourable to the complainants. While rejecting the theory of absolute discretion, Lord Reid observed:-

"Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reasons, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court."

14. In *Breen v. Amalgamated Engineering Union* (1971) 2 QB 175, Lord Denning MR observed:-

"The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevantly. It its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside. That is established by Padfield v. Minister of Agriculture, Fisheries and Food which is a landmark in modern administrative law."

15. The question whether the State and / or its agency / instrumentality can transfer the public property or interest in public property in favour of a private person by negotiations or in a like manner has been considered and answered in negative in several cases. In *Akhil Bhartiya Upbhokta Congress v. State of Madhya Pradesh* (2011) 5 SCC 29, this Court was called upon to examine whether the Government of Madhya Pradesh could have allotted 20 acres land to Shri Kushabhau Thakre Memorial Trust under the M. P. Nagar Tatha Gram Nivesh Adhiniyam, 1973 read with M. P. Nagar Tatha

Gram Nivesh Vikasit Bhoomiyo, Griho, Bhavano Tatha Anya Sanrachanao K Vyayan Niyam, 1975. After noticing the provision of the Act and the Rules, as also those contained in M.P. Revenue Book Circular and the judgments of this Court in *S. G. Jaisinghani v. Union of India* AIR 1967 SC 1427, *Ramana Dayaram Shetty v. International Airport Authority of India* (1979) 3 SCC 489, *Erusian Equipment and Chemicals Ltd. v. State of W.B.* (1975) 1 SCC 70, *Kasturi Lal Lakshmi Reddy v. State of J&K* (1980) 4 SCC 1, *Common Cause v. Union of India* (1996) 6 SCC 530, *Shrilekha Vidyarthi v. State of U. P.* (1991) 1 SCC 212, *LIC v. Consumer Education & Research Centre* (1995) 5 SCC 482, *New India Public School v. HUDA* (1996) 5 SCC 510, the Court culled out the following propositions:

"What needs to be emphasised is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well-defined policy, which shall be made known to the public by publication in the Official Gazette and other recognised modes of publicity and such policy must be implemented/executed by adopting a non-discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefited by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence, etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favouritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State.

We may add that there cannot be any policy, much less, a rational policy of allotting land on the basis of applications

made by individuals, bodies, organisations or institutions dehors an invitation or advertisement by the State or its agency/instrumentality. By entertaining applications made by individuals, organisations or institutions for allotment of land or for grant of any other type of largesse the State cannot exclude other eligible persons from lodging competing claim. Any allotment of land or grant of other form of largesse by the State or its agencies/ instrumentalities by treating the exercise as a private venture is liable to be treated as arbitrary, discriminatory and an act of favouritism and/or nepotism violating the soul of the equality clause embodied in Article 14 of the Constitution."

16. The factual matrix of this case shows that before granting 30 years' lease of the plot in favour of the appellant, the Corporation neither issued any advertisement nor followed any procedure consistent with the doctrine of equality so as to enable the members of the public to participate in the process of alienation of public property. Therefore, the conclusion reached by the High Court, though for different reasons, that Resolution dated 28.8.1991 and the sanction accorded by the State Government vide letter dated 12.6.2000 are legally unsustainable does not call for interference by this Court.

17. We are also convinced that even though the lease granted to Gopaldas Mohta was renewed in favour of Parmanand Mundhada vide Resolution dated 29.10.1975, respondent Nos.1 and 2 cannot derive any benefit from the said renewal merely because the Corporation did not cancel or rescind the resolution. It was neither the pleaded case of respondent Nos.1 and 2 nor any material was produced by them before the High Court to show that Parmanand Mundhada had taken any action in furtherance of Resolution dated 29.10.1975 and fresh lease deed was executed in his favour. The only plea taken by them was that Parmanand Mundhada had filed an appeal under Section 397(3) read with Section 411 against increase in the ground rent and the imposition of

penalty. However, nothing has been said about the fate of that appeal. If Parmanand Mundhada, his heirs or respondent Nos.1 and 2 felt that the disposal of the appeal has been unduly delayed then they could have filed a writ for issue of a mandamus directing the appellate authority to decide the appeal within a specified period but no such step is shown to have been taken by either of them. Therefore, we are constrained to take the view that Resolution dated 29.10.1975 had become redundant and the same can no longer be relied upon by respondent Nos.1 and 2 for claiming any right or interest in the plot.

18. The ratio of the judgment in Damodhar Tukaram *Mangalmurti v. State of Bombay* (supra) which has been relied upon by Shri Naphade has no bearing on this case. The question which came up for consideration in that case was whether Civil Court has the jurisdiction to decide the issue of fair and equitable enhancement of the annual rent. The facts of that case were that the then Provincial Government of the Central Provinces and Berar, Nagpur devised a scheme to extend residential accommodation by acquiring agricultural land and making it available for residential purposes. The lease granted in respect of building sites of 10,000 sq. ft. contained a renewal clause with a stipulation that the lessor can make fair and equitable increase in the amount of annual rent. At the time of renewal, the lessor increased the annual rent from Rs. 3-8-0 to Rs. 21-14-0 in accordance with Clause III of the indenture of lease. One of the preliminary issues framed by the Subordinate Judge, Nagpur was whether the Civil Court has the jurisdiction to decide as to what should be fair and equitable enhancement in the amount of annual rent. He ruled in favour of the plaintiff and his view was confirmed by the lower appellate Court. When the matter was taken up before the High Court, the Division Bench consisting of the Chief Justice and Mudholkar, J expressed divergent views. The third Judge to whom the matter was referred agreed with the learned Chief Justice that the Civil Court did not have jurisdiction in the

matter. By majority of 2:1, this Court reversed the judgment of the High Court. Speaking for the majority, S. R. Das, J made the following observations:

> "We consider that the words" fair and equitable 'must be given their due meaning and proper effect. The question then asked is — what meaning is to be given to the words "such ... as the lessor shall determine". It is indeed true that these words constitute an adjectival clause to the expression "fair and equitable enhancement", but we consider that the meaning of the adjectival clause is merely this: the lessor must first determine what it considers to be fair and equitable enhancement; but if in fact it is not so, it is open to the lessee to ask the court to determine what is fair and equitable enhancement. We do not think that on a proper construction of the clause, the intention was to oust the jurisdiction of the court and make the determination of the enhancement by the lessor final and binding on the lessee."

19. In the present case, we are not concerned with the question whether the decision of the Corporation to increase the rent was legally correct and justified because, as mentioned above, the appeal allegedly filed by Parmanand Mundhada under Section 397 (3) read with Section 411 of the Act was not pursued to its logical end and in the writ petitions filed by them, respondent Nos.1 and 2 did not question ten times increase in the rent payable by the lessee.

20. The argument of Shri Shekhar Naphade, learned senior counsel for respondent Nos.1 and 2 that the Corporation is bound to renew the lease granted to his clients in terms of Section 116 of the Transfer of Property Act, 1882 because the plot in question remained in their possession through the appellant also merits rejection. The reason for this conclusion is that no evidence was produced before the High Court to show that the appellant was continuing in possession with the consent of Parmanand Mundhada, his heirs or respondent

Nos.1 and 2. Rather, it was their pleaded case that after expiry of the period specified in lease deed dated 10.9.1947, the appellant did not have any right to continue in possession.

21. We are also of the view that Resolution dated 29.10.1975 though passed in consonance with Clause 10 of lease dated 28.10.1944, has to satisfy the test of reasonableness, equality and fairness. Though, the initial lease was granted to Gopaldas Mohta before coming into force of the Constitution, while considering the issue of renewal of lease the Corporation was duty bound to take action and decision strictly in consonance with the constitutional principles and decision to renew the lease in favour of Parmanand Mundhada could not have been taken except after following a procedure consistent with the equality clause, which was not done.

22. In the result, the appeals are dismissed. The appellant shall hand over possession of the plot to the Corporation within a period of three months. After taking possession of the plot, the Corporation shall alienate the same by sale, lease, or otherwise by auction or by inviting tenders and after following a procedure consistent with Article 14 of the Constitution. The Corporation shall pay market value of the structure, as obtaining on the date of the order of the High Court to the appellant.

B.B.B. Appeals dismissed.

NARSING PRASAD
v.
ANIL KUMAR JAIN & ORS.
(Civil Appeal No. 3153 of 2012)

MARCH 27, 2012

[DALVEER BHANDARI AND DIPAK MISRA, JJ.]

Service Law:

Uttar Pradesh Avas Evam Vikas Parishad (Appointment and Conditions of Service of Chief Engineer) Regulations, 1990 - Regulations 7, 8 and 11 - Post of Chief Engineer - Appointment of appellant by the Uttar Pradesh Avas Evam Vikas Parishad, to officiate as the Chief Engineer - Challenged by respondent, senior most in the feeding cadre - High Court observing that in the absence of merit selection, a senior most person is entitled to hold the charge unless there is any legal impediment, held that the respondent was entitled to hold the post of Chief Engineer till regular selection - On appeal, held: On a perusal of the order passed by the High Court, it is not clear that the finding of the selection committee was brought to the notice of the High Court - Order of the Chairman of the Uttar Pradesh Avas Evam Vikas Parishad, was brought before this Court for the first time - As per Regulation 7, the Selection committee is required to be constituted by the Board - However, in the instant case, the decision to appoint the appellant was taken by the Chairman - Supreme Court has passed an order of status quo relating to promotional posts in certain civil appeals which is still in force - Thus, a regular promotion cannot take place and, the direction of the High Court to hold regular selection within two months is untenable - Considering the sensitive nature of the post and the duties to be performed by the incumbent, selection committee directed to be constituted by the Board to consider the suitability of all the eligible candidates for the

purpose of holding the post of the Chief Engineer - Till then appellant to continue holding charge - Order passed by the High Court set aside.

The Uttar Pradesh Avas Evam Vikas Parishad passed an order that the appellant, a Superintending Engineer, would hold the post of Chief Engineer on officiating basis till the regular selection was made. Respondent challenged the appointment before the High Court on the ground that he was senior in the cadre of the Superintending Engineer and thus, the charge should be given to him. The High Court quashed the order passed by the Parishad. Therefore, the appellant filed the instant appeal.

Partly allowing the appeal, the Court

HELD: 1.1 On a perusal of the order passed by the High Court, it is not clear that the finding of the selection committee was brought to the notice of the High Court. For the first time, a document contained in Annexure P-6 showing the order of the respondent No. 2-Chairman of the Uttar Pradesh Avas Evam Vikas Parishad, was brought before this Court. Regulation 8 of the Uttar Pradesh Avas Evam Vikas Parishad (Appointment and Conditions of Service of Chief Engineer) Regulations, 1990 lays down the procedure for selection for promotion. Regulation 11 stipulates for preparation of list by the selection committee. The selection committee is required to be constituted by the Board as per Regulation 7. On a perusal of Annexure A-6, it appears that the decision was taken by the Chairman but not by the Board. The High Court directed that if any officiating appointment is to be made, the case of the first respondent should be first considered and he should be given the charge unless there is any legal impediment. There is further direction to hold a regular selection within a maximum period of 2 months. [Para 7] [182-E-H]

1.2 This Court had passed an order of status quo relating to promotional posts in certain civil appeals and the said order is still in force. Thus, a regular promotion cannot take place and, therefore, the direction of the High Court in that regard is untenable. However, as in the interest of the administration, someone has to remain in charge, the employer, i.e., the Parishad can choose someone to hold the officiating charge. Regard being had to the sensitive nature of the post and the duties to be performed by the incumbent, it is appropriate to direct that the selection committee be constituted by the Board within a period of four weeks which shall consider the suitability of all the eligible candidates for the purpose of holding the additional charge of the post of the Chief Engineer. It is made clear that the decision in favour of any candidate to hold the additional charge would not enure to his benefit and no claim can be put forth on the said basis at the time of consideration for regular promotion. When the High Court passed the order, the present appellant was holding the charge. This Court, on 24.11.2011, while issuing notice, directed status quo as of that day to be maintained by the parties. Keeping in view the totality of circumstances, it is directed that till the Board takes a decision after getting the report of the selection committee, the interim order passed in this case should remain in force. The order of the High Court is set aside. [Paras 8, 9 and 10] [183-A-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3153 of 2012.

From the Judgment & Order dated 21.10.2011 of the High Court of Allahabad, Lucknow Bench in Writ Petition No. 1793 (S.B.) of 2011.

Mukul Rohtagi, Arun Bhardwaj, Rameshwar Prasad Goyal, Praveen Chauhan, Amol Sinha, Vijay Kumar, Anshum Jain for the Appellant.

Dinesh Kumar Garg, Vishwajit Singh, Abhindra Maheshwari, Pankaj Kumar Singh, Ritesh Agrawal for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. The present appeal by way of special leave under Article 136 of the Constitution of India is directed against the Judgment and Order dated 21.10.2011 passed by the High Court of Judicature at Allahabad Bench at Lucknow in Writ Petition No. 1793 (SB) of 2011 whereby the Division Bench of the High Court quashed the Order dated 30.09.2011 of the Uttar Pradesh Avas Evam Vikas Parishad (for short, 'the Parishad') whereby it had decided that the present appellant, a Superintending Engineer, shall hold the post of Chief Engineer on officiating basis till the regular selection was made.

3. The factual expose', as has been unfurled, is that the post of Chief Engineer fell vacant and the Parishad, after deliberation, appointed the appellant to officiate as the Chief Engineer. The respondent, Anil Kumar Jain, invoked the extraordinary jurisdiction of the High Court challenging the said appointment on many a ground. It was contended before the High Court that he was senior in the cadre of the Superintending Engineer and, therefore, the charge should have been given to him and not to a junior person; that he had an excellent service record and there was no reason to supersede him and compel a senior officer to work under a junior; that in the absence of merit selection or regular selection being made, a senior most person was to be given charge unless he had any other disqualification, and that when there was no disqualification as far as he was concerned, it was obligatory on the part of the Parishad to appoint him to function on officiating basis on higher post. In oppugnation to the stand put forth by the first respondent, the appellant as well as the Parishad urged that while appointing the appellant herein by

the Uttar Pradesh Avas Evam Vikas Prishad (Appointment and Conditions of Service of Chief Engineer) Regulations, 1990 (for short, "the Regulations"), especially Regulations 8 and 11 were kept in view; that the respondent in the Writ Petition was found more suitable to function on the higher post on officiating basis; that in the Parishad, most of the work is of civil nature and as the Writ Petitioner belongs to electrical cadre and not to the civil cadre the present appellant who has excellent track record in the civil cadre was selected to hold the post on officiating basis; and that even for a stop-gap arrangement, the merit for such a higher post is to be considered and that having been done, the action of the Parishad could not be flawed.

4. The High Court took note of the rival submissions and opined that at no point of time, the criteria of merit had been considered before passing the Order; that in the absence of merit selection, a senior most person is entitled to hold the charge unless there is any legal impediment; that if the relevant regulations are properly understood, the Writ Petitioner would be eligible to be considered for the post of the Chief Engineer as no distinction can be made between the electrical and civil cadre; and that the Writ Petitioner was not ousted from the zone of consideration as has been admitted by the Parishad. Being of this view, the High Court axed the Order passed by the Parishad and directed that in case any officiating arrangement is to be made, the Writ Petitioner's case shall be first considered and he shall be given the charge unless there is any legal impediment till the regular selection is made. The High Court further directed that the selection shall be made within a maximum period of two months.

5. We have heard the learned counsel for the parties and perused the record.

6. The central issue that arises for consideration is whether the High Court is justified in expressing the view that the first respondent was entitled to hold the post of Chief Engineer till regular selection was made on the ground that he was the

senior most in the feeding cadre. Mr. Rohtagi, learned senior counsel, contended that regard being had to the sensitive nature of the post, the selection procedure was undertaken and, thereafter, the petitioner was found suitable to hold the post. He has commended us to Regulation 11 of the Regulations to highlight that even for officiating purpose the selection procedure is to be adopted. He has invited our attention to the findings of the competent authority dated 30.09.2009 to substantiate the stand that there has been a selection. Per contra, Mr. Garg, learned counsel for the respondent, would contend that Regulation 11 would not be attracted as additional charge given for higher post was given to the respondent. That apart, the learned counsel would urge that the factum of any kind of procedure being taken recourse to by the selection committee was not brought to the notice of the High Court and in any event, the findings of the competent authority on which reliance has been placed do not really reflect that the appropriate committee has taken the decision.

7. On a perusal of the Order passed by the High Court, it is not clear that the finding of the selection committee was brought to the notice of the High Court. For the first time, a document contained in Annexure P-6 showing the order of the respondent No. 2 has been brought before this Court. The respondent No. 2 is the Chairman of the Uttar Pradesh Avas Evam Vikas Parishad. Regulation 8 of the Regulations lays down the procedure for selection for promotion. Regulation 11 stipulates for preparation of list by the selection committee. The selection committee is required to be constituted by the Board as per Regulation 7. On a perusal of Annexure A-6, it appears that the decision is taken by the Chairman but not by the Board. The High Court had directed that if any officiating appointment is to be made, the case of the first respondent shall be first considered and he shall be given the charge unless there is any legal impediment. There is further direction to hold a regular selection within a maximum period of 2 months.

8. This Court had passed an order of *status quo* relating to promotional posts in certain civil appeals and the said order is still in force. Thus, a regular promotion cannot take place and, therefore, the direction of the High Court in that regard is untenable. However, as in the interest of the administration, someone has to remain in charge, the employer, i.e., the Parishad can choose someone to hold the officiating charge. Regard being had to the sensitive nature of the post and the duties to be performed by the incumbent, we think it appropriate to direct that the selection committee be constituted by the Board within a period of four weeks which shall consider the suitability of all the eligible candidates for the purpose of holding the additional charge of the post of the Chief Engineer. It is hereby made clear that the decision in favour of any candidate to hold the additional charge would not enure to his benefit and no claim can be put forth on the said base at the time of consideration for regular promotion. Be it noted, before the High Court passed the order, the present appellant was holding the charge. This Court, on 24.11.2011, while issuing notice, had directed status quo as of that day to be maintained by the parties.

9. Keeping in view the totality of circumstances, it is directed that till the Board takes a decision after getting the report of the selection committee, the interim order passed in this case shall remain in force.

10. In the result, the appeal is allowed to the extent indicated hereinabove and the order of the High Court is set aside leaving the parties to bear their respective costs.

N.J. Appeal partly allowed.

SUNIL KUMAR
v.
STATE OF HARYANA
(Crl.M.P. No. 7477 of 2012)
IN
SLP (Crl.) No. 2430 of 2012

MARCH 27, 2012

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

Administration of Justice:

Abuse of process of the court - Petitioner and another person convicted and sentenced u/s. 7 of the 1955 Act for having possession of large quantity of blue kerosene and indulging in unauthorized sale - Appeal by petitioner dismissed by the High Court vide order dated 30.7.2010 - Application by the petitioner for modifying the order of the High Court, giving him benefit of the provisions of s. 360 Cr.P.C. and/or s. 4 of the Probation of Offenders Act, 1958, dismissed by order dated 19.9.2011 - SLP against the order dated 30.7.2010 passed by High Court, dismissed - Subsequently, instant SLP filed challenging the order dated 19.9.,2011 - Held: High Court rightly concluded vide impugned order dated 19.9.2011 that court could not entertain the petition having become functus officio - Petitioner being a black-marketeer presumed that he had a right to dictate terms to the court and get desired results, thus, approached this Court again and sought the relief prayed before the High Court - Petitioner had lost in four courts earlier - No explanation was furnished as to why the instant petition could not be filed during the pendency of the earlier SLP or both the orders could not be challenged simultaneously - Thus, the relief sought by the petitioner cannot be granted - Petition is misconceived and untenable - Petition being devoid of any merit, is dismissed

with the cost of Rs.20,000/- to be deposited by the petitioner with the Supreme Court Legal Services Authority within the stipulated period - Essential Commodities Act, 1955

P.N. Duda v. P. Shiv Shanker & Ors. **AIR 1988 SC 1208: 1988 (3) SCR 547;** *Rathinam v. State of Tamil Nadu & Anr.* **(2011) 11 SCC 140: 2010 (11) SCR 871;** *State of Punjab v. Davinder Pal Singh Bhullar & Ors. etc.* **AIR 2012 SC 364;** *Vishnu Agarwal v. State of U.P. & Anr.* **AIR 2011 SC 1232;** *Dr. Buddhi Kota Subbarao v. K. Parasaran & Ors.,* **AIR 1996 SC 2687: 1996 (4) Suppl. SCR 574;** *Sabia Khan & Ors. v. State of U.P. & Ors.* **AIR 1999 SC 2284;** *Abdul Rahman v. Prasony Bai & Anr.* **(2003) 1 SCC 488: 2002 (4) Suppl. SCR 260;** *Issar Das v. The State of Punjab* **AIR 1972 SC 1295: 1972 (3) SCR 312;** *M/s. Precious Oil Corporation & Ors. v. State of Assam* **AIR 2009 SC 1566:2009 (1) SCR 762;** *Pyarali K. Tejani v. Mahadeo Ramchandra Dange & Ors.* **AIR 1974 SC 228: 1974 (2) SCR 154 - referred to.**

Kunhayammed & Ors. v. State of Kerala & Anr. **(2000) 6 SCC 359: 2000 (1) Suppl. SCR 538;** *Meghmala & Ors. v. G. Narasimha Reddy & Ors.* **(2010) 8 SCC 383: 2010 (10) SCR 47;** *Chhanni v. State of U.P.* **(2006) 5 SCC 396: 2006 (3) Suppl. SCR 305 - distinguished.**

Case Law Reference:

1988 (3) SCR 547	**Referred to**	**Para 2**
2010 (11) SCR 871	**Referred to**	**Para 3**
AIR 2012 SC 364	**Referred to**	**Para 9**
AIR 2012 SC 1232	**Referred to**	**Para 9**
2000 (1) Suppl. SCR 538	**Distinguished**	**Para 10**
2010 (10) SCR 47	**Distinguished**	**Para 10**
2006 (3) Suppl. SCR 305	**Distinguished**	**Para 11**

1996 (4) Suppl. SCR 574	**Referred to**	**Para 14**
AIR 1999 SC 2284	**Referred to**	**Para 15**
2002 (4) Suppl. SCR 260	**Referred to**	**Para 16**
1972 (3) SCR 312	**Referred to**	**Para 17**
2009 (1) SCR 762	**Referred to**	**Para 18**
1974 (2) SCR 154	**Referred to**	**Para 18**

CRIMINAL APPELLATE JURISDICTION : SLP (CRL) No. 2430 of 2012.

From the Judgment & Order dated 19.9.2011 of the High Court of Punjab & Haryana at Chandigarh in CRM No. 39067 of 2011 in CRA No. 1127-SB/1999.

Rameshwar Prasad Goyal for the Petitioner

The order of the Court was delivered

O R D E R

DR. B.S. CHAUHAN, J 1. Delay condoned.

2. Once it had been commented that anti-social elements i.e. FERA violators, bride burners and whole horde of reactionaries have found their safe haven in the Supreme Court and such a comment became subject matter of contempt of this Court and had to be dealt with by this Court in *P.N. Duda v. P. Shiv Shanker & Ors.,* AIR 1988 SC 1208.

3. This Court in *Rathinam v. State of Tamil Nadu & Anr.,* (2011) 11 SCC 140 quoted the observations made by the High Court in that case expressing its views that common man must feel assured to get justice and observed as under:

"Let not the mighty and the rich think that courts are their paradise and in the legal arena they are the dominant players."

4. These judgments make one thing crystal clear that criminals do not hesitate approaching courts even by abusing the process of the court and some times succeed also. The instant case belongs to the same category. Petitioner feels that merely because he is a black-marketeer and succeeded in exploiting the helplessness of the poor people of the Society and is capable of engaging lawyers, he has a right to use, abuse and misuse the process of the court and can approach any court any time without any hesitation and without observing any required procedure prescribed by law.

5. An FIR dated 15.9.1998 was lodged against the petitioner and one other person under Section 7 of Essential Commodities Act, 1955 (hereinafter called the Act 1955) as they were found in possession of 1370 litres of blue kerosene and indulging in unauthorised sale thereof in violation of the provisions of Section 7 of the Act, 1955. After completing investigation chargesheet was filed and trial commenced.

6. The trial court vide judgment and order dated 27.10.1999/2.11.1999 found them guilty of the said offence and awarded sentence of imprisonment for one year alongwith a fine of Rs.2,000/- each. Against the aforesaid order, the appeal of the petitioner stood dismissed by the High Court vide judgment and order dated 30.7.2010. Petitioner preferred an application dated 25.7.2011 before the High Court for modifying the aforesaid judgment and order dated 30.7.2010 giving him the benefit of the provisions of Section 360 of Code of Criminal Procedure, 1973 (hereinafter called Cr.P.C.) and/or Section 4 of the Probation of Offenders Act, 1958 (hereinafter called the Act 1958). The said application was dismissed vide impugned order dated 19.9.2011.

7. It may be pertinent to mention that against the judgment and order dated 30.7.2010, the petitioner had filed SLP (Crl.) no.1469 of 2011 on 13.10.2011 which was dismissed by this Court vide order dated 27.1.2012. Subsequent thereto this special leave petition has been filed on 29.2.2012 challenging

the order dated 19.9.2011. No explanation has been furnished as why the present petition could not be filed during the pendency of the earlier SLP or both the orders could not be challenged simultaneously as the order impugned herein had been passed much prior to the filing of the first SLP on 13.10.2011, and petitioner surrendered to serve out the sentence only on 13.1.2012.

8. The High Court dealt with various propositions of law while dealing with the averments raised on his behalf including the application of the provisions of Section 362 Cr.P.C. which puts a complete embargo on the criminal court to reconsider any case after delivery of the judgment as the court becomes functus officio.

9. This Court in a recent judgment in *State of Punjab v. Davinder Pal Singh Bhullar & Ors. etc.,* AIR 2012 SC 364 dealt with the issue considering a very large number of earlier judgments of this Court including *Vishnu Agarwal v. State of U.P. & Anr.,* AIR 2011 SC 1232 and came to the conclusion:

> "Thus, the law on the issue can be summarised to the effect that the criminal justice delivery system does not clothe the court to add or delete any words, except to correct the clerical or arithmetical error as specifically been provided under the statute itself after pronouncement of the judgment as the Judge becomes functus officio. Any mistake or glaring omission is left to be corrected only by the appropriate forum in accordance with law."

10. Learned counsel for the petitioner placed a very heavy reliance on the judgment of this Court in *Kunhayammed & Ors. v. State of Kerala & Anr.,* (2000) 6 SCC 359, wherein this court has held that in case the special leave petition is dismissed by this Court *in limine*, party aggrieved may file a review petition before the High Court. The said judgment has been explained in various subsequent judgments observing that in case the review petition has been filed before the High Court

prior to the date the special leave petition is dismissed by this Court, the same may be entertained. However, a party cannot file a review petition before the High Court after approaching the Supreme Court as it would amount to abuse of process of the court. (See: *Meghmala & Ors. v. G. Narasimha Reddy & Ors.* (2010) 8 SCC 383).

The ratio of the aforesaid case has no application in the instant case as that was a matter dealing with civil cases.

11. Further reliance has been placed on behalf of the petitioner on the judgment of this Court in *Chhanni v. State of U.P.,* (2006) 5 SCC 396, wherein the court itself held as under:

> "9. The High Court is justified in its view that there is no provision for modification of the judgment."

Further direction has been issued by this court to re-consider the case exercising its power under Article 142 of the Constitution of India. Thus, the aforesaid judgment does not lay down the law of universal application, nor it deals with the provisions of Section 362 Cr.P.C. Thus, in view of the above, the said judgment has also no application in the instant case.

12. The High Court in the impugned judgment came to the right conclusion that court could not entertain the petition having become functus officio.

13. Be that as it may, petitioner being the black-marketeer presumed that he had a right to dictate terms to the court and get desired results, thus, approached this Court again and sought the relief prayed before the High Court. Petitioner has lost in four courts earlier. In this fact-situation whether there should be any restrain on the petitioner or he should be permitted to abuse the judicial process *as he likes.*

14. This Court in *Dr. Buddhi Kota Subbarao v. K. Parasaran & Ors.,* AIR 1996 SC 2687 observed as under:

> "No litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be misused as a licence to file misconceived or frivolous petitions."

15. In *Sabia Khan & Ors. v. State of U.P. & Ors.,* AIR 1999 SC 2284, this Court held that filing totally misconceived petition amounts to abuse of the process of the Court and waste of courts' time. Such litigant is not required to be dealt with lightly.

16. Similarly, in *Abdul Rahman v. Prasony Bai & Anr.,* (2003) 1 SCC 488, this Court held that wherever the Court comes to the conclusion that the process of the Court is being abused, the Court would be justified in refusing to proceed further and refuse the party from pursuing the remedy in law.

17. Even otherwise, the issue as to whether benefit of the Act 1958 or Section 360 Cr.P.C. can be granted to the petitioner is no more res integra. In *Issar Das v. The State of Punjab,* AIR 1972 SC 1295, this Court dealt with the case under the provisions of Prevention of Food Adulteration Act observing that adulteration of food is a menace to public health and the statute had been enacted with the aim of eradicating that anti-social evils and for ensuring purity in the articles of food. The Legislature thought it fit to prescribe minimum sentence of imprisonment. Therefore, the court should not lightly resort to the provisions of the Act 1958 in case of an accused found guilty of offences under the Prevention of Food Adulteration Act.

18. In *M/s. Precious Oil Corporation & Ors. v. State of Assam,* AIR 2009 SC 1566, this Court dealt with the issue of application of the Act 1958 in case of offences punishable under Section 7 of the Act, 1955. The Court did not grant the benefit of the said provisions to the appellant therein placing reliance upon the judgment of this Court in *Pyarali K. Tejani v. Mahadeo Ramchandra Dange & Ors.,* AIR 1974 SC 228 wherein this Court has held as under:

"The kindly application of the probation principle is negatived by the imperatives of social defence and the improbabilities of moral proselytisation. No chances can be taken by society with a man whose anti-social operations, disguised as a respectable trade, imperil numerous innocents. He is a security risk. Secondly, these economic offences committed by white-collar criminals are unlikely to be dissuaded by the gentle probationary process. Neither casual provocation nor motive against particular persons but planned profit-making from numbers of consumers furnishes the incentive - not easily humanised by the therapeutic probationary measure."

19. Thus, in view of the above, the relief sought by the petitioner cannot be granted. Petition is misconceived and untenable. The petition being devoid of any merit, is accordingly dismissed with the cost of Rs.20,000/- which the petitioner is directed to deposit within a period of four weeks with the Supreme Court Legal Services Authority and file proof thereof before the Registrar of this Court, failing which the matter be placed before the Court for appropriate direction for recovery.

N.J. Special Leave Petition dismissed.

YOGENDRA PRATAP SINGH
v.
SAVITRI PANDEY & ANR.
(Criminal Appeal No. 605 of 2012)

APRIL 03, 2012

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

Negotiable Instruments Act, 1881 - ss. 138(c) and 142(b) - Offence punishable u/s. 138 - Whether cognizance of an offence could be taken on the basis of a complaint filed before expiry of the period of 15 days stipulated in the notice required to be served upon the drawer of the cheque in terms of s. 138(c) - If no, whether the complainant could be permitted to present the complaint again notwithstanding the fact that the period of one month stipulated u/s. 142 (b) for the filing of such a complaint has expired - Conflict in the judicial pronouncements - Matter referred to the larger bench - Reference to larger bench.

Respondent issued four cheques in the favour of appellant and the same were dishonoured when presented for encashment. The respondent was served with the notice on 23.009.2008 calling upon him to pay the amount. On 07.10.2008, which is before the expiry of the stipulated period of 15 days, the appellant filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 against the respondent in the court of Additional Civil Judge, Magistrate. The Magistrate took cognizance of the offence on 14.10.2008 and issued summons to the respondent. The respondent filed a petition u/s. 482 Cr.P.C. challenging the said order. The High Court quashed the order passed by the Magistrate taking cognizance of the offence punishable u/s. 138 of the Act since the complaint having been filed within 15

days of the service of the notice, was premature and the order passed by the Magistrate taking cognizance of the offence on the basis of such a complaint is legally bad. Therefore, the appellant filed the instant appeal.

The questions which arose for consideration in the instant appeal were whether cognizance of an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 could be taken on the basis of a complaint filed before the expiry of the period of 15 days stipulated in the notice required to be served upon the drawer of the cheque in terms of Section 138 (c) of the Act and, if no, whether the complainant could be permitted to present the complaint again notwithstanding the fact that the period of one month stipulated under Section 142 (b) for the filing of such a complaint has expired?

Referring the matter to larger Bench, the Court

HELD: 1.1 Proviso to Section 138 of the Negotiable Instruments Act, 1881 is all important and stipulates three distinct conditions precedent, which must be satisfied before the dishonour of a cheque can constitute an offence and become punishable. The first condition is that the cheque ought to have been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. The second condition is that the payee or the holder in due course of the cheque, as the case may be, ought to make a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid. The third condition is that the drawer of such a cheque should have failed to make payment of the said amount of money to the payee or as the case may be, to the holder in due course of the

cheque within fifteen days of the receipt of the said notice. It is only upon the satisfaction of all the three conditions mentioned and enumerated under the proviso to Section 138 as clauses (a), (b) and (c) thereof that an offence under Section 138 can be said to have been committed by the person issuing the cheque. [Para 5] [200-F-H; 201-A-C]

1.2 Section 142 of the Negotiable Instruments Act governs taking of cognizance of the offence and starts with a non-obstante clause. It provides that no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course and such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138. In terms of sub-section (c) to Section 142, no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class is competent to try any offence punishable under Section 138. [Para 6] [201-C-E]

1.3 A conjoint reading of Sections 138 and 142 makes it abundantly clear that a complaint under Section 138 can be filed only after the cause of action to do so accrues to the complainant in terms of clause (c) of the proviso to Section 138 which as noticed earlier happens only when the drawer of the cheque in question fails to make the payment of the cheque amount to the payee or the holder of the cheque within 15 days of the receipt of the notice required to be sent in terms of clause (b) to the proviso to Section 138. [Para 7] [201-F-G]

1.4 A complaint filed in anticipation of the accrual of the cause of action under clause (c) of the proviso to Section 138 would be a premature complaint. The complainant would have no legal justification to file such a complaint for the cause of action to do so would not

accrue to him till such time the drawer of the cheque fails to pay the amount covered by the cheque within the stipulated period of 15 days from the date of the receipt of the notice. It follows that on the date such a premature complaint is presented to the Magistrate the same can and ought to be dismissed as premature and thus, not maintainable. [Para 8] [201-G-H; 202-A-B]

1.5 In the instant case, the Magistrate took cognizance of the offence on 14th October, 2008 by which time the stipulated period of 15 days had expired but no payment towards the cheque amount was made to the complainant even upto the date the cognizance was taken. The commission of the offence was thus, complete on the date cognizance was taken, but the complaint on the basis whereof the cognizance was taken remained premature. [Para 8] [202-B-C]

1.6 As regards the question whether the subsequent development namely completion of the third requirement for the commission of an offence under Section 138 could be taken note of for purposes of cognizance under Section 142 of the Act, the complaint filed by the appellant was plainly premature. The fact that subsequent to the filing of the complaint an offence under Section 138 had been committed was no reason for the court to ignore the fact that the complaint on the basis of which it was taking cognizance of the offence was not a valid complaint. It is said so because Section 142 of the Negotiable Instruments Act forbids taking of cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or the holder of the cheque in due course. Such a complaint in order to be treated as a complaint within the contemplation of Section 142 ought to be a valid complaint. This in turn means that such a complaint must have been filed after the complainant had the cause of action to do so under clause (c) of the proviso to Section 138. A complaint, that

is, premature was no complaint in the eyes of law and no cognizance could be taken on the basis thereof. [Para 9] [202-D-H]

1.7 The view taken in the two decisions by this Court - Narsingh Das Tapadia's case and Sarav Investment & Financial Consultancy Private Limited and Anr.'s case are at variance with each other. That apart, the decision in Narsingh Das Tapadia's case does not, correctly state the legal position and may require a fresh look by a larger Bench of this Court. The cleavage in the judicial opinion on the question does not appear to be confined to the judgments of this Court alone. Judicial opinion on the question is split even among the High Courts in the country. The conflict in the judicial pronouncements, therefore, needs to be resolved authoritatively. [Paras 10, 11, 12, 13 and 15] [203-A-G; 204-H; 205-B; 206-C]

Narsingh Das Tapadia v. Goverdhan Das Partani and Anr.* **(2000) 7 SCC 183: 2000 (3) Suppl. SCR 171; ***Sarav Investment & Financial Consultancy Private Limited and Anr. v. Llyod Register of Shipping Indian Office Staff Provident Fund and Anr.* **(2007) 14 SCC 753: 2007 (10) SCR 1110;** *Sandip Guha v. Saktipada Ghosh* **2008 (3) CHN 214;** *Niranjan Sahoo v. Utkal Sanitary, BBSR,* **(Crl. Misc. Case No. 889 of 1996, decided on 13th February, 1998);** *Rakesh Nemkumar Porwal v. Narayan Dhondu Joglekar and Anr.* **1994 (3) Bom CR 355;** *Ashok Verma v. Ritesh Agro Pvt. Ltd.* **1995 (1) Bank CLR 103;** *N. Venkata Sivaram Prasad v. Rajeswari Constructions* **1996 Cri.L.J. 3409 (A.P.);** *Smt. Hem Lata Gupta v. State of U.P and Anr.* **2002 Cri.L.J. 1522 (All);** *Ganga Ram Singh v. State of U.P. & Ors.* **2005 Cri.L.J. 3681 (All);** *Yunus Khan v. Mazhar Khan* **2004 (1) GLT 652;** *Mahendra Agarwal v. Gopi Ram Mahajan* **(RLW 2003 (1) Raj 673);** *Zenith Fashions Makers (P) Ltd. v. Ultimate Fashion Makers Ltd. and Anr.* **121 (2005) DLT 297);** *Bapulal v. Krapachand Jain* **2004 Cri.L.J. 1140;** *Rattan Chand v. Kanwar Ram Kripal and Anr.* **2010 Cri.L.J. 706;** *I.S.P.*

Solutions India (P) Ltd. and Ors. v. Kuppuraj **2006 Cri.L.J. 3711;** *Harpreet Hosiery Rehari v. Nitu Mahajan* **2000 Cri.L.J. 3625;** *S. Janak Singh v. Pritpal Singh* **2007 (2) J.K. 91;** *Ashok Hegde v. Jathin Attawan* **1997 Cri.L.J. 3691;** *Arun Hegde and Anr. v. M.J. Shetty* **ILR 2001 Kar 3295 - referred to.**

1.8 The second question formulated may arise only in case the answer to the first question is in the negative. If no cognizance could be taken on the basis of a complaint filed prematurely, the question would be whether such a complaint could be presented again after the expiry of 15 days and beyond the period of one month under the clause (b) of Section 142 of the Act. Whether or not the complainant can in a situation like the one in the case at hand invoke the proviso to clause (b) and whether or not this Court can and ought to invoke its power under Section 142 to permit the complainant to file a complaint even after the expiry of period of one month stipulated under Section 142 are incidental questions that may fall for determination while answering question no.2. [Para 16] [206-D-F]

1.9 The two questions formulated are referred to a three-Judge Bench of this Court. [Para 17] [206-G]

Case Law Reference:

2000 (3) Suppl. SCR 171	**Referred to**	**Para 10**
2007 (10) SCR 1110	**Referred to**	**Para 11**
2008 (3) CHN 214	**Referred to**	**Para 13**
1994 (3) Bom CR 355	**Referred to**	**Para 13**
1995 (1) Bank CLR 103	**Referred to**	**Para 13**
1996 Cri.L.J. 3409 (A.P.)	**Referred to**	**Para 13**
2002 Cri.L.J. 1522 (All)	**Referred to**	**Para 14**

2005 Cri.L.J. 3681 (All)	**Referred to**	**Para 14**
2004 (1) GLT 652	**Referred to**	**Para 14**
RLW 2003 (1) Raj 673	**Referred to**	**Para 14**
121 (2005) DLT 297	**Referred to**	**Para 14**
2004 Cri.L.J. 1140	**Referred to**	**Para 14**
2010 Cri.L.J. 706	**Referred to**	**Para 14**
2006 Cri.L.J. 3711	**Referred to**	**Para 14**
2000 Cri.L.J. 3625	**Referred to**	**Para 15**
2007 (2) J.K. 91	**Referred to**	**Para 15**
1997 Cri.L.J. 3691	**Referred to**	**Para 15**
ILR 2001 Kar 3295	**Referred to**	**Para 15**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 605 of 2012.

From the Judgment & Order dated 21.05.2010 of the High Court of Allahabad in Criminal Miscellaneous Application No. 773 of 2009.

Shakil Ahmed, Syed Mohd. Moonis Abbas for the Appellant.

JN Dubey, Anurag Dubey, Anu Sawhney, Meenesh Dubey, S.R. Setia for the Respondents.

The Judgment of the Court was delivered

J U D G M E N T

1. Leave granted.

2. This appeal assails an order passed by the High Court whereby it has allowed a petition under Section 482 of the Cr.P.C. and quashed the order passed by the Magistrate taking

cognizance of an offence punishable under Section 138 of The Negotiable Instruments Act, 1881. The following two questions arise for consideration:

(i) Can cognizance of an offence punishable under Section 138 of the Negotiable Instruments Act 1881 be taken on the basis of a complaint filed before the expiry of the period of 15 days stipulated in the notice required to be served upon the drawer of the cheque in terms of Section 138 (c) of the Act aforementioned? And,

(ii) If answer to question No.1 is in the negative, can the complainant be permitted to present the complaint again notwithstanding the fact that the period of one month stipulated under Section 142 (b) for the filing of such a complaint has expired?

3. The questions arise in the following factual backdrop:

The appellant filed a complaint under Section 138 of the Negotiable Instruments Act against respondent No.1 Smt. Savitri Pandey in the Court of Additional Civil Judge (J.D.)/ Magistrate, Sonbhadra in the State of Uttar Pradesh. The respondent's case was that four cheques issued by the accused-respondent in his favour were dishonoured, when presented for encashment. A notice calling upon the respondent-drawer of the cheque to pay the amount covered by the cheques was issued and duly served upon the respondent as required under Section 138 (c) of The Negotiable Instruments Act, 1881. No payment was, however, made by the accused till 7th October, 2008 when a complaint under Section 138 of the Act aforementioned was filed before the Magistrate. Significantly enough the notice in question having been served on 23rd September, 2008, the complaint presented on 7th October, 2008 was filed before expiry of the stipulated period of 15 days. The Magistrate all the same took cognizance of the offence on 14th October, 2008 and issued summons to the accused, who then assailed the said order in

a petition under Section 482 of the Cr.P.C. before the High Court of Judicature at Allahabad. The High court took the view that since the complaint had been filed within 15 days of the service of the notice the same was clearly premature and the order passed by the Magistrate taking cognizance of the offence on the basis of such a complaint is legally bad. The High Court accordingly quashed the complaint and the entire proceedings relating thereto in terms of its order impugned in the present appeal.

4. We have heard learned counsel for the parties at some length. Section 138 of the Negotiable Instrument Act, inter alia, provides:

"where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to two year, or with fine which may extend to twice the amount of the cheque, or with both."

5. Proviso to Section 138, however, is all important and stipulates three distinct conditions precedent, which must be satisfied before the dishonour of a cheque can constitute an offence and become punishable. The first condition is that the cheque ought to have been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. The second condition is that the payee or the holder in due course of the cheque, as the case may be, ought to make a demand for the

payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid. The third condition is that the drawer of such a cheque should have failed to make payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice. It is only upon the satisfaction of all the three conditions mentioned above and enumerated under the proviso to Section 138 as clauses (a), (b) and (c) thereof that an offence under Section 138 can be said to have been committed by the person issuing the cheque.

6. Section 142 of the Negotiable Instruments Act governs taking of cognizance of the offence and starts with a non-obstante clause. It provides that no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course and such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138. In terms of sub-section (c) to Section 142, no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class is competent to try any offence punishable under Section 138.

7. A conjoint reading of Sections 138 and 142 makes it abundantly clear that a complaint under Section 138 can be filed only after the cause of action to do so accrues to the complainant in terms of clause (c) of the proviso to Section 138 which as noticed earlier happens only when the drawer of the cheque in question fails to make the payment of the cheque amount to the payee or the holder of the cheque within 15 days of the receipt of the notice required to be sent in terms of clause (b) to the proviso to Section 138.

8. The upshot of the above discussion is that a complaint filed in anticipation of the accrual of the cause of action under clause (c) of the proviso to Section 138 would be a premature complaint. The complainant will have no legal justification to file

such a complaint for the cause of action to do so would not accrue to him till such time the drawer of the cheque fails to pay the amount covered by the cheque within the stipulated period of 15 days from the date of the receipt of the notice. It follows that on the date such a premature complaint is presented to the Magistrate the same can and ought to be dismissed as premature and hence not maintainable. That is, however, not what happened in the case at hand. In the present case, the Magistrate took cognizance of the offence on 14th October, 2008 by which time the stipulated period of 15 days had expired but no payment towards the cheque amount was made to the complainant even upto the date the cognizance was taken. The commission of the offence was thus complete on the date cognizance was taken, but the complaint on the basis whereof the cognizance was taken remained premature.

9. The question in the above backdrop is whether the subsequent development namely completion of the third requirement for the commission of an offence under Section 138 could be taken note of for purposes of cognizance under Section 142 of the Act. The complaint filed by the appellant was in our view plainly premature. The fact that subsequent to the filing of the complaint an offence under Section 138 had been committed was no reason for the court to ignore the fact that the complaint on the basis of which it was taking cognizance of the offence was not a valid complaint. We say so because Section 142 of the Negotiable Instruments Act forbids taking of cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or the holder of the cheque in due course. Such a complaint in order to be treated as a complaint within the contemplation of Section 142 ought to be a valid complaint. This in turn means that such a complaint must have been filed after the complainant had the cause of action to do so under clause (c) of the proviso to Section 138. A complaint, that is, premature was no complaint in the eyes of law and no cognizance could be taken on the basis thereof.

10. Having said that, we must refer to two decisions of this Court that were cited at the Bar by learned counsel for the parties in support of their respective submissions. In *Narsingh Das Tapadia v. Goverdhan Das Partani and Anr.* (2000) 7 SCC 183, a similar question arose before a two-Judge Bench of this Court. That was also a case where on the date the complaint was filed the complainant had no cause of action but by the time cognizance of the offence was taken by the Magistrate, the stipulated period of 15 days had expired and the commission of the offence was complete. This Court drew a distinction between "taking cognizance of an offence" and "the filing of a complaint by the complainant". This Court held that while there was a bar to the taking of a cognizance by the Magistrate, there was no bar to the filing of a complaint and that a complaint filed even before the expiry of the period of 15 days could be made a basis for taking cognizance of the offence provided cognizance was taken after the expiry of the said period. This Court observed:

> "Mere presentation of the complaint in the court cannot be held to mean that its cognizance had been taken by the Magistrate. If the complaint is found to be premature, it can await maturity or be returned to the complainant for filing later and its mere presentation at an earlier date need not necessarily render the complaint liable to be dismissed or confer any right upon the accused to absolve himself from the criminal liability for the offence committed."

11. The other decision pressed into service before us was also delivered by a two Judge Bench of this Court in *Sarav Investment & Financial Consultancy Private Limited and Another v. Llyod Register of Shipping Indian Office Staff Provident Fund and Anr.* (2007) 14 SCC 753. There this Court held that Section 138 of the Negotiable Instruments Act contains a penal provision and creates a vicarious liability. Even the burden of proof to some extent is on the accused. Having regard to the purport of the said provision and the severe penalty

sanctioned by it, the same warrants a strict construction. The Court further held that service of a notice in terms of Section 138 proviso (b) of the Act is a part of the cause of action for lodging the complaint under Section 138 and that service of a notice under clause (b) of the proviso to Section 138 was an essential requirement to be complied with before a complaint could be filed.

The Court observed:

> "16. Section 138 of the Act contains a penal provision. It is a special statute. It creates a vicarious liability. Even the burden of proof to some extent is on the accused. Having regard to the purport of the said provision as also in view of the fact that it provides for a severe penalty, the provision warrants a strict construction. Proviso appended to Section 138 contains a non obstante clause. It provides that nothing contained in the main provision shall apply unless the requirements prescribed therein are complied with. Service of notice is one of the statutory requirements for initiation of a criminal proceeding. Such notice is required to be given within 30 days of the receipt of the information by the complainant from the bank regarding the cheque as unpaid. Clause (c) provides that the holder of the cheque must be given an opportunity to pay the amount in question within 15 days of the receipt of the said notice. Complaint petition, thus, can be filed for commission of an offence by a drawee of a cheque only 15 days after service of the notice. What are the requirements of service of a notice is no longer res integra in view of the recent decision of this Court in C.C. Alavi Haji v. Palapetty Muhammed"

12. It follows that a complaint filed before the expiry of the stipulated period of 15 days was not a valid complaint for purposes of Section 142 of the Act. To that extent, therefore, the view taken in the two decisions referred to above are at variance with each other. That apart, the decision in *Narsingh*

Das Tapadia (supra) does not, in our opinion, correctly state the legal position and may require a fresh look by a larger Bench of this Court. The cleavage in the judicial opinion on the question does not appear to be confined to the judgments of this Court alone.

13. Judicial opinion on the question is split even among the High Courts in the country. For instance, the High Court of Calcutta in *Sandip Guha v. Saktipada Ghosh* 2008 (3) CHN 214, High Court of Orissa in *Niranjan Sahoo v. Utkal Sanitary, BBSR,* [Crl. Misc. Case No.889 of 1996, decided on 13th February, 1998], High Court of Bombay in *Rakesh Nemkumar Porwal v. Narayan Dhondu Joglekar and Anr.* 1994 (3) Bom CR 355, High Court of Punjab and Haryana in *Ashok Verma v. Ritesh Agro Pvt. Ltd.* 1995 (1) Bank CLR 103 and the High Court of Andhra Pradesh in *N. Venkata Sivaram Prasad v. Rajeswari Constructions* 1996 Cri.L.J. 3409 (A.P.) have taken the view that a complaint filed within 15 days of the notice period was premature and hence liable to be quashed.

14. The High Court of Allahabad on the other hand has taken a contrary view in *Smt. Hem Lata Gupta v. State of U.P & Anr.* 2002 Cri.L.J. 1522 (All) and held that cognizance taken on the basis of a complaint filed within 15 days of the notice period was perfectly in order if such cognizance was taken after the expiry of the said period. To the same effect are the decisions of High Court of Allahabad in *Ganga Ram Singh v. State of U.P. & Ors.* 2005 Cri.L.J. 3681 (All), High Court of Gauhati in *Yunus Khan v. Mazhar Khan,* [2004 (1) GLT 652], High Court of Rajasthan (Jaipur Bench) in *Mahendra Agarwal v. Gopi Ram Mahajan,* [RLW 2003 (1) Raj 673], High Court of Delhi in *Zenith Fashions Makers (P) Ltd. v. Ultimate Fashion Makers Ltd. and Anr.,* [121 (2005) DLT 297], High Court of Madhya Pradesh, Indore Bench in *Bapulal v. Krapachand Jain,* 2004 Cri.L.J. 1140, High Court of Himachal Pradesh in *Rattan Chand v. Kanwar Ram Kripal and Anr.* 2010 Cri.L.J. 706 and High Court of Madras in *I.S.P. Solutions India (P) Ltd. and Ors. v. Kuppuraj,* 2006 Cri.L.J. 3711.

15. It is noteworthy that the same High Court has in certain cases taken different views on the subject. For instance the High Court of Jammu and Kashmir has in *Harpreet Hosiery Rehari v. Nitu Mahajan,* 2000 Cri.L.J. 3625 held that dismissal of complaint on ground of that the same is premature is valid; while in *S. Janak Singh v. Pritpal Singh,* 2007 (2) J.K. 91, it has held that cognizance taken on a complaint filed before expiry of 15 days of the notice, after the expiry of the said period is permissible. A similar difference of opinion can also be seen in two decisions of the Karnataka High Court in *Ashok Hegde v. Jathin Attawan,* 1997 Cri.L.J. 3691 and *Arun Hegde and Anr. v. M.J. Shetty,* ILR 2001 Kar 3295. The conflict in the judicial pronouncements referred to above, therefore, needs to be resolved authoritatively.

16. The second question formulated earlier may arise only in case the answer to the first question is in the negative. If no cognizance could be taken on the basis of a complaint filed prematurely, the question would be whether such a complaint could be presented again after the expiry of 15 days and beyond the period of one month under the clause (b) of Section 142 of the Act. Whether or not the complainant can in a situation like the one in the case at hand invoke the proviso to clause (b) and whether or not this Court can and ought to invoke its power under Section 142 to permit the complainant to file a complaint even after the expiry of period of one month stipulated under Section 142 are incidental questions that may fall for determination while answering question no.2.

17. In the light of the above, we deem it fit to refer the two questions formulated in the beginning of the judgment to a three-Judge Bench of this Court. The Registry shall place the file before the Chief Justice for constitution of an appropriate Bench.

N.J. Matter referred to larger bench.

AMRIT BHANU SHALI & ORS.
v.
NATIONAL INSURANCE CO. LTD. & ORS.
(Civil Appeal No. 3397 of 2012)

APRIL 04, 2012

[G.S. SINGHVI AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

Motor Vehicles Act, 1988 - s. 166 - Fatal accident - Of unmarried man aged 26 years - Parents and unmarried sister of deceased filing petition claiming compensation - Tribunal holding that only parents were dependents as the sister got married in the meantime - Taking into account his age, his unmarried status and his annual salary, deducting 50% for personal and living expenses and applying multiplier of 17, awarded compensation of Rs. 8,66,000/- - High Court reduced the compensation to Rs. 6,68,000/- by applying multiplier of 13 - On appeal, held: Tribunal rightly used the multiplier of 17 based on the age of the deceased and not on the basis of the age of the dependents and rightly deducted 50% for personal and living expenses - Age of dependents has no nexus with the computation of compensation - Compensation computed deducting 50% for personal and living expenses and using multiplier of 17 - Rs. 1,00,000 granted towards the affection of the son, Rs. 10,000 towards funeral and ritual expenses and Rs. 2500/- on account of loss of sight - Thus granting compensation amounting to Rs. 9,54,000/- - Also awarded interest @ 6% P.A. from the date of filing of the claim petition - Compensation - Interest.

Sarla Verma v. Delhi Transport Corporation **(2009) 6 SCC 121 - relied on.**

Kerala SRTC v. Susamma Thomas **(1994) 2 SCC 176 ; *U.P. SRTC v. Trilok Chand* (1996) 4 SCC 362;** *New India*

Assurance Co. Ltd. v. Charlie **(2005) 10 SCC 720: 2005 (2) SCR 1173;** *Fakeerappa v. Karnataka Cement Pipe Factory* **2004 (2) SCC 473: 2004 (2) SCR 369 - referred to.**

Case Law Referennce:

(2009) 6 SCC 121	**Relied on**	**Para 15**
(1994) 2 SCC 176	**Referred to**	**Para 15**
(1996) 4 SCC 362	**Referred to**	**Para 15**
2005 (2) SCR 1173	**Referred to**	**Para 15**
2004 (2) SCR 369	**Referred to**	**Para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3397 of 2012.

From the Judgment & Order dated 12.11.2010 of the High Court of Chhattisgarh at Bilaspur in Misc Appeal © No. 515 of 2010.

Dr. Rajesh Pandey Mridula Ray Bharadwaj for the Appellants.

S.L. Gupta, M.S. Mangla, Ram Ashray, Shalu Sharma for the Respondents.

The order of the Court was delivered

O R D E R

1. Delay condoned

2. Leave granted.

3. Feeling dissatisfied with the reduction of compensation determined by Motor Accident Claims Tribunal, Raipur, Chhattisgarh (for short, 'the Tribunal') in Motor Accident Claim No.80/2008 and being aggrieved for not enhancing the amount as was claimed, the appellants preferred this appeal.

4. The deceased-Ritesh Bhanu Shali, son of the Ist and 2nd appellants, was going to Thanod on 20th July, 2008 by Swift Car bearing Registration No.CG-04-HA/6905 from Naharpara, Raipur, Chhattisgarh. While he was coming back at about 4.30 p.m. near Thanod, one Scorpio Car bearing Registration No.CG-04-HA/5372 coming rashly and negligently from Abhanpur dashed the Maruti Swift Car. Due to that accident, Ritesh Bhanu Shali and one Sardar Jaspreet died on the spot and another Shivam received injuries. The Ist appellant-Amrit Bhanu Shali is the father, the 2nd appellant-Smt. Sarlaben is the mother and 3rd appellant-Mamta Bhanu Shali is the sister of the deceased. Claiming to be the dependent on the deceased they filed Motor Accident Claim Case No.80/2008 before the Tribunal u/S 166 of the Motor Vehicles Act, 1988 (for short, 'the Act') for award of compensation to the tune of Rs.25,50,000/-.

5. The non-applicants, owner of the car, driver and National Insurance Company Ltd. (hereinafter referred to as the "Insurance Company") appeared and defended their case. On the pleadings of the parties the Tribunal framed the following issues:

"SL.NO. ISSUE

1. Whether on 20.07.2001 at about 4.30 P.M. near Village Thanod more, the non applicant No.1 had hit the Swift Car by driving rashly and negligently the vehicle Scorpio bearing No.CG 04 HA/5372 under the ownership of non applicant No.2 and insured with the non applicant No.3 due to which Ritesh Bhanushali died after receiving the injuries ?

2. Whether applicants have the right to get the compensation separately and jointly from the non applicants ? If yes then how much ?

3. Whether at the time of accident the non applicant No.1 was having valid driving license ?

4. Whether the non applicant was driving the vehicle in violation of terms and agreement of policy ?

5. Relief and cost."

6. In support of the claim petition, the Ist appellant-Amirt Bhanu Shali examined himself (AW-1) and one Shivam Mahobe (AW-2), who was also travelling in the same Maruti Swift Car. The appellants have produced Exhibits P-1 to P-10 series including a report to the Police Station, Abhanpur. The Ist Appellant-Amirt Bhanu Shali (AW-1) in his statement stated that at the time of accident his son-Ritesh Bhanu Shali was 26 years old, as his date of birth is 24.08.1982 and he was doing business of real estate and used to sale handset mobile and also took tuitions and used to earn Rs. 10,000/- per month. The deceased-Ritesh Bhanu Shali also used to file Income Tax Returns. The Income Tax Returns filed by his son-Ritesh was produced in the Court as Exhibit P-10 and the photocopies of which is Exhibit.P-10-C. No separate document was placed pertaining to the sale and purchase of land. The Ist Appellant-Amrit Bhanu Shali (AW-1) stated that both the appellants- father and the mother were not earning and 3rd appellant was unmarried at the time of accident and was dependent on the deceased. It is stated that Mamta Bhanu Shali has also got married.

7. The non-applicant No.1-Mukesh Agrawal stated that he is the owner of the Scorpio Car bearing Registration No. CG-04-HA/5372 and at the time of accident the licence holder driver was Bakar Khan. At the time of accident the original licence was with the driver. During that accident licence was not seized. After the accident he took out the details of the licence of Bakar Khan from Regional Transport Officer, Raipur. He denied that Bakar Khan does not know driving. He further stated that he has presented the original policy of the vehicle

before the Insurance Company. At the time of accident the surveyor of the Insurance Company came for examination and a sum of Rs.3,20,000/- was paid by the Insurance Company towards damage.

8. The Tribunal on appreciation of oral evidence and analysis of documentary evidence set the Issue No.1 in the affirmative and held that the accident was caused due to rash and negligent driving by the driver of the Scorpio Car.

9. While dealing with issue No. 2, the Tribunal adverted to the statement made by the appellant No.1 in his cross examination and held that the appellant No.3 Mamta Bhanu Shali cannot be treated as dependant upon the deceased because she was aged about 29 years and was married by that time. The rest of the appellant Nos. 1 and 2, the parents, were accepted as dependents. The Tribunal taking into consideration the fact that the deceased was unmarried and 26 years old young man at the time of accident and his salary was Rs.99,000/- per annum, deducted 50% of the income and applying the multiplier of 17 as per the decision of this Court in *"Sarla Verma v. Delhi Transport Corporation"* (2009) 6 SCC 121 held that the appellants are entitled to get compensation of Rs.8,66,000/-. Rest of the issues were decided in favour of the appellants.

10. The appellants challenged the award of the Tribunal by filing Miscellaneous Appeal (C) No. 765 of 2010 before the Chhattisgarh High Court for enhancement of compensation. The National Insurance Company also challenged the same award by filing Miscellaneous Appeal (C) No. 515 of 2010 before the Chhattisgarh High Court. Therefore, the appellants withdrew their Miscellaneous Appeal (C) No. 765 of 2010 on 2.8.2010 with a liberty to file cross-objection for enhancement of compensation in Miscellaneous Appeal (C) No. 515 of 2010. The permission was so granted. The appellants filed cross objection in Miscellaneous Appeal (C) No. 515 of 2010 for enhancement of compensation.

11. The High Court by impugned order dated 12.11.2010 reduced the compensation to Rs.6,68,000/- by applying the multiplier of 13 and observed as follows:-

> "The impugned award of the Tribunal is liable to be modified as we feel that looking to the age of the deceased as 26 years, the multiplier of 13 was to be applied according to the decision of Hon'ble the Apex Court in the case of *Sarla Verma (Smt) and others vs. Delhi Transport Corporation and Another,* reported in (2009) 6 SCC 121, but the learned Tribunal has applied the multiplier of 17. Therefore, without changing the annual income and other amounts as awarded by the Tribunal on other heads, in our opinion, the multiplier of 13 would be appropriate in the instant case. Thus the compensation towards dependency would come to Rs.6,43,500/- (Rs.49,500 X 13 = 6,43,500/-). Besides this amount, the claimants (father & mother of deceased) are entitled to get Rs.10,000/- (each) (i.e. Rs.20,000/-) on account of loss of love & affection, Rs. 2,000/- on account of funeral expenses and Rs.2500/- on account of loss of estate as awarded by the Tribunal. Therefore, the Total amount comes to Rs.6,68,000/- (Rs.6,43,500/-+20,000/-+2,000/-+2500/-=Rs.6,68,000/-). Therefore, the claimants are entitled to get the said amount of compensation instad of the amount as awarded by the Tribunal. The claimants would be entitled to get interest @6% per annum from the date of filing of the claim petition. Rest of the conditions mentioned in the impugned award shall remain intact."

12. Learned counsel appearing on behalf the appellants submitted that 50% deduction towards 'personal and living expenses' of the deceased is totally disproportionate to the size of the his family and as the family of the deceased bachelor was large and there are three dependent-non-earning members, the 'personal and living expenses' ought to have been restricted to one-third and contribution to the family should have been

taken as two-third. He further submitted that the High Court committed serious error by applying multiplier of 13 which was against the law laid down by this Court in the case of *Sarla Verma* (supra).

13. Learned Counsel appearing on behalf of the respondents-Insurance Company submitted that the deceased-Ritesh Bhanu Shali was unmarried boy aged about 26 years and the High Court rightly applied the multiplier of 13 as per the age of the claimants, i.e. parents. According to the respondents, the multiplier is to be applied as per the age of the deceased or as per the age of the claimant, whichever is higher but aforesaid submission cannot be accepted in view of the finding of this Court in the case of *Sarla Verma* (supra).

14. We have considered the respective arguments and perused the record. The questions which arise for consideration are :

(i) What should be the deduction for the 'personal and living expenses of the deceased- Ritesh Bhanu Shali to decide the question of the contribution of the dependent members of the family; and

(ii) What is the proper selection of multiplier for deciding the claim.

15. The question relating to deduction for 'personal and living expenses' and selection of multiplier fell for consideration before this Court in the case of *Sarla Verma (Smt) and others vs. Delhi Transport Corporation and another* reported in (2009) 6 SCC 121. In the said case this Court taking into consideration the decisions in *Kerala SRTC v. Susamma Thomas,* (1994) 2 SCC 176; *U.P. SRTC v. Trilok Chand,* (1996*) 4 SCC 362; New India Assurance Co. Ltd. v. Charlie,* (2005) 10 SCC 720 and *Fakeerappa v. Karnataka Cement Pipe Factory,* (2004) 2 SCC 473, held as follows:

"(i)Re Question - Deduction for personal and living expenses:

30. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra, the general practice is to apply standardised deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependent family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members exceeds six.

31. Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent(s) and siblings is likely to be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependant and the mother alone will be considered as a dependant. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependants, because they will either be independent and earning, or married, or be dependent on the father.

32. Thus even if the deceased is survived by parents and siblings, only the mother would be considered to be a dependant, and 50% would be treated as the personal and living expenses of the bachelor and 50% as the contribution to the family. However, where the family of the bachelor is large and dependent on the income of the

deceased, as in a case where he has a widowed mother and large number of younger non-earning sisters or brothers, his personal and living expenses may be restricted to one-third and contribution to the family will be taken as two-third."

(ii)Re Question - Selection of multiplier

42. We therefore hold that the multiplier to be used should be as mentioned in Column (4) of the table above (prepared by applying Susamma Thomas, Trilok Chandra and Charlie), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

16. Admittedly both the parents, Ist appellant- Amrit Bhanu Shali (father) and 2nd appellant- Smt. Sarlaben (mother) have been held to be dependents of deceased- Ritesh Bhanu Shali and, therefore, the Tribunal held that the Ist appellant and 2nd appellant have the right to get the compensation. On the date of the accident the 3rd appellant- Mamta was not married but by the time the case was heard by the Tribunal the 3rd appellant-Mamta had already been married. In these circumstances, she is not found to be dependent upon the deceased. Thus, both the parents being dependents, i.e., father and the mother, the Tribunal rightly restricted the 'personal and living expenses' of the deceased to 50% and contribution to the family was required to be taken as 50% as per the decision of this Court in the case of *Sarla Verma* (supra).

17. The selection of multiplier is based on the age of the deceased and not on the basis of the age of dependent. There may be a number of dependents of the deceased whose age

may be different and, therefore, the age of dependents has no nexus with the computation of compensation.

18. In the case of *Sarla Verma* (supra) this Court held that the multiplier to be used should be as mentioned in Column (4) of the table of the said judgment which starts with an operative multiplier of 18. As the age of the deceased at the time of the death was 26 years, the multiplier of 17 ought to have been applied. The Tribunal taking into consideration the age of the deceased rightly applied the multiplier of 17 but the High Court committed a serious error by not giving the benefit of multiplier of 17 and brining it down to the multiplier of 13.

19. The appellants produced Income Tax Returns of deceased-Ritesh Bhanu Shali for the years 2002 to 2008 which have been marked as Ext.P-10-C. The Income Tax Return for the year 2007-2008 filed on 12.03.2008 at Raipur, four months prior to the accident, shows the income of Rs.99,000/- per annum. The Tribunal has rightly taken into consideration the aforesaid income of Rs.99,000/- for computing the compensation. If the 50% of the income of Rs.99,000/- is deducted towards 'personal and living expenses' of the deceased the contribution to the family will be 50%, i.e., Rs.49,500/- per annum. At the time of the accident, the deceased-Ritesh Bhanu Shali was 26 years old, hence on the basis of decision in *Sarla Verma* (supra) applying the multiplier of 17, the amount will come to Rs.49,500/- x 17 =Rs.8,41,500/-. Besides this amount the claimants are entitled to get Rs.50,000/- each towards the affection of the son, i.e., Rs.1,00,000/- and Rs.10,000/- on account of funeral and ritual expenses and Rs.2,500/- on account of loss of sight as awarded by the Tribunal. Therefore, the total amount comes to Rs.9,54,000/- (Rs.8,41,500/- + Rs.1,00,000/- + Rs.10,000/- + Rs.2,500/-) and the claimants are entitled to get the said amount of compensation instead of the amount awarded by the Tribunal and the High Court. They would also be entitled to get interest at the rate of 6% per annum from the date of the filing of the

claim petition leaving rest of the conditions mentioned in the award intact. Accordingly, the appeal is allowed. The impugned judgment dated 12.11.2010 passed by the High Court of Chhattisgarh at Bilaspur in Misc. Appeal No.(C) No.515 of 2010 is set aside and the award passed by the Tribunal is modified to the extent above. The amount which has already been received by the claimants-appellants shall be adjusted and rest of the amount be paid at an early date. No order as to costs.

K.K.T. Appeal allowed.

MUNICIPAL CORPORATION OF GREATER MUMBAI
v.
THOMAS MATHEW & ORS.
(Civil Appeal No. 3417 of 2012)

APRIL 09, 2012

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

Mumbai Municipal Corporation Act, 1888 - s. 314 - Illegal demolition - Issuance of notice by the Municipal Corporation u/s. 314 to occupants directing them to demolish reconstructed structure on the site which was earlier demolished by the Municipal Corporation - Suit filed by the occupants against the Municipal Corporation - Thereafter, Municipal Corporation demolished the unauthorized structure in public interest - Trial court holding that the Municipal Corporation could not place any materials in support of its claim that the property in dispute belongs to them and the structure put up by the occupants is unauthorized - Suit decreed partly declaring that the notice issued was illegal and occupants allowed to reconstruct the said structure as it was prior to the demolition at their own cost - Appeal filed by the Corporation - Said order upheld by the High Court with certain modifications - Appeal before Supreme Court - Municipal Corporation though did not file any material before the Courts below but filing certain documents as additional evidence before Supreme Court claiming to be owners of the property - Held: There is no need to go into these materials at this juncture considering the alternative direction issued by the High Court granting alternative site to the occupants which is quite reasonable - If the Corporation wants to keep the site open, in public interest, they are bound to comply with the direction with the stipulated time period - Such a conclusion is arrived at because there was inaction on the part of the officers of the Corporation before the courts below.

Appellant-Corporation issued notice under Section 314 of the Mumbai Municipal Corporation Act, 1888 to respondent who were in occupation of patra structures constructed on foot paths and streets and directed them to remove the said patra sheds. On non-compliance of the direction, the Municipal Corporation demolished the unauthorized structures. Thereafter, the Corporation issued notice under Section 354 A directing the respondents to stop the erection of structure/execution of the work. The respondents filed a suit challenging the said notice. The Civil Judge restrained the Corporation from taking any action in pursuance of issuance of the notice under Section 354A till filing its reply affidavit in the suit. The said injunction order was discontinued later and thereafter, the suit was dismissed as withdrawn. Meanwhile, the Corporation issued another notice u/s 314 of the Act directing the respondents to demolish the reconstructed structure of the very site which was demolished by the Corporation earlier. The respondents filed another suit challenging the said notice. Thereafter, the Corporation demolished the unauthorized suit structure and justified its action as taken in public interest in its written statement. The Civil Judge holding that the Corporation was not in position to place any material in support of its claim that the property in dispute belongs to the Corporation and the structure put up by the respondents is unauthorized, partly decreed the suit declaring that notice was illegal and allowed the respondents to reconstruct the said structure as it was prior to the demolition at their own cost. The Corporation filed first appeal. The High Court upheld the decree passed by the trial court with certain modifications. Therefore, the appellant-Corporation filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1 Though counsel for the appellant insisted that in view of the fact that the suit structure (shops) situate on the road margin which belongs to the appellant-Corporation, admittedly the said stand was not substantiated either before the trial court or the High Court by placing any documentary evidence. In fact, the trial judge, in his judgment, pointed that in the year 1996, when the affidavit in reply filed in the earlier suit not to take action without following due process of law, the Municipal Corporation never stated that the suit premises is falling on the road and also denied that they ever demolished the suit premises. The question as to why and how they allegedly issued the notice under Section 314 of the Mumbai Municipal Corporation Act, 1888 and demolished the suit premises, the finding is that the defendants did not issue any notice under Section 314 of the MMC Act. Even before the High Court, the appellant-Corporation was not in a position to place any material in support of its claim. As a matter of fact, before the High Court, it was pointed out by the 1st respondent, who appeared in person about the amendment of the plaint directing the appellant to provide an alternative site or land in similar locality so that the respondents could reconstruct their structure. The appellant-Corporation and their counsel failed to take note of the amendments made in the original plaint. Even in this Court, the appellant did not place the amended copy of the plaint and the entire claim of the respondents as projected before the courts below. As a matter of fact, the first respondent pointed out that the appellant-Corporation deliberately omitted certain paragraphs. On going through the same, the claim of the first respondent that the relevant portions have not been correctly filed before this Court, is accepted. No doubt, counsel for the appellant by filing certain documents as additional evidence wanted to project that the property in dispute belongs to the appellant-Corporation and the structure

put up by the respondents is unauthorized, a pertinent question is asked as to why those materials were not placed either before the trial court or at least before the High Court for which Assistant Commissioner filed an affidavit. The lame excuse set up by the appellant-Corporation cannot be accepted. It is not the case of the appellant that they are unaware of the procedure and how to contest their case when they are contesting thousands of cases on behalf of the Municipal Corporation. Inasmuch as the relevant materials were not placed by the appellant either before the trial court or before the High Court, considering the alternative direction issued by the High Court in the impugned order which is quite reasonable, there is no inclination to go into those materials at this juncture. [Para 6] [224-C-H; 225-A-C; F-H]

1.2 If the appellant wanted to keep the site open, in public interest, they are bound to comply with the direction No.2 in the impugned judgment. For compliance of the said direction of the High Court, the appellant is granted the stipulated time failing which the respondents are free to execute the modified judgment of the High Court at once. Such a conclusion is arrived at only because of the inaction on the part of the officers of the appellant-Corporation before the courts below. [Para 7] [226-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3417 of 2012.

From the Judgment & Order dated 10.02.2011 of the High Court of Judicature at Bombay in First Appeal No. 223 of 2009.

R.P. Bhatt, S. Sukumaran, Anand Sukumar, Bhupesh Kumar Pathak, Meera Mathur for the Appellant.

Thomas Mathew (Respondent-In-Person).

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Delay condoned.

2. Leave granted.

3. This appeal is directed against the final judgment and order dated 10.02.2011 passed by the High Court of Judicature at Bombay in First Appeal No. 223 of 2009 whereby the High Court disposed of the appeal filed by the appellant herein with certain modifications in the judgment and decree passed by the trial Court in Notice of Motion No. 4026 of 2003 in L.C. Suit No.539 of 2002.

4. Brief facts:

(a) The appellant-Corporation is a public body duly enacted and formed for the benefit of public at large and to regulate and control the unauthorized construction carried out in the city of Mumbai. The respondents are the owners of the suit premises.

(b) On 17.04.1998, a notice bearing No. KW/036/AEM/OD under Section 314 of the Mumbai Municipal Corporation Act, 1888 (hereinafter referred to as "the MMC Act") was issued to all persons who are in occupation of the Patra structures which are constructed on foot paths and streets situated near Empire House on Veera Desai Road, Last Bus Stop, Andheri (West), Mumbai directing to remove the said Patra Sheds etc. together with their belongings within two days. On failure to comply with the said direction, the Corporation demolished the unauthorized structures raised by the respondents on 22.04.1998.

(c) Again on 19.12.2001, the Corporation issued notice under Section 354A of the MMC Act bearing No. KW/BF/354A/2154/JE-V/SEB-II directing the respondents to stop the erection of structure/execution of the work forthwith failing which the same shall be removed.

(d) Questioning the said notice, the respondents filed L.C. Suit No. 6650 of 2001 before the City Civil Court, Bombay. By order dated 21.12.2001, the Civil Judge restrained the Corporation from taking any action in pursuance of the notice issued under Section 354A of the MMC Act till filing its reply affidavit in the suit.

(e) On 08.01.2002, the Corporation issued another notice under Section 314 of MMC Act being KW/1138/AEM/OD directing the respondents to demolish the reconstructed structure on the very site which was demolished by the Corporation earlier on 22.04.1998. The respondents replied to the above notice through their advocate stating that the said notice was illegal and bad in law.

(f) After filing of the reply affidavit by the Corporation in L.C. Suit No. 6650 of 2001, the Civil Judge by order dated 19.01.2002 discontinued the injunction order passed earlier.

(g) Challenging the notice dated 08.01.2002 issued by the Corporation under Section 314 of MMC Act, the respondents filed Suit No. 539 of 2002.

(h) On 25.01.2002, Suit No. 6650 of 2001 was dismissed as withdrawn.

(i) On 16.09.2003, the Corporation demolished the unauthorized suit structure. Justifying its action taken in public interest, the Corporation filed its written statement and additional written statement in Suit No. 539 of 2002 on 30.06.2004 and 14.03.2005. By order dated 06.01.2009, the Civil Judge partly decreed the suit declaring that notice dated 08.01.2002 issued by the Corporation under Section 314 of the MMC Act was illegal and allowed the respondents to reconstruct the said structure as it was prior to the demolition at their own cost.

(j) Being aggrieved by the aforesaid order, the Corporation

filed First Appeal being No. 223 of 2009 before the High Court. Vide order dated 10.02.2011, the High Court confirmed the decree passed by the trial Court with certain modifications.

(k) Being aggrieved by the order passed by the High Court, the appellant-Corporation has filed this appeal by way of special leave before this Court.

5. Heard Mr. R.P. Bhatt, learned senior counsel for the appellant and Mr. Thomas Mathew, respondent No.1, who appeared in person.

6. Though learned senior counsel for the appellant insisted that in view of the fact that the suit structure (shops) situate on the road margin which belongs to the appellant-Corporation, admittedly the said stand was not substantiated either before the trial Court or the High Court by placing any documentary evidence. In fact, the trial Judge, in his judgment, in para 21, pointed that in the year 1996, when the affidavit in reply filed in the earlier suit not to take action without following due process of law, the defendants (Municipal Corporation) have never stated that the suit premises is falling on the road and also denied that they have ever demolished the suit premises. It was further pointed out that the question arise as to why and how they have allegedly issued the notice under Section 314 of the MMC Act and demolished the suit premises. The finding is that the defendants have not issued any notice under Section 314 of the MMC Act. Even before the High Court, the appellant-Corporation was not in a position to place any material in support of its claim. As a matter of fact, before the High Court, it was pointed out by the 1st respondent, who appeared in person about the amendment of the plaint directing the appellant to provide an alternative site or land in similar locality so that the respondents can reconstruct their structure. The appellant-Corporation and their counsel failed to take note of the amendments made in the original plaint. Even in this Court, the appellant has not placed the amended copy of the plaint and the entire claim of the respondents as projected before the

Courts below. As a matter of fact, Mr. Thomas Mathew, the first respondent appearing in person on behalf of the respondents, took us through various pages and pointed out that the appellant-Corporation has deliberately omitted certain paragraphs. On going through the same, we agree with the claim of the first respondent that the relevant portions have not been correctly filed before us. No doubt, learned senior counsel for the appellant by filing certain documents as additional evidence wants to project that the property in dispute belongs to the appellant-Corporation and the structure put up by the respondents is unauthorized, we asked a pertinent question why those materials have not been placed either before the trial Court or at least before the High Court for which Assistant Commissioner K/West Ward of Mumbai has filed an affidavit stating as follows:

> "I state that Petitioner Corporation could not produce the ownership documents of set back land before City Civil Court/High Court. If the Petitioner Corporation had produced the documents of ownership of set back land, the Hon'ble Court would not have passed the orders in favour of respondents. I, therefore, say and submit that the petitioners being aggrieved by the Hon'ble High Court's order dated 10.02.2011 for reconstruction of the suit structure has filed the present Special Leave Petition in this Hon'ble Court which is in the interest of public at large."

We are unable to accept the lame excuse set up by the appellant-Corporation. It is not the case of the appellant that they are unaware of the procedure and how to contest their case when they are contesting thousands of cases on behalf of the Municipal Corporation. Inasmuch as the relevant materials have not been placed by the appellant either before the trial Court or before the High Court, considering the alternative direction issued by the High Court in the impugned order which is quite reasonable, we are not inclined to go into those materials at this juncture.

7. If the appellant wants to keep the site open, in public interest, we are of the view that they are bound to comply with the direction No.2 in the impugned judgment. For compliance of the above direction of the High Court, the appellant is granted six months time from today failing which the respondents are free to execute the modified judgment of the High Court at once. We are constrained to arrive at such a conclusion only because of the inaction on the part of the officers of the appellant-Corporation before the Courts below.

8. In the light of the above discussion, the appeal fails and the same is dismissed. Inasmuch as the first respondent i.e. Mr. Thomas Mathew, who is fighting the case on behalf of all the respondents by appearing in person in this Court, we award a cost of Rs. 25,000/- to him payable by the appellant-Municipal Corporation within a period of eight weeks from today.

N.J. Appeal dismissed.

BANDEKAR BROTHERS PRIVATE LTD. ETC.
v.
M/S. V.G. QUENIM & ORS.
(Civil Appeal Nos. 3533-3540 of 2012)

APRIL 13, 2012

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

Remand - Recovery suits as also various applications filed by appellant against respondent - Orders passed by trial court, High Court and Supreme Court in the matter on different occasions - Remand of the matter to the trial court for de novo consideration of the applications filed by the appellants, by the High Court - Interference with - Held: Considering the various disputes, orders passed by the courts and in order to shorten the litigation, taking note of the stand taken by the respondents in the form of an affidavit that the property which was the subject matter of the undertaking given by them, would not be encumbered in any manner in favour of any third party nor any interest would be created in favour of any third party, interference with the remand order passed by the High Court, not called for - Both parties permitted to clarify their stand briefly before the trial court and leave it to the court for passing appropriate orders, as directed by the High Court.

Appellants filed suits against respondents for recovery of money. Applications were also filed seeking ad-interim/interim reliefs. Thereafter, several disputes arose and several applications and petitions were filed. The trial court, the High Court and the Supreme Court on different occasion passed various orders. The respondents gave an undertaking that they would not part with the shares 'VP' company and the Mining Machinery, however, pursuant to the order passed by the

Supreme Court, the respondents demolished the said residential bungalow. Aggrieved, the appellants filed an application and the same was dismissed. The appellants then filed a writ petition. The respondents also filed a writ petition. The High Court disposed of the writ petitions by remanding the matter to the trial court for de novo consideration of the applications filed by the appellants. Therefore, the appellants filed the instant appeals.

Disposing of the appeals, the Court

HELD: 1.1 Pursuant to the order of the High Court, the trial court proceeded to hear the arguments on the applications and, in fact, heard arguments on the said applications for a period of 11 days. It is seen from the records that the grievance of the plaintiff in all the applications under consideration is that even though the defendants have given an undertaking that they would not part with the shares 'VP' company and the Mining Machinery on 13.05.2002 pursuant to the order of this Court dated 19.04.2002, the defendants demolished the said residential bungalow, which was the subject matter of the undertaking given by them. In view of the long history of the case and various earlier orders passed by the High Court as well as by this Court, the matter is probed once again. [Para 6] [235-A-D]

1.2 Respondents fairly stated that though the respondents demolished the bungalow, they have not encumbered or sold the same to anyone, on the other hand after demolition, a new bungalow was constructed. He also pointed out that the said plot was adjoining to one which also belongs to them. In the form of an affidavit, respondent No.6 and his wife-respondent No.7 filed an undertaking. In both the affidavits, they highlighted that their ownership and entitlement of the property in question, construction of new bungalow and the two plots. They also asserted that as on date both of

them are the owners of the said new bungalow and the land on which the said bungalow is existing. They also made a specific undertaking that pending disposal of the suits pending in the Court of Civil Judge, Senior Division, they would not part with the possession of the said bungalow as also the land on which the said bungalow is existing nor the said bungalow and land on which the bungalow is existing shall be encumbered in any manner in favour of any third party nor any interest would be created in favour of any third party. It was prayed for recording of the said undertakings of respondent Nos.6 and 7. As far as the sale of iron ore and machinery etc. is concerned, it is claimed that the injunction order was not served on them on the date when the alleged disposal took place. It is a matter for verification and it is for the trial court to ascertain from the records. [Para 7] [235-E-H; 236-A-C]

1.3 Though the counsel for the appellants vehemently opposed the order of the remand and the conduct of the respondents, considering various disputes and orders passed by the trial court, the High Court and this Court on different occasion and in order to shorten the litigation, taking note of the stand taken by the respondents, particularly, respondent Nos. 6 and 7 in the form of affidavits, the impugned order of the High Court is not interfered with. On the other hand, both parties are permitted to clarify their stand briefly before the trial court and leave it to the court for passing appropriate orders, as directed by the High Court. Respondent Nos. 6 and 7 are permitted to file an affidavit in the form of an undertaking before the trial court as filed in this Court. The order of remand made by the High Court is confirmed and the trial court is directed to pass appropriate orders. [Para 8] [236-D-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3533-3540 of 2012.

From the Judgment & Order dated 14.12.2009 of the High Court of Bombay at goa in Writ Petition Nos. 558-561 of 2009.

Ranjit Kumar, Krishan Venugopal, B.V. Gadnis, A. Venayagam Balan for the Appellant.

Mukul Rohtagi, Rajesh Kumar, Raghnath, Yogesh Nadankar, Sarwa Mitter (for Mitter & Mitter Co.) for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. These appeals are filed against the final judgment and order dated 14.12.2009 passed by the High Court of Bombay at Goa in Writ Petition Nos. 558-561 of 2009 filed by the respondents herein and Writ Petition Nos. 600-603 of 2009 filed by the appellants herein wherein the High Court disposed of all the writ petitions remanding the matter back to the trial Court for de novo consideration of the applications being C.M.A. Nos. 26 of 2007 to 29/2007/A and C.M.A. Nos. 31/2007 to 34/2007/A filed by the appellants herein in Special Civil Suit Nos. 7, 8, 14 & 21/2000/A respectively.

3. Brief facts:

a) M/s Bandekar Brothers Pvt. Ltd. filed three suits against the respondents herein for recovering money being Special Civil Suit No. 7/2000/A on 08.02.2000 for a suit claim of Rs.91,89,973.50 and for further interest against the hiring of services; Special Civil Suit No. 14/2000/A on 31.03.2000 for a suit claim of Rs.2,65,71,705/- and for further interest against the transactions of Iron Ore taken on loan/returnable basis by respondent No.1; Special Civil Suit No. 21/2000/A on 09.06.2000 for a net suit claim of Rs.2,98,58,668.49 for further interest being the dues against the transactions of exchange of Ore taken place between the parties. M/s Vasantram Mehta & Co. Private Limited, a sister concern of M/s Bandekar Bros.

Private Limited filed a Civil Suit being Special Civil Suit No. 8/2000/A on 17.02.2000 against the respondents for a suit claim of Rs.7,40,405.83 and for further interest against the hiring of services. With the said four civil suits, the respective appellants also filed applications seeking ad-interim/interim reliefs being CMA Nos.19, 50, 26, 60, 99 and 160/2000/A respectively.

b) In C.M.A. No. 19/2000/A in Special Civil Suit No.7/2000/A, the Civil Judge by order dated 09.02.2000 restrained the respondent-Company from creating further interest in the iron ore lying at its Kudnem Stockyard at Kudnem. On 10.03.2000, the respondents, under the written statement, denied having had any transactions of loan and exchange of Ore with the appellants and in turn filed a counter claim by issuing a fabricated Debit Note dated 09.03.2000 for Rs.1,88,27,796/- claiming to have supplied 51416.800 WMT of Ore to them on sale basis until June 1999.

c) On 18.03.2000, the appellants filed another application being CMA No. 50/2000A applying for a temporary injunction on the ground that despite the order dated 09.02.2000 passed by the Civil Judge, the respondent-Company had sold iron Ore to its sister concern – M/s Kudnem Mineral Processing Company Private Ltd. By order dated 21.03.2000, the Civil Judge declined to grant ad interim relief to the appellants.

d) Against the said order, the appellants preferred CRA No. 83 of 2000 before the High Court of Bombay, Panaji Bench at Goa. By order dated 31.03.2000, the High Court remanded the matter back to the trial Court by recording the statement made by the respondents that they would not dispose of or alienate the assets described in the schedule to the said order till the disposal of CMA No.50/2000/A by the trial Court. One of the assets included in the said Schedule was a residential bungalow.

e) On 13.07.2000, the respondent-Company filed written statement in Special Civil Suit No. 8/2000/A in which they

claimed to have supplied 27573.780 WMT of Ore to the sister concern of the appellants on sale basis from February, 1996 to June, 1997 and filed a counterclaim for the said sum. In Special Civil Suit Nos. 14 and 21/2000/A also, the respondents filed written statements and denied having had any transactions of loan/return and exchange of Ore between them during the period from February, 1996 to June, 1999.

f) Despite the stay order passed by the High Court on 31.03.2000, the respondents removed one of the scheduled items. Against that action of the respondents, the appellants filed MCA No. 480 of 2000 in CRA No. 83 of 2000 before the High Court for contempt of the order dated 31.03.2000. By order dated 18.01.2001, the High Court directed the respondents not to take any of the scheduled items till the disposal of the applications filed by the appellants before the trial Court.

g) By a common order dated 13.03.2001, the trial Court dismissed CMA No.19/2000/A filed for attachment before judgment whereas in CMA No.50/2000/A, it granted injunction only to the extent of machineries.

h) Aggrieved by the said order, the appellants preferred Appeal Nos. 27 and 28 of 2001 before the High Court wherein the High Court by order dated 11.05.2001 again remanded the matter back to the trial Court to decide the applications afresh. In that order, the High Court recorded the undertaking given by the respondents that they would abide by order dated 18.01.2001 passed by it till the trial Court finally dispose of all the applications pending before it.

i) On remand, the trial court, by its common order dated 05.09.2001, granted some reliefs in all the applications filed by the appellants in the said four suits.

j) Aggrieved by the said order, the respondents filed appeals from Order Nos. 57 to 61 of 2001 before the High

Court which were dismissed by the High Court by a common judgment dated 13.12.2001.

k) Challenging the said order of the High Court, the respondents filed special leave petitions (converted to C.A. No.6102 of 2004) before this Court. This Court, by order dated 19.04.2002, modified the order dated 05.09.2001 passed by the trial Court to the extent setting aside the conditional attachment on the properties. This Court further directed the respondents to give an undertaking before the trial Court that they would not part with the shares of M/s Vilman Packaging Pvt. Ltd., the residential bungalow at No.436, Miramar, Panaji, Goa and the mining machinery.

l) On 29.01.2003 the respondent-Company filed a suit for recovery of money against the appellants.

m) After completion of arguments in three suits (Civil Suit Nos. 7, 8 and 14/2000/A) judgments were reserved by the trial Court. The hearing was not completed in Civil Suit No. 21 of 2000/A.

n) Respondent No.1 (e) submitted an application before the North Goa Planning and Development Authority to construct a new residential bungalow in his name on the plot on which H.No.436 existed and the adjacent plot owned by him and for the amalgamation of the said two plots. By order dated 13.12.2006, the Authority granted the said permission.

o) For the reasons stated by the Civil Judge, this Court by order dated 27.04.2007 extended the time to decide the suit within three months.

p) On 18.09.2007, the trial Court commenced the arguments in Special Civil Suit No.21/2000/A. The respondent filed an application dated 28.09.2007 to withdraw the special Civil Suit No.1 of 2003. By order dated 01.10.2007, the trial Court allowed the said application for withdrawal.

q) The appellant filed application being CMA No. 26/2007 before the trial Court on 30.11.2007 under Order XXXIX Rule 2A seeking to pass appropriate orders for disobedience of injunction granted by the trial Court and for striking off the defence for willful breach of the undertaking given to the trial Court under Rule 11.

r) The appellant also filed C.M.A No. 31 of 2007 before the trial Court on 10.12.2007 under Order XXXIX Rules 2 and 7 for injunction against the respondents from carrying out any further work or damaging the property in question. In other three suits also, the appellant filed the similar applications.

s) In the said applications, the respondent filed reply dated 10.04.2008 justifying the demolition and an additional affidavit tendering conditional apology.

t) The Civil Judge, Senior Division, Panaji by order dated 06.06.2009 dismissed C.M.A. No.26/2007 and granted the relief prayed for in C.M.A. No.31/2007.

u) Aggrieved by the order dated 06.06.2009, the appellants preferred W.P. Nos. 600 to 603 of 2009 and respondents preferred W.P. Nos. 558-561 of 2009 before the High Court. By the impugned final judgment and order dated 14.12.2009, the High Court disposed of the writ petitions by remanding the matter to the trial Court for de novo consideration of the applications filed by the appellants.

v) Aggrieved by the said order, the appellants have filed these appeals by way of special leave petitions before this Court.

4. Heard Mr. Ranjit Kumar and Mr. Krishnan Venugopal, learned senior counsel for the appellants and Mr. Mukul Rohtagi, learned senior counsel for the respondents.

5. The only point for consideration in these appeals is whether the High Court is justified in remanding the matter to

the trial Court for de novo consideration of the applications filed by the appellants herein?

6. It is brought to our notice that pursuant to the order of the High Court dated 14.12.2009, the trial court has proceeded to hear the arguments on the applications and, in fact, heard arguments on the said applications for a period of 11 days commencing from 06.01.2010 ending on 20.02.2010. It is seen from the records that the grievance of the plaintiff in all the applications under consideration is that even though the defendants have given an undertaking that they will not part with the shares of M/s Vilman Packaging Private Limited, House No. 436 at Miramar, Panaji and the Mining Machinery on 13.05.2002 pursuant to the order of this Court dated 19.04.2002, the defendants have demolished the said residential bungalow, which was the subject matter of the undertaking given by them. In view of the long history of the case and various earlier orders passed by the High Court as well as by this Court, we are not inclined to go further and probe the matter once again.

7. Mr. Mukul Rohtagi, learned senior counsel for the respondents fairly stated that though the respondents have demolished the bungalow, they have not encumbered or sold the same to anyone, on the other hand after demolition, a new bungalow was constructed. He also pointed out that the said plot was adjoining to one which also belongs to them. In the form of an affidavit, Shri Prasad Vassudev Keni, respondent No.6 and his wife, Smt. Vini Prasad Keni, respondent No.7 filed an undertaking. In both the affidavits, they highlighted that their ownership and entitlement of the property in question, construction of new bungalow and the two plots, namely, Chalta Nos. 11 and 15 of P.T. Sheet No. 116, which bungalow has been allotted House No.13/436/A. They also asserted that as on date both of them are the owners of the said new bungalow and the land on which the said bungalow is existing. They also made a specific undertaking that pending disposal of the suits,

viz., Special Civil Suit Nos. 7/2000, 8/2000, 14/2000 and 21/2000 pending in the Court of Civil Judge, Senior Division at Panaji, Goa, they shall not part with the possession of the said bungalow bearing House No.13/436/A as also the land on which the said bungalow is existing nor the said bungalow and land on which the bungalow is existing shall be encumbered in any manner in favour of any third party nor any interest will be created in favour of any third party. Mr. Rohtagi prayed for recording of the said undertakings of respondent Nos.6 and 7. As far as the sale of iron ore and machinery etc. is concerned, it is claimed that the injunction order was not served on them on the date when the alleged disposal took place. It is a matter for verification and it is for the trial Court to ascertain from the records.

8. Though Mr. Ranjit Kumar and Mr. Krishnan Venugopal vehemently opposed the order of the remand and the conduct of the respondents herein, as observed earlier, considering various disputes and orders passed by the trial Court, the High Court and this Court on different occasion and in order to shorten the litigation, taking note of the stand taken by the respondents, particularly, respondent Nos. 6 & 7 in the form of affidavits, we are not inclined to interfere with the impugned order of the High Court. On the other hand, we permit both parties to clarify their stand briefly before the trial Court and leave it to the Court for passing appropriate orders, as directed by the High Court. Respondent Nos. 6 and 7 are permitted to file an affidavit in the form of an undertaking before the trial court as filed in this Court.

9. In the light of what is stated above, we dispose of these appeals by confirming the order of remand made by the High Court and direct the trial Court to pass appropriate orders as early as possible, preferably within a period of three months from the date of receipt of copy of this judgment. There shall be no order as to costs.

N.J. Appeals disposed of.

OM PRAKASH
v.
STATE OF RAJASTHAN AND ANR.
(Criminal Appeal No.651 of 2012)

APRIL 13, 2012

[G.S. SINGHVI AND GYAN SUDHA MISRA, JJ.]

Juvenile Justice (Care and Protection of Children) Act, 2000 – Offence of rape – Plea of juvenility by accused – Determination of age of the accused – Medical evidence – Appreciation of – 13½ year old girl allegedly subjected to rape by accused-respondent no.2 and a co-accused – Respondent no.2 claimed to be a juvenile – Both trial court and High Court could not record a conclusive finding of fact that respondent no.2 was a juvenile on the date of the incident, yet granted him benefit of the Juvenile Justice Act to refer him for trial to a juvenile court – On appeal by father of the victim, held: The age of accused-respondent no.2 could not be proved merely on the basis of school record as the courts below inspite of its scrutiny could not record a finding of fact that the accused, in fact, was a minor on the date of the incident – In such a situation when the school record itself is not free from ambiguity, medical opinion cannot be allowed to be overlooked or treated to be of no consequence – Opinion of medical experts based on x-ray and ossification test of the accused will have to be given precedence over the shaky evidence based on school records and a plea of circumstantial inference based on a story set up by the father of the accused – While the medical expert who conducted the ossification test opined that accused was 19 years of age on the date of commission of the offence, another medical expert opined on the basis of x-ray films that age of the accused was above 18 years and below 20 years – The doctor's estimation of age although is not a sturdy substance for proof as it is only

an opinion, such opinion based on scientific medical test like ossification and radiological examination will have to be treated as a strong evidence having corroborative value while determining the age of the alleged juvenile accused – The situation, however, would be different if the academic records are alleged to have been withheld deliberately to hide the age of the alleged juvenile and the authenticity of the medical evidence is under challenge at the instance of the prosecution – In that event, whether the medical evidence should be relied upon or not will depend on the value of the evidence led by the contesting parties – Respondent no.2 and his father failed to prove that respondent no.2 was a minor at the time of commission of offence – Although the Juvenile Justice Act by itself is a piece of benevolent legislation, protection under the same cannot be made available to an accused who in fact is not a juvenile but seeks shelter merely by using it as a protective umbrella or statutory shield – Consequently, accused-respondent no.2 directed to be sent for trial before the court of competent jurisdiction wherein the trial is pending and not to the Juvenile Court as pleaded by him – Medical Jurisprudence.

Appellant is the father of a 13 ½ year old girl who was allegedly subjected to rape by the accused-Respondent No.2. Respondent no.2 was allowed to avail the benefit of protection under Juvenile Justice (Care and Protection of Children) Act 2000, although the courts below could not record a finding that he, in fact, was a juvenile on the date of incident.

The questions *inter alia* which arose for consideration in the instant appeal were:- (i) Whether the respondent/accused herein who is alleged to have committed an offence of rape under Section 376 IPC and other allied sections along with a co-accused who already stands convicted for the offence under Section 376 IPC, can be allowed to avail the benefit of protection

to a juvenile in order to refer him for trial to a juvenile court under the Juvenile Justice (Care and Protection of Children) Act, 2000 although the trial court and the High Court could not record a conclusive finding of fact that the respondent-accused was below the age of 18 years on the date of the incident; (ii) Whether the principle and benefit of 'benevolent legislation' relating to Juvenile Justice Act could be applied in cases where two views regarding determination of the age of child/accused was possible and the so-called child could not be held to be a juvenile on the basis of evidence adduced; (iii) Whether medical evidence and other attending circumstances would be of any value and assistance while determining the age of a juvenile, if the academic record certificates do not conclusively prove the age of the accused and (iv) Whether reliance should be placed on medical evidence if the certificates relating to academic records is deliberately withheld in order to conceal the age of the accused and authenticity of the medical evidence regarding the age is under challenge.

Allowing the appeal, the Court

HELD:1. In the instant case, the age of the accused-respondent no.2 could not be proved merely on the basis of school record as the courts below inspite of its scrutiny could not record a finding of fact that the accused, in fact, was a minor on the date of the incident. In a situation when the school record itself is not free from ambiguity and conclusively prove the minority of the accused-respondent no.2, medical opinion cannot be allowed to be overlooked or treated to be of no consequence. In this context the statement of NAW-3, the medical jurist who conducted the ossification test of the accused and opined before the court that the accused was 19 years of age is of significance since it specifically states that the accused was not a juvenile on the date of

commission of the offence. The statement of NAW-1, Asstt. Professor in Radiology also cannot be overlooked since he opined that on the basis of x-ray films, the age of the accused is above 18 years and below 20 years. Thus, in a circumstance where the trial court itself could not arrive at a conclusive finding regarding the age of the accused, the opinion of the medical experts based on x-ray and ossification test will have to be given precedence over the shaky evidence based on school records and a plea of circumstantial inference based on a story set up by the father of the accused which prima facie is a cock and bull story. [Para 17] [253-F-H; 254-A-D]

2. It is no doubt true that if there is a clear and unambiguous case in favour of the juvenile accused that he was a minor below the age of 18 years on the date of the incident and the documentary evidence at least prima facie proves the same, he would be entitled for this special protection under the Juvenile Justice Act. But when an accused commits a grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor, a casual or cavalier approach while recording as to whether an accused is a juvenile or not cannot be permitted as the courts are enjoined upon to perform their duties with the object of protecting the confidence of common man in the institution entrusted with the administration of justice. Hence, while the courts must be sensitive in dealing with the juvenile who is involved in cases of serious nature like sexual molestation, rape, gang rape, murder and host of other offences, the accused cannot be allowed to abuse the statutory protection by attempting to prove himself as a minor when the documentary evidence to prove his minority gives rise to a reasonable doubt about his assertion of minority. Under such circumstance, the medical evidence based on scientific investigation will have to be given due weight and precedence over the

evidence based on school administration records which give rise to hypothesis and speculation about the age of the accused. [Para 18] [254-D-H; 255-A]

3. In the instant matter, the accused-respondent no.2 is alleged to have committed a crime which repels against moral conscience as he chose a girl of 13 and a half years to satisfy his lust by hatching a plot with the assistance of his accomplice who already stands convicted and thereafter the accused has attempted to seek protection under the plea that he committed such an act due to his innocence without understanding its implication in which his father is clearly assisting by attempting to rope in a story that he was a minor on the date of the incident which is not based on conclusive evidence worthy of credence but is based on a confused story as also shaky and fragile nature of evidence which hardly inspires confidence. It is hard to ignore that when the Additional Sessions Judge in spite of meticulous scrutiny of oral and documentary evidence could not arrive at a conclusive finding that he was clearly a juvenile below the age of 18 years on the date of incident, then by what logic and reasoning he should get the benefit of the theory of benevolent legislation on the foothold of Juvenile Justice Act is difficult to comprehend as it clearly results in erroneous application of this principle and thus there is sufficient force in the contention of the appellant that the benefit of the principle of benevolent legislation can be made applicable in favour of only those delinquents who undoubtedly have been held to be a juvenile which leaves no scope for speculation about the age of the alleged accused. [Para 19] [255-C-G]

4. One cannot overlook that the trial court as well as the High Court while passing the impugned order could not arrive at any finding at all as to whether the accused was a major or minor on the date of the incident and yet

gave the benefit of the principle of benevolent legislation to an accused whose plea of minority that he was below the age of 18 years itself was in doubt. In such situation, the scales of justice is required to be put on an even keel by insisting for a reliable and cogent proof in support of the plea of juvenility specially when the victim was also a minor. [Para 20] [255-H; 256-A-B]

5. The benefit of the principle of benevolent legislation attached to Juvenile Justice Act would thus apply to only such cases wherein the accused is held to be a juvenile on the basis of at least *prima facie* evidence regarding his minority as the benefit of the possibilities of two views in regard to the age of the alleged accused who is involved in grave and serious offence which he committed and gave effect to it in a well planned manner reflecting his maturity of mind rather than innocence indicating that his plea of juvenility is more in the nature of a shield to dodge or dupe the arms of law, cannot be allowed to come to his rescue. Hence if the plea of juvenility or the fact that he had not attained the age of discretion so as to understand the consequence of his heinous act is not free from ambiguity or doubt, the said plea cannot be allowed to be raised merely on doubtful school admission record and in the event it is doubtful, the medical evidence will have to be given due weightage while determining the age of the accused. [Para 21] [256-C-E]

6. In the facts of this case, the trial court inspite of the evidence led on behalf of the accused, was itself not satisfied that the accused was a juvenile as none of the school records relied upon by the respondent-accused could be held to be free from doubt so as to form a logical and legal basis for the purpose of deciding the correct date of birth of the accused indicating that the accused was a minor/juvenile on the date of the incident. Where

the courts cannot clearly infer in spite of available evidence on record that the accused is a juvenile or the said plea appear to have been raised merely to create a mist or a smokescreen so as to hide his real age in order to shield the accused on the plea of his minority, the attempt cannot be allowed to succeed so as to subvert or dupe the cause of justice. Drawing parallel between the plea of minority and the plea of *alibi,* it may be worthwhile to state that it is not uncommon to come across criminal cases wherein an accused makes an effort to take shelter under the plea of *alibi* which has to be raised at the first instance but has to be subjected to strict proof of evidence by the court trying the offence and cannot be allowed lightly in spite of lack of evidence merely with the aid of salutary principle that an innocent man may not have to suffer injustice by recording an order of conviction in spite of his plea of alibi. Similarly, if the conduct of an accused or the method and manner of commission of the offence indicates an evil and a well planned design of the accused committing the offence which indicates more towards the matured skill of an accused than that of an innocent child, then in the absence of reliable documentary evidence in support of the age of the accused, medical evidence indicating that the accused was a major cannot be allowed to be ignored taking shelter of the principle of benevolent legislation like the Juvenile Justice Act, subverting the course of justice as statutory protection of the Juvenile Justice Act is meant for minors who are innocent law breakers and not accused of matured mind who uses the plea of minority as a ploy or shield to protect himself from the sentence of the offence committed by him. The benefit of benevolent legislation under the Juvenile Justice Act obviously will offer protection to a genuine child accused/ juvenile who does not put the court into any dilemma as to whether he is a juvenile or not by adducing evidence in support of his plea of minority but in absence of the

same, reliance placed merely on shaky evidence like the school admission register which is not proved or oral evidence based on conjectures leading to further ambiguity, cannot be relied upon in preference to the medical evidence for assessing the age of the accused. [Paras 22, 23] [256-F-G; 258-B-H; 259-A-B]

7. While considering the relevance and value of the medical evidence, the doctor's estimation of age although is not a sturdy substance for proof as it is only an opinion, such opinion based on scientific medical test like ossification and radiological examination will have to be treated as a strong evidence having corroborative value while determining the age of the alleged juvenile accused. The situation, however, would be different if the academic records are alleged to have been withheld deliberately to hide the age of the alleged juvenile and the authenticity of the medical evidence is under challenge at the instance of the prosecution. In that event, whether the medical evidence should be relied upon or not will obviously depend on the value of the evidence led by the contesting parties. [Para 24] [259-C-D-F-H]

Ramdeo Chauhan @ Raj Nath v. State of Assam **(2001) 5 SCC 714: 2001 (3) SCR 669 – relied on.**

8. Respondent No.2 and his father have failed to prove that Respondent No.2 was a minor at the time of commission of offence and hence could not have been granted the benefit of the Juvenile Justice Act which undoubtedly is a benevolent legislation but cannot be allowed to be availed of by an accused who has taken the plea of juvenility merely as an effort to hide his real age so as to create a doubt in the mind of the courts below who thought it appropriate to grant him the benefit of a juvenile merely by adopting the principle of benevolent legislation but missing its vital implication that

although the Juvenile Justice Act by itself is a piece of benevolent legislation, the protection under the same cannot be made available to an accused who in fact is not a juvenile but seeks shelter merely by using it as a protective umbrella or statutory shield. This will have to be discouraged if the evidence and other materials on record fail to prove that the accused was a juvenile at the time of commission of the offence. Juvenile Justice Act which is certainly meant to treat a child accused with care and sensitivity offering him a chance to reform and settle into the mainstream of society, the same cannot be allowed to be used as a ploy to dupe the course of justice while conducting trial and treatment of heinous offences. This would clearly be treated as an effort to weaken the justice dispensation system and hence cannot be encouraged. [Para 25] [260-A-F]

10. This Court therefore deems it just and appropriate to set aside the judgment and order passed by the High Court as also the courts below. Consequently, the accused-respondent no.2 shall be sent for trial before the court of competent jurisdiction wherein the trial is pending and not to the Juvenile Court as pleaded by him. [Para 26] [260-F-G]

Case Law Reference:

2001 (3) SCR 669 relied on Para 22,24

CRIMINAL APPELATE JURISDICTION : Criminal Appeal No. 651 of 2012.

From the Judgment & Order dated 19.08.2010 of the High Court of Judicature for Rajasthan, at Jodhpur in S.B. Crl. Revision Petition No. 597 of 2009.

M.R. Calla, Shivani M. Lal, Amit Kumar Singh, Uday Gupta, M.K. Tripathy, Pratiksha Sharma, R.C. Kaushik for the Appellant.

P.S. Narasimha, Sriram Parabhat, Vishnu Shankar Jain Sushil Kr. Dubey, Pragati Nikhar, R. Gopalakrishnan for the Respondents.

The Judgment of the Court was delivered by

GYAN SUDHA MISRA, J. 1. The Judgment and order dated 19.08.2010 passed by the High Court of Rajasthan at Jodhpur in SBCRR No.597 of 2009 is under challenge in this appeal at the instance of the appellant Om Prakash who is a hapless father of an innocent girl of 13 ½ years who was subjected to rape by the alleged accused-Respondent No.2 Vijay Kumar @ Bhanwroo who has been allowed to avail the benefit of protection under Juvenile Justice (Care and Protection of Children) Act 2000, although the courts below could not record a finding that he, in fact, was a juvenile since he had not attained the age of 18 years on the date of incident. Hence this Special Leave Petition in which leave has been granted after condoning the delay.

2. Thus the questions inter alia which require consideration in this appeal are:-

(i) whether the respondent/accused herein who is alleged to have committed an offence of rape under Section 376 IPC and other allied sections along with a co-accused who already stands convicted for the offence under Section 376 IPC, can be allowed to avail the benefit of protection to a juvenile in order to refer him for trial to a juvenile court under the Juvenile Justice (Care and Protection of Children) Act, 2000 (shortly referred to as the 'Juvenile Justice Act') although the trial court and the High Court could not record a conclusive finding of fact that the respondent-accused was below the age of 18 years on the date of the incident?

(ii) whether the principle and benefit of 'benevolent legislation' relating to Juvenile Justice Act could be applied in cases where two views regarding determination of the age of child/accused was possible and the so-called child

could not be held to be a juvenile on the basis of evidence adduced?

(iii) whether medical evidence and other attending circumstances would be of any value and assistance while determining the age of a juvenile, if the academic record certificates do not conclusively prove the age of the accused ?

(iv) whether reliance should be placed on medical evidence if the certificates relating to academic records is deliberately with held in order to conceal the age of the accused and authenticity of the medical evidence regarding the age is under challenge?

3. Juvenile Justice Act was enacted with a laudable object of providing a separate forum or a special court for holding trial of children/juvenile by the juvenile court as it was felt that children become delinquent by force of circumstance and not by choice and hence they need to be treated with care and sensitivity while dealing and trying cases involving criminal offence. But when an accused is alleged to have committed a heinous offence like rape and murder or any other grave offence when he ceased to be a child on attaining the age of 18 years, but seeks protection of the Juvenile Justice Act, under the ostensible plea of being a minor, should such an accused be allowed to be tried by a juvenile court or should he be referred to a competent court of criminal jurisdiction where the trial of other adult persons are held.

4. The questions referred to hereinbefore arise in this appeal under the facts and circumstances emerging from the materials on record which disclose that the appellant/ complainant lodged a written report on 23.5.2007 at about 1.00 p.m. that his daughter Sandhya aged about 13 1/2 years a student of class IX at Secondary School Ghewada was called from the school by the accused Bhanwaru @ Vijay Kumar, son of Joga Ram through her friend named Neetu on 23.2.2007 at about 1.00 p.m. in the afternoon. Neetu told Sandhya that

Bhanwroo was in the Bolero vehicle near the bus stand. Sandhya left the school after taking permission from the school authorities and when she reached near the bus stand she did not find the Bolero vehicle. She therefore, made a telephonic call to Bhanwru who told her that he was standing at Tiwri Road ahead of bus stand. She then noticed the Bolero vehicle on Tiwri Road, but she did not find Neetu and when she enquired about Neetu, the accused Bhanwroo @ Vijay Kumar son of Joga Ram misguided her and told her that Neetu had got down to go to the toilet after which she was made to sit in the vehicle which was forcibly driven towards Tiwri and after a distance of 3-4 Km., a person named Subhash Bishnoi was also made to sit in the vehicle. The vehicle was then taken to a lonely place off the road where heinous physical assault of rape was committed on her by Bhanwroo @ Vijay Kumar and Subhash Bishnoi. Since the victim girl/the petitioner's daughter resisted and opposed, she was beaten as a result of which she sustained injuries on her thigh, hand and back. She was then taken towards the village Chandaliya and she was again subjected to rape. Bhanwru then received a phone call after which Bhanwru and Subhash dropped her near the village Ghewada but threatened her that in case she disclosed about this event to anyone, she will be killed. Sandhya, therefore, did not mention about this incident to anyone in the school but on reaching home, she disclosed it to her mother i.e. the appellant's/complainant's wife who in turn narrated it to the appellant when he came back to village from Jodhpur on 24.2.2007. The appellant could not take an immediate decision keeping in view the consequences of the incident and called his brother Piyush from Jodhpur and then lodged a report with the P.S. Osian on the basis of which a case was registered under Section 365, 323 and 376 IPC bearing C.R.No. 40/2007 dated 25.2.2007. In course of the investigation, the accused Bhanwru @ Vijay Kumar was arrested and in the arrest memo his name was mentioned as Vijay Kumar @ Bhanwar Lal son of Joga Ram and his age has been mentioned as 19 years. After completion of the investigation, it was found that the

offences under Sections 363, 366, 323 and 376 (2)(g) IPC were made out against the accused Vijay Kumar @ Bhanwar Lal, son of Joga Ram Jat aged 19 years, Subhash son of Bagaram Bishnoi aged 20 years and against Smt. Mukesh Kanwar @ Mugli @ Neetu aged 27 years and hence charge sheet was submitted before the Judicial Magistrate, Osian. Vijay Kumar @ Bhanwar Lal and Subhash were taken in judicial custody.

5. An application thereafter was moved on behalf of the accused Vijay Kumar @ Bhanwar Lal before the Judicial Magistrate, Osian stating that he was a juvenile offender and, therefore, he may be sent to the Juvenile Court for trial.

6. Arguments were heard on the aforesaid application by the concerned learned magistrate on 29.3.2007 and the learned magistrate allowed the application by his order dated 29.3.2007, although the Public Prosecutor contested this application relying upon the police investigation and the medical report wherein the age of the accused was recorded as 19 years. In the application, the stand taken on behalf of Vijay Kumar was that in the school records, his date of birth was 30.6.1990.

7. However, contents of this application clearly reveal that no dispute was raised in the application on behalf of Vijay Kumar that the name of the accused Vijay Kumar was only Vijay Kumar and not @ Bhanwar Lal. It was also not urged that the name of accused Vijay Kumar has been wrongly mentioned in the police papers as Vijay Kumar @ Bhanwar Lal nor in course of investigation it was evaer stated that the case was wrongly registered in the name of accused Vijay Kumar @ Bhanwar Lal. Without even raising this dispute, the academic record of Vijay Kumar @ Bhanwar Lal was produced whereas according to the complainant the factual position is that the name of the accused was Bhanwar Lal which was recorded in the Government Secondary School Jeloo Gagadi (Osian) when he entered the school on 18.12.1993 and again on 22.4.1996 his name was entered in the school register wherein his date of

birth was recorded as 12.12.1988.

8. The complainant contested the age of the accused Vijay Kumar and it was submitted that the accused Vijay Kumar had been admitted in the 2nd Standard in some private school known as Hari Om Shiksham Sansthan in Jeloo Gagadi (Osian) with a changed name as Vijay Kumar and there the date of birth was mentioned as 30.6.1990 which was reflected in the subsequent academic records and on that basis the admission card in the name of Vijay Kumar with date of birth as 30.6.1990 was mentioned in the application for treating him as a juvenile.

9. The case then came up before the Additional Sessions Judge (Fast Tract No.I) Jodhpur as Sessions Case No. 151/2007 on 3.10.2007. Shri Joga Ram, the father of the accused moved an application under Section 49 of the Juvenile Justice (Care and Protection of Children) Act, 2000 stating that the date of birth of his son was 30.6.1990 in his school administration record and, therefore, on the date of incident i.e. 23.02.2007, he was less than 18 years. In this application form dated 3.10.2007, Joga Ram, father of the accused Vijay Kumar had himself stated at three places i.e. title, para in the beginning and in the first part describing the name of his son (accused) as Vijay Kumar @ Bhanwar Lal stating that his son was born on 30.6.1990 at his house and he was first admitted in the school named Hari Om Shikshan Sansthan, Jeloo Gagadi, Osian on 1.9.1997 in 2nd standard and his son studied in this school from 1.9.1997 to 15.7.2007 from 2nd standard and the transfer certificate dated 4.7.2007 was enclosed. The said application form had been signed by Joga Ram as father of the accused Vijay Kumar on which the signature of the headmaster along with the seal was also there. In transfer certificate the date of birth of the accused was also stated along with some other facts in order to assert that Vijay Kumar was less than 18 years of age on the date of the incident. But he had nowhere stated that he had another son named Bhanwru who had died in 1995 and whose date of birth was 12.12.1988. He attempted to establish that the accused Vijay Kumar is the

younger son of Joga Ram and the elder son Bhanwru had died in the year 1995 and it was he whose date of birth was 1988. He thus asserted that Vijay Kumar in fact was born in the year 1990 and his name was not Bhanwru but only Vijay Kumar. This part of the story was set up by the father of the accused Joga Ram at a later stage when the evidence was adduced.

10. The application filed on behalf of the accused Vijay Kumar was contested by the complainant and both the parties led evidence in support of their respective plea. The specific case of the complainant was that Bhanwru Lal and Vijay Kumar in fact are one and the same person and Joga Ram has cooked up a story that he had another son named Bhanwar Lal whose date of birth was 12.12.1988 and who later expired in 1995. The complainant stated that as per the version of the father of the accused if the deceased's son Bhanwar Lal continued in the school up to 24.2.1996, the same was impossible as he is stated to have expired in 1995 itself. According to the complainant Vijay Kumar and Bhanwar Lal are the names of the same person who committed the offence of rape in the year 2007 and the defence taken by the accused was a concocted story merely to take undue advantage of the Juvenile Justice Act.

11. After taking into consideration the oral and documentary evidence, the Sessions Court categorically concluded that in this case no definite clear and conclusive view is possible keeping in view the evidence which has come on record with regard to the age of the accused and both the views are clearly established and, therefore, the view which is in favour of the accused is taken and the accused is held to be a juvenile. The accused Vijay Kumar was accordingly declared to be a juvenile and was directed to be sent to the Juvenile Justice Board for trial. This order was passed by the Additional Sessions Judge (Fast Tract No.1) Jodhpur on 16.5.2009 in Sessions Case No. 151/2007.

12. The complainant-appellant thereafter assailed the order

of the Additional Sessions Judge holding the respondent Vijay Kumar as a juvenile by filing a revision petition before the High Court. The learned Judge hearing the revision observed that a lot of contradictory evidence with regard to the age and identity of Vijay Kumar @ Bhanwru has emerged and a lot of confusion has been created with regard to the date of birth of accused Vijay Kumar @ Bhanwroo. But the learned single Judge was pleased to hold that the Additional Sessions Judge had appreciated the evidence in the right perspective and he is not found to have erred in declaring respondent No.2 Vijay Kumar @ Bhanwru to be a juvenile offender. He has, therefore, rightly been referred to the Juvenile Justice Board for trial which warrants no interference. The learned single Judge consequently dismissed the revision petition against which the complainant filed this special leave petition (Crl.) No. 2411/ 2011 which after grant of leave has given rise to this appeal.

13. Assailing the orders of the courts below, learned counsel for the appellant has essentially advanced twofold submissions in course of the hearing. He had initially submitted that Vijay Kumar alias Bhanwar Lal, son of Joga Ram is the same person and Vijay Kumar is the changed name of Bhanwar Lal whose correct date of birth is 12.12.1988 and not 30.6.1990 as stated by Joga Ram, father of the accused. Hence, Vijay Kumar @ Bhanwar Lal was not a juvenile on the date of commission of the offence.

14. In order to substantiate this plea, learned counsel for the appellant submitted that in the application which was moved by Joga Ram, father of the accused, before the Additional Sessions Judge under Section 49 of the Juvenile Justice Act, he has nowhere mentioned that he had two sons named Vijay Kumar and Bhanwar Lal and that Bhanwar Lal had died in 1995 whose date of birth was 12.12.1988 and his other son Vijay Kumar's date of birth was 30.6.1990. In fact, he himself had mentioned his son's name as Vijay Kumar @ Bhanwru at more than one place in the application and later has planted a story that he had two sonce viz., Bhanwar Lal and Vijay Kumar, and

Bhanwar Lal whose date of birth was 12.12.1988 had already died in the year 1995.

15. Learned counsel for the appellant further contended that the benefit of the principle of benevolent legislation conferred on the Juvenile Justice Act, cannot be applied in the present case as the courts below -specially the court of fact which is the Additional Sessions Judge (Fast Track No.1) Jodhpur did not record a categorical finding with regard to the date of birth of the respondent-accused and the aforesaid principle can be applied only to a case where the accused is clearly held to be a juvenile so as to be sent for trial by the juvenile court or to claim any other benefit by the alleged juvenile accused. Counsel for the Appellant has relied upon the evidence of NAW-3 -Medical Jurist, who conducted ossification test of the accused and opined before the court that the accused was 19 years of age and statement of NAW-1 Assistant Professor in Radiology who opined before the court on 23.11.2007 that on the basis of the x-ray films, age of the accused is above 18 years and below 20 years.

16. Learned counsel for the accused-respondent on his part contended that medical opinion could be sought only when matriculation or equivalent certificate or date of birth certificate from the school was not available and since in the present case the admission certificate of the accused from the school record is available which states the date of birth to be 30.6.1990, the school certificate ought to be allowed to prevail upon the medical opinion.

17. We are unable to appreciate and accept the aforesaid contention of learned counsel for the respondent since the age of the accused could not be proved merely on the basis of the school record as the courts below in spite of its scrutiny could not record a finding of fact that the accused, in fact, was a minor on the date of the incident. Hence, in a situation when the school record itself is not free from ambiguity and conclusively prove the minority of the accused, medical opinion cannot be allowed

to be overlooked or treated to be of no consequence. In this context the statement of NAW-3 Dr. Jagdish Jugtawat, the medical jurist who conducted the ossification test of the accused and opined before the court that the accused was 19 years of age is of significance since it specifically states that the accused was not a juvenile on the date of commission of the offence. The statement of NAW-1 Dr. C.R. Agarwal, Asstt. Professor in Radiology also cannot be overlooked since he opined that on the basis of x-ray films, the age of the accused is above 18 years and below 20 years. Thus, in a circumstance where the trial court itself could not arrive at a conclusive finding regarding the age of the accused, the opinion of the medical experts based on x-ray and ossification test will have to be given precedence over the shaky evidence based on school records and a plea of circumstantial inference based on a story set up by the father of the accused which prima facie is a cock and bull story.

18. It is no doubt true that if there is a clear and unambiguous case in favour of the juvenile accused that he was a minor below the age of 18 years on the date of the incident and the documentary evidence at least prima facie proves the same, he would be entitled for this special protection under the Juvenile Justice Act. But when an accused commits a grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor, a casual or cavalier approach while recording as to whether an accused is a juvenile or not cannot be permitted as the courts are enjoined upon to perform their duties with the object of protecting the confidence of common man in the institution entrusted with the administration of justice. Hence, while the courts must be sensitive in dealing with the juvenile who is involved in cases of serious nature like sexual molestation, rape, gang rape, murder and host of other offences, the accused cannot be allowed to abuse the statutory protection by attempting to prove himself as a minor when the documentary evidence to prove his minority gives rise to a reasonable doubt about his assertion of minority. Under such circumstance, the medical evidence

based on scientific investigation will have to be given due weight and precedence over the evidence based on school administration records which give rise to hypothesis and speculation about the age of the accused. The matter however would stand on a different footing if the academic certificates ad school records are alleged to have been with held deliberately with ulterior motive and authenticity of the medical evidence is under challenge by the prosecution.

19. In the instant matter, the accused Vijay Kumar is alleged to have committed a crime which repels against moral conscience as he chose a girl of 13 and a half years to satisfy his lust by hatching a plot with the assistance of his accomplice Subhash who already stands convicted and thereafter the accused has attempted to seek protection under the plea that he committed such an act due to his innocence without understanding its implication in which his father Joga Ram is clearly assisting by attempting to rope in a story that he was a minor on the date of the incident which is not based on conclusive evidence worthy of credence but is based on a confused story as also shaky and fragile nature of evidence which hardly inspires confidence. It is hard to ignore that when the Additional Sessions Judge in spite of meticulous scrutiny of oral and documentary evidence could not arrive at a conclusive finding that he was clearly a juvenile below the age of 18 years on the date of incident, then by what logic and reasoning he should get the benefit of the theory of benevolent legislation on the foothold of Juvenile Justice Act is difficult to comprehend as it clearly results in erroneous application of this principle and thus we find sufficient force in the contention of learned counsel for the appellant that the benefit of the principle of benevolent legislation can be made applicable in favour of only those delinquents who undoubtedly have been held to be a juvenile which leaves no scope for speculation about the age of the alleged accused.

20. We therefore cannot overlook that the trial court as well as the High Court while passing the impugned order could not

arrive at any finding at all as to whether the accused was a major or minor on the date of the incident and yet gave the benefit of the principle of benevolent legislation to an accused whose plea of minority that he was below the age of 18 years itself was in doubt. In such situation, the scales of justice is required to be put on an even keel by insisting for a reliable and cogent proof in support of the plea of juvenility specially when the victim was also a minor.

21. The benefit of the principle of benevolent legislation attached to Juvenile Justice Act would thus apply to only such cases wherein the accused is held to be a juvenile on the basis of at least prima facie evidence regarding his minority as the benefit of the possibilities of two views in regard to the age of the alleged accused who is involved in grave and serious offence which he committed and gave effect to it in a well planned manner reflecting his maturity of mind rather than innocence indicating that his plea of juvenility is more in the nature of a shield to dodege or dupe the arms of law, cannot be allowed to come to his rescue. Hence if the plea of juvenility or the fact that he had not attained the age of discretion so as to understand the consequence of his heinous act is not free from ambiguity or doubt, the said plea cannot be allowed to be raised merely on doubtful school admission record and in the event it is doubtful, the medical evidence will have to be given due weightage while determining the age of the accused.

22. Adverting to the facts of this case we have noticed that the trial court in spite of the evidence led on behalf of the accused, was itself not satisfied that the accused was a juvenile as none of the school records relied upon by the respondent-accused could be held to be free from doubt so as to form a logical and legal basis for the purpose of deciding the correct date of birth of the accused indicating that the accused was a minor/juvenile on the date of the incident. This Court in several decisions including the case of Ramdeo Chauhan @ Raj Nath vs. State of Assam, reported in (2001) 5 SCC 714dealing with a similar circumstance had observed which adds weight and

strength to what we have stated which is quoted herein as follows :-

> "it is clear that the petitioner neither was a child nor near about the age of being a child within the meaning of the Juvenile Justice Act or the Children Act. He is proved to be a major at the time of the commission of the offence. No doubt, much less a reasonable doubt is created in the mind of the court, for the accused entitling him to the benefit of a lesser punishment, it is true that the accused tried to create a smoke screen with respect to his age. But such effort appear to have been made only to hide his real age and not to create any doubt in the mind of the court. The judicial system cannot be allowed to be taken to ransom by having resort to imaginative and concocted grounds by taking advantage of loose sentences appearing in the evidence of some of the witnesses particularly at the stage of special leave petition. The law insists on finality of judgments and is more concerned with the strengthening of the judicial system. The courts are enjoined upon to perform their duties with the object of strengthening the confidence of the common man in the institution entrusted with the administration of justice. Any effort which weakens the system and shakes the faith of the common man in the justice dispensation system has to be discouraged."

The above noted observations no doubt were recorded by the learned Judges of this Court while considering the imposition of death sentence on the accused who claimed to be a juvenile, nevertheless the views expressed therein clearly lends weight for resolving an issue where the court is not in a position to clearly draw an inference wherein an attempt is made by the accused or his guardian claiming benefit available to a juvenile which may be an effort to extract sympathy and impress upon the Court for a lenient treatment towards the so-called juvenile accused who, in fact was a major on the date of incident.

23. However, we reiterate that we may not be misunderstood so as to infer that even if an accused is clearly below the age of 18 years on the date of commission of offence, should not be granted protection or treatment available to a juvenile under the Juvenile Justice Act if a dispute regarding his age had been raised but was finally resolved on scrutiny of evidence. What is meant to be emphasized is that where the courts cannot clearly infer in spite of available evidence on record that the accused is a juvenile or the said plea appear to have been raised merely to create a mist or a smokescreen so as to hide his real age in order to shield the accused on the plea of his minority, the attempt cannot be allowed to succeed so as to subvert or dupe the cause of justice. Drawing parallel between the plea of minority and the plea of alibi, it may be worthwhile to state that it is not uncommon to come across criminal cases wherein an accused makes an effort to take shelter under the plea of alibi which has to be raised at the first instance but has to be subjected to strict proof of evidence by the court trying the offence and cannot be allowed lightly in spite of lack of evidence merely with the aid of salutary principle that an innocent man may not have to suffer injustice by recording an order of conviction in spite of his plea of alibi. Similarly, if the conduct of an accused or the method and manner of commission of the offence indicates an evil and a well planned design of the accused committing the offence which indicates more towards the matured skill of an accused than that of an innocent child, then in the absence of reliable documentary evidence in support of the age of the accused, medical evidence indicating that the accused was a major cannot be allowed to be ignored taking shelter of the principle of benevolent legislation like the Juvenile Justice Act, subverting the course of justice as statutory protection of the Juvenile Justice Act is meant for minors who are innocent law breakers and not accused of matured mind who uses the plea of minority as a ploy or shield to protect himself from the sentence of the offence committed by him. The benefit of benevolent legislation

under the Juvenile Justice Act obviously will offer protection to a genuine child accused/juvenile who does not put the court into any dilemma as to whether he is a juvenile or not by adducing evidence in support of his plea of minority but in absence of the same, reliance placed merely on shaky evidence like the school admission register which is not proved or oral evidence based on conjectures leading to further ambiguity, cannot be relied upon in preference to the medical evidence for assessing the age of the accused.

24. While considering the relevance and value of the medical evidence, the doctor's estimation of age although is not a sturdy substance for proof as it is only an opinion, such opinion based on scientific medical test like ossification and radiological examination will have to be treated as a strong evidence having corroborative value while determining the age of the alleged juvenile accused. In the case of *Ramdeo Chauhan Vs. State of Assam* (supra), the learned judges have added an insight for determination of this issue when it recorded as follows:-

> "Of course the doctor's estimate of age is not a sturdy substitute for proof as it is only his opinion. But such opinion of an expert cannot be sidelined in the realm where the Court gropes in the dark to find out what would possibly have been the age of a citizen for the purpose of affording him a constitutional protection. *In the absence of all other acceptable material, if such opinion points to a reasonable possibility regarding the range of his age, it has certainly to be considered."*

The situation, however, would be different if the academic records are alleged to have been with held deliberately to hide the age of the alleged juvenile and the authenticity of the medical evidence is under challenge at the instance of the prosecution. In that event, whether the medical evidence should be relied upon or not will obviously depend on the value of the evidence led by the contesting parties.

25. In view of the aforesaid discussion and analysis based on the prevailing facts and circumstances of the case, we are of the view that the Respondent No.2 Vijay Kumar and his father have failed to prove that Respondent No.2 was a minor at the time of commission of offence and hence could not have been granted the benefit of the Juvenile Justice Act which undoubtedly is a benevolent legislation but cannot be allowed to be availed of by an accused who has taken the plea of juvenility merely as an effort to hide his real age so as to create a doubt in the mind of the courts below who thought it appropriate to grant him the benefit of a juvenile merely by adopting the principle of benevolent legislation but missing its vital implication that although the Juvenile Justice Act by itself is a piece of benevolent legislation, the protection under the same cannot be made available to an accused who in fact is not a juvenile but seeks shelter merely by using it as a protective umbrella or statutory shield. We are under constraint to observe that this will have to be discouraged if the evidence and other materials on record fail to prove that the accused was a juvenile at the time of commission of the offence. Juvenile Justice Act which is certainly meant to treat a child accused with care and sensitivity offering him a chance to reform and settle into the mainstream of society, the same cannot be allowed to be used as a ploy to dupe the course of justice while conducting trial and treatment of heinous offences. This would clearly be treated as an effort to weaken the justice dispensation system and hence cannot be encouraged.

26. We therefore deem it just and appropriate to set aside the judgment and order passed by the High Court as also the courts below and thus allow this appeal. Consequently, the accused Vijay Kumar, S/o Joga Ram shall be sent for trial before the court of competent jurisdiction wherein the trial is pending and not to the Juvenile Court as pleaded by him. We order accordingly.

B.B.B. Appeal allowed.

UNITED INDIA INSURANCE CO. LTD.
v.
LAXMAMMA & ORS.
(Civil Appeal No. 3589 of 2012)

APRIL 17, 2012

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

Motor Vehicles Act, 1988 - ss. 146, 147 and 149 - Insurer's liability against third party risk - Limits of - Owner of the vehicle taking an insurance policy for a year and paying the premium through cheque - Said cheque towards the premium got dishonoured - Subsequent to the accident, insurer cancelled the insurance policy - Liability of insurer to indemnify third party under the insurance policy - Held: Liability of authorized insurer to indemnify third parties subsists and the insurer has to satisfy award of compensation unless the policy of insurance is cancelled by the authorized insurer and intimation of such cancellation has reached the insured before the accident - When before the accident, insurance company cancels the policy of insurance and intimates the owner, the insurance company is not liable to indemnify the third parties.

The owner of a bus obtained an insurance policy from the appellant-Insurance Company (insurer) for a period of one year, against the third party risk. The premium was paid through cheque but the said cheque bounced. Thereafter, due to negligent driving by the bus driver, 'M' (husband of respondent No. 1 and father of respondent No. 2 and 3) met with an accident, sustained grievous injuries and subsequently died. Thereafter, the appellant cancelled the insurance policy after the incident took place and intimated the same to the owner few days later. The respondents filed a claim petition seeking compensation. The appellant contended that the

insurance policy was not valid as the premium was paid through cheque which got dishonoured and thus, they were not liable. The tribunal held that the cancellation of the policy because of non-payment of the premium was done by the insurer after the accident had taken place and the intimation of cancellation was given to the owner much later, thus, the insurer was liable to the claimants and awarded compensation of Rs. 6,01,244/- to the claimants. The High Court upheld the order. Therefore, the appellant filed the instant appeal.

The question which arose for consideration in the instant appeal was whether the appellant-Insurance Company (insurer) is absolved of its obligations to the third party under the policy of insurance because the cheque given by the owner of the vehicle towards the premium got dishonoured and subsequent to the accident, the insurer cancelled the policy of insurance.

Dismissing the appeal, the Court

HELD: 1.1 Where the policy of insurance is issued by an authorized insurer on receipt of cheque towards payment of premium and such cheque is returned dishonoured, the liability of authorized insurer to indemnify third parties in respect of the liability which that policy covered subsists and it has to satisfy award of compensation by reason of the provisions of Sections 147(5) and 149(1) of the Motor Vehicles Act, 1988 unless the policy of insurance is cancelled by the authorized insurer and intimation of such cancellation has reached the insured before the accident. In other words, where the policy of insurance is issued by an authorized insurer to cover a vehicle on receipt of the cheque paid towards premium and the cheque gets dishonored and before the accident of the vehicle occurs, such insurance company cancels the policy of insurance and sends intimation thereof to the owner, the insurance company's liability to

indemnify the third parties which that policy covered ceases and the insurance company is not liable to satisfy awards of compensation in respect thereof. [Para 19] [274-F-H; 275-A-B]

1.2 In the instant case, the owner of the bus obtained policy of insurance from the insurer for the period April 16, 2004 to April 15, 2005 for which premium was paid through cheque on April 14, 2004. The accident occurred on May 11, 2004. It was only thereafter, that the insurer cancelled the insurance policy by communication dated May 13, 2004 on the ground of dishonour of cheque which was received by the owner of the vehicle on May 21, 2004. The cancellation of policy having been done by the insurer after the accident, the insurer became liable to satisfy award of compensation passed in favour of the claimants. The judgment of the High Court does not call for any interference. However, the insurer shall be at liberty to prosecute its remedy to recover the amount paid to the claimants from the insured. [Paras 20 and 21] [275-C-F]

Oriental Insurance Co. Ltd. v. Inderjit Kaur and Ors. **(1998) 1 SCC 371: 1997 (6) Suppl. SCR 225;** *National Insurance Co. Ltd. v. Seema Malhotra and Ors.***(2001) 3 SCC 151: 2001 (1) SCR 1131;** *Deddappa and Ors. v. Branch Manager, National Insurance Co. Ltd.* **(2008) 2 SCC 595: 2007 (13) SCR 287;** *New India Assurance Co. Ltd. v. Rula and Ors.* **(2000) 3 SCC 195: 2000 (2) SCR 148- referred to.**

Case Law Reference:

1997 (6) Suppl. SCR 225	**Referred to**	**Para 5**
2001 (1) SCR 1131	**Referred to**	**Para 5**
2007 (13) SCR 287	**Referred to**	**Para 5**
2000 (2) SCR 148	**Referred to**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3589 of 2012.

From the Judgment & Order dated 11.11.2008 of the High Court of Karnataka at Bangalore in MFA No. 445 of 2007.

A.K. De, Rajesh Dwivedi, Debasis Misra, Devabrat Singh, for the Appellant.

P.R. Ramasesh, Azeem A. Kalebudde for the Respondents.

The Judgment of the Court was delivered by

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

2. The only question that arises for consideration in this appeal by special leave is: whether the appellant, United India Insurance Company Limited (insurer) is absolved of its obligations to the third party under the policy of insurance because the cheque given by the owner of the vehicle towards the premium got dishonoured and subsequent to the accident, the insurer cancelled the policy of insurance.

3. The above question arises in this way. M. Nagaraj (husband of respondent no. 1 and father of respondent nos. 2 and 3) was travelling in a bus bearing registration no. KA 018116 on May 11, 2004. At about 8.50 a.m. on that day due to negligent application of brake by the bus driver, the back door of the bus suddenly opened and M. Nagaraj standing near the door fell down. He sustained grievous injuries and subsequently died. The respondent nos. 1 to 3, to be referred as claimants, filed a claim petition before the Motor Accident Claims Tribunal, Bangalore (for short, 'Tribunal') seeking compensation of Rs. 15 lakhs. The present appellant, insurer was impleaded as respondent no. 2 while the owner of the bus was impleaded as respondent no. 1. The owner and the insurer contested the claim petition on diverse grounds. The insurer

raised the plea in the written statement that the insurance policy dated April 14, 2004 issued by it covering the said bus for the period April 16, 2004 to April 15, 2005 was not valid as the premium was paid through cheque and the cheque got dishonoured and, therefore, there was no liability on it to cover the third party risk.

4. The Tribunal on recording the evidence and after hearing the parties held that the claimants were successful in proving that on May 11, 2004 at 8.50 a.m. the deceased M. Nagaraj was travelling in the bus and he fell down from the bus through the door by sudden application of brake negligently by the driver and died due to the injuries sustained in that accident. The Tribunal also recorded the finding of fact on examination of the documentary and oral evidence that cancellation of policy because of non-payment of the premium was done by the insurer after the accident had taken place and intimation of cancellation was given to the owner on May 21, 2004 whereas accident took place on May 11, 2004. The Tribunal, thus, held that the insurer was liable to the claimants. The Tribunal in its award dated June 28, 2006 held that claimants were entitled to compensation in the sum of Rs. 6,01,244/- and apportioned that amount amongst claimants. Aggrieved by the award of the Tribunal, the insurer preferred appeal before the High Court. The High Court dismissed the insurer's appeal on November 11, 2008. It is from this order that the present appeal has arisen.

5. Mr. A.K. De, learned counsel for the appellant strenuously urged that having regard to the undisputed fact that the cheque issued by the owner of the vehicle towards the premium for insurance of vehicle was dishonoured, the contract of insurance became void and the insurer could not be compelled to perform its part of promise under the policy. He submitted that no liability can be fastened on the insurers qua third party if the policy of insurance is rendered void for want of consideration to the insurer. Learned counsel submitted that the view taken by this Court in *Oriental Insurance Co. Ltd. v.*

Inderjit Kaur and others[1] has been diluted by the later decisions of this Court in the case of *National Insurance Co. Ltd. v. Seema Malhotra and others*[2] and *Deddappa and others v. Branch Manager, National Insurance Co. Ltd.*[3]. In the alternative, learned counsel for the insurer submitted that if the Court holds that the insurer is liable to pay compensation to the claimants, the amount so paid by the insurer to the claimants must be allowed to be recovered from the insured.

6. Mr. P.R. Ramasesh, learned counsel for respondent no. 4 (owner) supported the view of the High Court. He submitted that on the date of the accident, the policy was subsisting and the liability of the insurer continued and, therefore, the insurer cannot recover the amount paid to the claimants from the insured.

7. Section 64-VB of the Insurance Act, 1938 (for short, 'Insurance Act') provides as under :

> **"64-VB. No risk to be assumed unless premium is received in advance.-** (1) No insurer shall assume any risk in India in respect of any insurance business on which premium is not ordinarily payable outside India unless and until the premium payable is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed or unless and until deposit of such amount as may be prescribed, is made in advance in the prescribed manner.
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> (2) For the purposes of this section, in the case of risks for which premium can be ascertained in advance, the risk may be assumed not earlier than the date on which the premium has been paid in cash or by cheque to the insurer.

1. (1998) 1 SCC 371.
2. (2001) 3 SCC 151.
3. (2008) 2 SCC 595.

Explanation.- Where the premium is tendered by postal money order or cheque sent by post, the risk may be assumed on the date on which the money order is booked or the cheque is posted, as the case may be.

(3) Any refund of premium which may become due to an insured on account of the cancellation of a policy or alteration in its terms and conditions or otherwise shall be paid by the insurer directly to the insured by a crossed or order cheque or by postal money order and a proper receipt shall be obtained by the insurer from the insured, and such refund shall in no case be credited to the account of the agent.

(4) Where an insurance agent collects a premium on a policy of insurance on behalf of an insurers, he shall deposit with, or dispatch by post to, the insurer, the premium so collected in full without deduction of his commission within twenty-four hours of the collection excluding bank and postal holidays.

(5) The Central Government, may, by rules, relax the requirements of sub-section (1) in respect of particular categories in insurance policies.

(6) The Authority may, from time to time, specify, by the regulations made by it, the manner of receipt of premium by the insurer."

The above provision states that no risk is assumed by the insurer unless premium payable is received in advance.

8. The Motor Vehicles Act, 1988 (for short, 'the M.V. Act') in Chapter XI deals with insurance of motor vehicles against third party risks. Section 145 in that Chapter provides for definitions: (a) authorised insurer, (b) certificate of insurance, (c) liability, (d) policy of insurance, (e) property, (f) reciprocating country and (g) third party.

9. Section 146 mandates insurance of a motor vehicle against third party risk. Inter alia, it provides that no person shall use the motor vehicle in a public place unless a policy of insurance has been taken with regard to such vehicle complying with requirements as set out in Chapter XI. The owner of vehicle, thus, is statutorily mandated to obtain insurance for the motor vehicle to cover the third party risk except in exempted and exception categories as set out in Section 146 itself.

10. Section 147 makes provision for requirements of policies and limits of liability. Sub-section (5) thereof is relevant for the present purposes which reads as follows :

"S. 147. - Requirements of policies and limits of liability.-

(1)) to (4) xxx xxx xxx xxx xxx xxx

(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons."

11. Section 149 deals with the duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks. Sub-section (1) which is relevant for the present purposes reads as under:

"S.149.- Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.- (1) If, after a certificate of insurance has been issued under sub-section (3) of section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of section 147 (being a liability covered by the terms of the policy) or under the provisions of section 163A is obtained

against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."

12. The above provisions came up for consideration in the case of *Inderjit Kaur*[1]. That was a case where a bus met with an accident. The policy of insurance was issued by the Oriental Insurance Company Limited on November 30, 1989. The premium for the policy was paid by cheque but the cheque was dishonoured. The insurance company sent a letter to the insured on January 23, 1990 that the cheque towards premium had been dishonoured and, therefore, the insurance company was not at risk. The premium was paid in cash on May 2, 1990 but in the meantime on April 19, 1990 the accident took place, the bus collided with the truck and the truck driver died. The truck driver's wife and minor sons filed claim petition. A three-Judge Bench of this Court noticed the above provisions and then held in paragraphs 9, 10 and 12 (pages 375 and 376) as under :

"9. We have, therefore, this position. Despite the bar created by Section 64-VB of the Insurance Act, the appellant, an authorised insurer, issued a policy of insurance to cover the bus without receiving the premium therefor. By reason of the provisions of Sections 147(5) and 149(1) of the Motor Vehicles Act, the appellant became liable to indemnify third parties in respect of the liability which that policy covered and to satisfy awards of compensation in respect thereof notwithstanding its entitlement (upon which we do not express any opinion) to avoid or cancel the policy for the reason that the cheque

issued in payment of the premium thereon had not been honoured.

10. The policy of insurance that the appellant issued was a representation upon which the authorities and third parties were entitled to act. The appellant was not absolved of its obligations to third parties under the policy because it did not receive the premium. Its remedies in this behalf lay against the insured.

12. It must also be noted that it was the appellant itself who was responsible for its predicament. It had issued the policy of insurance upon receipt only of a cheque towards the premium in contravention of the provisions of Section 64-VB of the Insurance Act. The public interest that a policy of insurance serves must, clearly, prevail over the interest of the appellant."

13. In *Inderjit Kaur*[1], the Court invoked the doctrine of public interest and held that the insurance company was liable to indemnify third parties in respect of the liability which the policy covered despite the bar created by Section 64-VB of the Insurance Act. The Court did leave open the question of insurer's entitlement to avoid or cancel the policy as against insured when the cheque issued for payment of the premium was dishonoured.

14. In *New India Assurance Co. Ltd. v. Rula and others*[4], the Court was concerned with a question very similar to the question posed before us. That was a case where the insurance policy was issued by the New India Assurance Co. Ltd. in terms of the requirements of the M.V. Act but the cheque by which the owner had paid the premium bounced and the policy was cancelled by the insurance company but before the cancellation of the policy, accident had taken place. A two-Judge Bench of this Court considered the statutory provisions contained in the M.V. Act and the judgment in Inderjit Kaur1. In

4. (2000) 3 SCC 195.

paragraph 13 (at page 200), the Court held as under :

> "13. This decision, which is a three-Judge Bench decision, squarely covers the present case also. *The subsequent cancellation of the insurance policy in the instant case on the ground that the cheque through which premium was paid was dishonoured, would not affect the rights of the third party which had accrued on the issuance of the policy on the date on which the accident took place.* If, on the date of accident, there was a policy of insurance in respect of the vehicle in question, the third party would have a claim against the Insurance Company and the owner of the vehicle would have to be indemnified in respect of the claim of that party. Subsequent cancellation of the insurance policy on the ground of non-payment of premium would not affect the rights already accrued in favour of the third party"
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> (Emphasis supplied)

15. In *Seema Malhotra*[2], the Court was concerned with the question whether the insurer is liable to honour the contract of insurance where the insured gave a cheque to the insurer towards the premium amount but the cheque was dishonoured by the drawee bank due to insufficiency of funds in the account of the drawer. In the case of *Seema Malhotra*[2], the above question arose from the following facts : the owner of a Maruti car entered into an insurance contract with National Insurance Company Limited on December 21, 1993; on the same day the owner gave a cheque of Rs. 4,492/- towards the first instalment of the premium; the insurance company issued a cover note as contemplated in Section 149 of the M.V. Act; the car met with an accident on December 31, 1993 in which the owner died and the car was completely damaged; on January 10, 1994 the bank on which the cheque was drawn by the insured sent an intimation to the insurance company that the cheque was dishonoured as there were no funds in the account of the drawer and on January 20, 1994 the business concern

of the owner was informed that the cheque having been dishonoured by the bank, the insurance policy is cancelled with immediate effect and the company is not at risk. The widow and children of the owner filed a claim for the loss of the vehicle with the insurance company. When the claim was repudiated, they moved the State Consumer Protection Commission (for short, 'Commission'). The Commission rejected the claim of the claimants and held that insurer was justified in repudiating the contract as soon as cheque got bounced. The claimants moved the Jammu and Kashmir High Court. The High Court reversed the order of the Commission and held that the insurance company chose to cancel the insurance policy from the date of issuance of communication and not from the date the cheque was issued which got bounced. The matter reached this Court from the above judgment of the High Court. The Court referred to Section 64-VB of the Insurance Act, Sections 25, 51,52,54 and 65 of the Indian Contract Act and the decisions of this Court in *Inderjit Kaur*[1] and *Rula*[4] and held (at pages 156 and 157) as under :

> "17. In a contract of insurance when the insured gives a cheque towards payment of premium or part of the premium, such a contract consists of reciprocal promise. The drawer of the cheque promises the insurer that the cheque, on presentation, would yield the amount in cash. It cannot be forgotten that a cheque is a bill of exchange drawn on a specified banker. A bill of exchange is an instrument in writing containing an unconditional order directing a certain person to pay a certain sum of money to a certain person. It involves a promise that such money would be paid.
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> 18. Thus, when the insured fails to pay the premium promised, or when the cheque issued by him towards the premium is returned dishonoured by the bank concerned the insurer need not perform his part of the promise. The corollary is that the insured cannot claim performance from the insurer in such a situation.

19. Under Section 25 of the Contract Act an agreement made without consideration is void. Section 65 of the Contract Act says that when a contract becomes void any person who has received any advantage under such contract is bound to restore it to the person from whom he received it. So, even if the insurer has disbursed the amount covered by the policy to the insured before the cheque was returned dishonoured, the insurer is entitled to get the money back.

20. However, if the insured makes up the premium even after the cheque was dishonoured but before the date of accident it would be a different case as payment of consideration can be treated as paid in the order in which the nature of transaction required it. As such an event did not happen in this case, the Insurance Company is legally justified in refusing to pay the amount claimed by the respondents."

16. In *Deddappa*[3], the Court was concerned with the plea of the insurance company that although the vehicle was insured by the owner for the period October 17, 1997 to October 16, 1998 but the cheque issued therefor having been dishonoured, the policy was cancelled and, thus, it was not liable. That was a case where for the above period of policy, the cheque was issued by the owner on October 15, 1997; the bank issued a return memo on October 21, 1997 disclosing dishonour of the cheque with remarks "fund insufficient" and the insurance company, thereafter, cancelled the policy of insurance by communicating to the owner of the vehicle and an intimation to the concerned RTO. The accident occurred on February 6, 1998 after the cancellation of the policy.

17. The Court in *Deddappa*[3] again considered the relevant statutory provisions and decisions of this Court including the above three decisions in *Inderjit Kaur*[1], *Rula*[4] and *Seema Malhotra*[2]. In para 24 (at page 601) of the Report, the Court observed as under:

"24. We are not oblivious of the distinction between the statutory liability of the insurance company vis-à-vis a third party in the context of Sections 147 and 149 of the Act and its liabilities in other cases. But the same liabilities arising under a contract of insurance would have to be met if the contract is valid. If the contract of insurance has been cancelled and all concerned have been intimated thereabout, we are of the opinion, the insurance company would not be liable to satisfy the claim."

Then in para 26 (at page 602), the Court invoked extraordinary jurisdiction under Article 142 of the Constitution of India and directed the insurance company to pay the amount of claim to the claimants and recover the same from the owner of the vehicle.

18. We find it hard to accept the submission of the learned counsel for the insurer that the three-Judge Bench decision in *Inderjit Kaur*[1] has been diluted by the subsequent decisions in *Seema Malhotra*[2] and *Deddappa*[3]. *Seema Malhotra*[2] and *Deddappa*[3] turned on the facts obtaining therein. In the case of *Seema Malhotra*[2], the claim was by the legal heirs of the insured for the damage to the insured vehicle. In this peculiar fact situation, the Court held that when the cheque for premium returned dishonoured, the insurer was not obligated to perform its part of the promise. Insofar as *Deddappa*[3] is concerned, that was a case where the accident of the vehicle occurred after the insurance policy had already been cancelled by the insurance company.

19. In our view, the legal position is this : where the policy of insurance is issued by an authorized insurer on receipt of cheque towards payment of premium and such cheque is returned dishonoured, the liability of authorized insurer to indemnify third parties in respect of the liability which that policy covered subsists and it has to satisfy award of compensation by reason of the provisions of Sections 147(5) and 149(1) of the M.V. Act unless the policy of insurance is cancelled by the

authorized insurer and intimation of such cancellation has reached the insured before the accident. In other words, where the policy of insurance is issued by an authorized insurer to cover a vehicle on receipt of the cheque paid towards premium and the cheque gets dishonored and before the accident of the vehicle occurs, such insurance company cancels the policy of insurance and sends intimation thereof to the owner, the insurance company's liability to indemnify the third parties which that policy covered ceases and the insurance company is not liable to satisfy awards of compensation in respect thereof.

20. Having regard to the above legal position, insofar as facts of the present case are concerned, the owner of the bus obtained policy of insurance from the insurer for the period April 16, 2004 to April 15, 2005 for which premium was paid through cheque on April 14, 2004. The accident occurred on May 11, 2004. It was only thereafter that the insurer cancelled the insurance policy by communication dated May 13, 2004 on the ground of dishonour of cheque which was received by the owner of the vehicle on May 21, 2004. The cancellation of policy having been done by the insurer after the accident, the insurer became liable to satisfy award of compensation passed in favour of the claimants.

21. In view of the above, the judgment of the High Court impugned in the appeal does not call for any interference. Civil appeal is dismissed. However, the insurer shall be at liberty to prosecute its remedy to recover the amount paid to the claimants from the insured. No order as to costs.

N.J. Appeal dismissed.

STATE OF HARYANA

v.

SHAKUNTLA AND ORS.

(Criminal Appeal No. 658 of 2008)

APRIL 19, 2012

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

Penal Code, 1860 - ss.302, 325, 148 and 149 - Murder - Common object - Armed assault on PW4's parents causing 30/33 injuries on different parts of their body and consequently their death - Earlier, on one occasion accused 'M' and 'R' had beaten PW4's parents, for which they were facing criminal trial, and on another occasion they had abused and beaten PW4 - All nine accused convicted by trial court - High Court accepted the plea of alibi taken by three accused i.e. 'S', 'P' and 'Sa' and acquitted them but upheld conviction in relation to the other six accused (including 'M' and 'R') -Cross-appeals by State and the six convicted accused - Held: M' and the other accused had been looking for an opportunity to fight with PW4's father and his family members, on one pretext or the other - All the accused, except those acquitted by the High Court, had participated with a common mind to cause fatal injuries upon the parents of PW4 - PW-4, in his statement, clearly and definitely explained the occurrence, by attributing specific role to each one of the accused - His version fully supported by that of PW-5, other documentary evidence on record and also medical evidence - The members of the assembly had acted in furtherance to the common object and the same object was made absolutely clear by the words of accused 'M' when he exhorted all the others to 'finish' the deceased persons - PW4's father, 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 PW4's

mother 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 instant case - The way in which the crime has been committed reflects nothing but sheer brutality - Conviction of six accused (as ordered by trial court and High Court) affirmed - As regards the other three accused 'S', 'P' and 'Sa', the High Court accepted their plea of alibi keeping in view the evidence led by the defence witnesses and acquitted them - It was for the State to show that the High Court completely fell in error of law or that judgment in relation to these accused was palpably erroneous, perverse or untenable - However, none of these parameters were satisfied in appeal preferred by the State against acquittal of the three accused - Judgment of High Court accordingly not interfered with.

Witness - Interested witness - Appreciation of - Held: Once, the statement of a witness is found trustworthy and is duly corroborated by other evidence, there is no reason for the Court to reject the statement of such witness, merely on the ground that it was a statement of a related or interested witness - In the present case, the presence of PW-4 and PW-5 (i.e. the children of the deceased couple) at the place of occurrence was natural and their statements were trustworthy, corroborated by other evidence and did not suffer from the vice of suspicion or uncertainty - 30 and 33 injuries respectively were caused on the bodies of the two deceased, but still, PW-4 and PW-5 attributed specific role to each individual accused, particularly with regard to the grievous injuries caused by them - The Court has to give credence to their statements as they lost their close relations and had no reason to falsely implicate the accused persons, who were

also their relations.

Constitution of India, 1950 - Article 136 - Acquittal by High Court - Interference with - Scope of - Held: Against the judgment of acquittal, onus is on the prosecution to show that the finding recorded by the High Court is perverse and requires correction by Supreme Court, in exercise of its powers under Article 136 of the Constitution - An appellate Court must bear in mind that in case of acquittal, there is a double presumption in favour of the accused - Firstly, the presumption of innocence is available to such accused under the fundamental principles of criminal jurisprudence, i.e., that every person shall be presumed to be innocent unless proved guilty before the court and secondly, that a lower court, upon due appreciation of all evidence has found in favour of his innocence - Merely because another view is possible, it would be no reason for the Supreme Court to interfere with the order of acquittal.

The prosecution case was that the nine accused persons namely, 'M', 'R', 'K', 'B', 'S', 'P', 'Ka', 'Sa' and 'L' came armed with lathis and other deadly weapons and launched armed assault on the parents of PW4 and thus caused their death. Earlier, on one occasion accused 'M' and 'R' had beaten PW4's parents, for which they were facing criminal trial, and on another occasion they had abused and beaten PW4. The trial Court convicted all the nine accused under Sections 148 as well as under Section 325/302 both read with Section 149 IPC. On appeal, the High Court accepted the plea of alibi taken by three accused i.e. 'S', 'P' and 'Sa' and acquitted them but upheld the conviction in relation to the other six accused (including 'M' and 'R').

The present three appeals have been filed against the said judgment of the High Court. Criminal Appeal No. 658 of 2008 has been preferred by the State against the order

of acquittal of 'S', 'P' and 'Sa', Criminal Appeal No. 1005 of 2008 has been preferred by the five convicted accused namely, 'M', 'R', 'K', 'B' and 'L' and Criminal Appeal No. 1707 of 2008 has been preferred by the accused, 'Ka' against dismissal of their respective appeals by the High Court.

Dismissing the appeals filed by the accused, as well as the appeal filed by the State, the Court

HELD:1. The facts and circumstances of the case clearly show that 'M' and the other accused had been looking for an opportunity to fight with PW4's father and his family members, on one pretext or the other. 'M' exhorted the others to 'finish them', upon which the accused persons started assaulting the victims and continued till both the parents of PW4 died. The circumstance deserving the attention of this Court is that, even when PW4's father fell on the ground as a result of a blow on his spine, still none of the accused person showed any mercy, they instead continued with the assault. The statements of Dr. PW-1 and Dr. PW2, and the post mortem reports of the deceased, Ext. PA and Ext. PC clearly demonstrate the intentional brutality and intent of the accused to kill the victims. They caused as many as 30 injuries on the person of PW4's father and 33 injuries on the person of PW4's mother, resulting in the death of both of them. [Para 12] [290-D-G]

2. Both the deceased had tried to run away, but were chased by the accused. While 'M' exhorted the others, all accused persons, particularly accused No.7, 'Ka', effectively participated in inflicting injuries on the bodies of the deceased. Thus, a common intention came into existence at the spur of the moment, even if the same was not pre-existing. The existence of common object and intent is not only reflected from the circumstantial evidence, but is also clearly demonstrated in the

statement of PW-4 and PW-5, respectively. The offenders, if have no common intention or object to kill the victim, they would normally stop assaulting the victim and leave him in the injured condition when he falls down on the ground. On the contrary, in the case in hand, all the accused, except those acquitted by the High Court, had participated with a common mind to cause fatal injuries upon both the parents of PW4. PW-4, in his statement, has clearly and definitely explained the occurrence, by attributing specific role to each one of the accused. According to him, 'R' inflicted Jaily blow on the legs of PW4's father. 'M' gave Jaily blow on the head of PW4's father, which the deceased deflected with his hands. 'K' gave Jaily blow on the back of PW4's father, whereafter the victim fell on the ground. Thereafter, 'B' inflicted Kasola blow on the head of PW4's father and finally, all the other accused started mercilessly inflicting blows on the person of the PW4's father. [Para 13] [290-H; 291-A-E]

3.1. The statement of PW-4 also shows that the accused persons had also inflicted injuries on the body of PW4's mother, with an intention to kill her. The version put forward by this witness is fully supported by that of PW-5 and from other documentary evidence placed on record. The medical evidence completely corroborates the story advanced by this witness for the prosecution. Once, the statement of a witness is found trustworthy and is duly corroborated by other evidence, there is no reason for the Court to reject the statement of such witness, merely on the ground that it was a statement of a related or interested witness. [Para 14] [291-E-G]

3.2. In the present case, it is more than clear that PW-4 and PW-5 were both present at the time of the incident. The prior animosity and clashes between the two families has come on record. In the cross-examination, no material was brought out to the contrary. It is clear that the

presence of PW-4 and PW-5 at the place of occurrence was natural and their statements, are trustworthy, corroborated by other evidence and do not suffer from the vice of suspicion or uncertainty. The Court has to give credence to their statement as they have lost their close relations and have no reason to falsely implicate the accused persons, who are also their relations. [Paras 17, 19] [292-F-G; 295-F-G]

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

Waman & Ors. v. State of Maharashtra **(2011) 7 SCC 295: 2011 (6) SCR 1072;** *Jalpat Rai & Ors. v. State of Haryana* **JT 2011 8 SC 55;** *State of Haryana v. Ram Singh* **(2002) 2 SCC 426: 2002 (1) SCR 208 - held inapplicable.**

4.1. In the present case, 30 and 33 injuries respectively had been caused on the bodies of the deceased, but still, PW-4 and PW-5 have attributed specific role to each individual accused, particularly with regard to the grievous injuries caused by them. [Para 23] [297-F-G]

4.2. It is clear that, as per the case of the prosecution, there were more than five persons assembled at the incident. 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 'M' when he exhorted all the others to 'finish' the deceased persons. [Para 26] [298-G-H; 299-A]

4.3. The intention and object on the part of this group was clear. They had come with the express object of killing PW4's father and his family members. In view of the manner in which 'M' exhorted all the others and the manner in which they acted thereafter, clearly establishes that their intention was not to inflict injuries simplicitor.

PW4's father, 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 PW4's mother 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 instant case. 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. [Para 27] [299-A, B-E]

Sarman & Ors. v. State of M.P. **1993 Supp. (2) SCC 356 - distinguished.**

Ramchandran & Ors. v. State of Kerala **(2011) 9 SCC 257 - referred to.**

Black's Law Dictionary, Sixth Edition and Advanced Law Lexicon, 3rdEdition - referred to.

5. PW-4, in his statement, had clearly stated that accused 'M', 'R', 'K' and one of their other relations, who was later on identified to be 'Ka', had reached there, armed with jailies. Even in the FIR, PW4 had made a similar statement that one other relative of his, whose name he did not know, had also come there. Thus, it was a case where PW-4 had duly identified that person, but did not know the exact name of that person. Further, it is true that the witnesses have not attributed any specific role to 'Ka', but their statement is clear that all the

accused persons had started inflicting injuries upon the body of the deceased. In other words, being members of the unlawful assembly, 'Ka', along with others, had also inflicted injuries upon the deceased, in furtherance to the common object and thus, would also be liable to be held guilty accordingly. Another important feature is that recovery of Ext. 11 Jaili was made at the behest of accused, 'Ka'and was taken into possession vide Ext. PUA/1. [Para 28] [299-G-H; 300-A-C]

6. The High Court acquitted three accused while accepting the plea of alibi taken by them. Against the judgment of acquittal, onus is on the prosecution to show that the finding recorded by the High Court is perverse and requires correction by this Court, in exercise of its powers under Article 136 of the Constitution of India. An appellate Court must bear in mind that in case of acquittal, there is a double presumption in favour of the accused. Firstly, the presumption of innocence is available to such accused under the fundamental principles of criminal jurisprudence, i.e., that every person shall be presumed to be innocent unless proved guilty before the court and secondly, that a lower court, upon due appreciation of all evidence has found in favour of his innocence. Merely because another view is possible, it would be no reason for this Court to interfere with the order of acquittal. It was for the State to show that the High Court has completely fallen in error of law or that judgment in relation to these accused was palpably erroneous, perverse or untenable. None of these parameters are satisfied in the appeal preferred by the State against the acquittal of three accused. [Paras 36 and 40] [301-G-H; 302-A-C; 304-D-E]

Girja Prasad (Dead) By Lrs. v. State of M.P. **(2007) 7 SCC 625: 2007 (9) SCR 483 ;** *Chandrappa v. State of Karnataka* **(2007) 4 SCC 415: 2007 (2) SCR 630;** *C. Antony v. K.G. Raghavan Nair* **(2003) 1 SCC 1 - relied on.**

Munshi Prasad & Ors. v. State of Bihar **(2002) 1 SCC 351: 2001 (4) Suppl. SCR 25 - referred to.**

Case Law Reference:

2011 (6) SCR 1072	**held inapplicable**	**Para 14, 15**
JT 2011 8 SC 55	**held inapplicable**	**Para 14**
2002 (1) SCR 208	**held inapplicable**	**Para 14,16**
(2012) 4 SCC 79	**relied on**	**Para 18**
1993 Supp. (2) SCC 356	**distinguished**	**Para 22**
(2011) 9 SCC 257	**referred to**	**Para 24**
2001 (4) Suppl. SCR 25	**referred to**	**Para 32**
2007 (9) SCR 483	**relied on**	**Para 37**
2007 (2) SCR 630	**relied on**	**Para 38**
(2003) 1 SCC 1	**relied on**	**Para 39**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 658 of 2008 etc.

From the Judgment & Order dated 26.07.2007 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 700-D/1997.

WITH

Crl. Appeal Nos. 1005 and 1707 of 2008.

S.B. Sanyal, R.K. Das, V. Giri, Manjit Singh, AAG, C.V. Subba Rao, Dinesh Chander Yadav, Vibhuti Sushant Gupta for Dr. Kailash Chand, Tarjit Singh, Kamal Mohan Gupta for Naresh Bakshi, A.V. Palli, Atul Sharma, Anupam Raina, Rekha Palli for the appearing parties.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. We may notice the case of

the prosecution in brief at the very outset of this judgment. On 3rd July, 1994, Manohar Lal (deceased) who had retired from service as Subedar in the Indian Army, had taken his wife, Smt. Sushila (deceased) to Delhi for her treatment as she was complaining of pain in the chest. Naresh Kumar, PW-4 is the eldest son of Manohar Lal. All were residents of Village Nandrampurbas, Haryana.

2. In the evening, when PW-4 was putting earth on a ditch in front of his house, accused Matadin and Rajender came there and abused and beat him. However, PW-4 did not lodge any police report in this regard. On 5th July, 1994, Manohar Lal and his wife Sushila returned from Delhi at about 9 AM. At that time PW-4, his sister Rajesh, PW-5 and their brother Suresh were sitting at the gate of their house. When Manohar Lal and Sushila were enquiring about the incident that had taken place on 3rd July, 1994, all the nine accused, namely, Matadin, Rajender, Krishan, Bhim Singh, Shakuntla, Premwati, Kailash, Sarjeeta and Laxmi came there armed with lathis and other deadly weapons. Laxmi opened the assault by giving an iron rod blow which hit Sushila at her leg. Thereafter, Matadin gave a Jaily blow on the head of Manohar Lal but Manohar Lal took it at his hand. To save themselves, Manohar Lal and Sushila started running towards the house of Guwarias but the accused chased them. Then Krishan gave a Jaily blow which hit Manohar Lal at his back as a result of which Manohar Lal fell down. Bhim Singh gave a Kasola blow at his head and then they all started beating Manohar Lal. Thereafter, all the accused opened attack on Sushila and beat her mercilessly. Ultimately, considering both of them dead, all the accused persons ran away towards village Silarpur. When the children of Manohar Lal went near their parents, they found that Manohar Lal had died on the spot, but Sushila was still alive and unconscious. Krishan, son of Richpal, took Sushila to the Civil Hospital, Rewari in a Maruti Van, but she was declared brought dead by the doctors there.

3. PW-4 who had left for the Police Station, Dharuhera,

leaving behind PW-5 and his younger brother near the body of Manohar Lal. On the way near village Alawarpur, he met Subey Singh, Sub-Inspector who recorded the statement of PW-4 vide Ext. PH. After making endorsement to the Police Station, an FIR vide Exh. PH/1, was registered in the Police Station, Dharuhera. The process of criminal law was set into motion against the accused persons on the basis of the statement, Ext. PH.

4. It has come on record that the deceased Manohar Lal had, after retirement, been working in the Indian Army in the Defence Supply Corps (DSC) at Defence Colony, Delhi. As afore-noted, he had taken his wife for medical treatment to Delhi. In the evening, the accused Matadin and Rajender had beaten up PW-4. Moreover, in the year 1986 also, Rajender and Matadin had beaten up Manohar Lal and his wife Sushila, for which they were also facing criminal trial.

5. In furtherance to registration of the above-mentioned FIR, on 10th July, 1994, all the accused were produced before the Investigating Officer and were arrested. Upon interrogation, they made disclosure statements on the basis of which weapons of offence were recovered. Then, the investigation was handed over to Udai Singh, SHO (PW-17), who after completion of investigation submitted the report to the court of competent jurisdiction under Section 173 of the Code of Criminal Procedure, 1973 (for short 'the CrPC'). Having been committed to the Court of Sessions, the accused were charged with the offences punishable under Sections 148, 302 read with Section 149, of the Indian Penal Code, 1860 (for short "the IPC") and Section 325 read with Section 149 IPC, to which they pleaded not guilty and claimed trial. They were tried in accordance with law and, finally, vide judgment of the Trial Court dated 22nd August, 1997, all the nine accused were held guilty for commission of the offence punishable under Sections 148 as well as the offence punishable under Section 325/302 both read with Section 149 IPC. The accused were awarded the following sentences, which were to run concurrently:

"2. After going through the statements of the accused persons and also the submissions made by their counsel and also the submissions made by the learned PP for the State, I sentence all the accused persons to undergo rigorous imprisonment for a period of one year also to pay a fine of Rs. 500/- each and in default of payment of fine the accused shall undergo RI for a period of three months, for the commission of offence punishable under section 148 Indian Penal Code. I again sentence all the accused persons to undergo rigorous imprisonment for a period of two years and also to pay a fine of Rs. 500/- each and in default of payment of fine, the accused shall undergo further rigorous imprisonment for a period of three months, for the commission of offence punishable under section 325 read with section 149 Indian Penal Code. I also sentence all the accused persons to "imprisonment for life" and also to pay a fine of Rs. 10,000/- each in default of payment of fine, the accused shall undergo rigorous imprisonment for a period of 2 years, for the commission of offence punishable under section 302 read with section 149 Indian Penal Code. All the sentences to run concurrently. Case property stands confiscated to the State and be disposed of after the period of limitation. File be consigned to records."

6. Aggrieved from the judgment of the Trial Court, the accused preferred an appeal before the High Court. The High Court, vide its judgment dated 26th July, 2007, upheld the conviction and sentence of accused Nos. 1 to 4 and 9 while acquitting the accused Nos. 5, 6 and 8 i.e. Shakuntla, Premwati and Sarjeeta. It also upheld the conviction and order of sentence in relation to the accused no. 7 Kailash.

7. The present three appeals have been filed against the said judgment of the High Court.

8. Criminal Appeal No. 658 of 2008 has been preferred by the State of Haryana against the order of acquittal of three accused namely Shakuntla, Premwati and Sarjeeta, Criminal Appeal No. 1005 of 2008 has been preferred by five convicted

accused namely, Matadin, Rajender, Krishan, Bhim Singh and Laxmi and Criminal Appeal No. 1707 of 2008 has been preferred by the accused, Kailash against dismissal of their respective appeals by the High Court. As all the three appeals are from one and the same judgment, therefore, these appeals shall be disposed of by a common judgment.

9. The contentions raised on behalf of the accused/ appellant before this Court are :

a) Taking the facts and circumstances of the case and the evidence cumulatively, an offence under Part I or Part II of Section 304, IPC is made out and not an offence punishable under Section 302 of the IPC.

b) There was neither common intention amongst the members of the assembly to cause death of the deceased persons nor any common object.

c) The witnesses examined by the prosecution are witnesses related to the deceased and, as such, the Court could not have relied upon the testimony of such interested witnesses in convicting the accused.

d) In fact, there was no assembly, much less an unlawful assembly, so as to attract the provisions of Section 149 IPC and the accused persons have been incorrectly charged and convicted for the said offences.

e) The Courts have erred in law in not giving the same weightage and significance to the defence witnesses as has been given to the prosecution witnesses. Relying upon the defence witnesses, the Court ought to have accepted the plea of alibi put forward by the accused. Upon the correct application of principles of appreciation of evidence, the accused should have been given the

benefit of doubt keeping in view the fact that the other three accused had been acquitted by the High Court.

f) In Criminal Appeal No. 1707 of 2008, accused No. 7, Kailash was neither named in the FIR nor was alleged to have caused any injury. There existed no common object and the material witnesses had not been examined. Being young boy of 23 years, he had been falsely involved in the crime and, thus, was entitled to acquittal.

10. While refuting these contentions, the State has made the following contentions in the appeal preferred by it against the acquittal of three accused :

a) There was no provocation, but still, the accused persons together assaulted the deceased persons and continued to assault them till they were certain that the victims were dead.

b) In fact, Manohar Lal had died on the spot while Sushila died on the way to the hospital. The number of injuries found upon the bodies of the deceased i.e. 30 and 33, respectively, clearly show that the intention was to kill and not to merely hurt or cause injury to the deceased persons.

c) From the evidence of PW-4 and PW-5, it is clear that the accused persons constituted an unlawful assembly and they had the common intention and object of killing the deceased.

11. On a proper appreciation of the evidence placed on record, it is clear that in the circumstances, one could hardly expect any other evidence to be available. It would only be the family members who would be present at the place of occurrence of the crime and only such interested persons could depose with regard to commission of the crime. The statements of these witnesses are trustworthy and offer the

graphic eye account of the exact events, during the course of occurrence. Clearly, there was common object among the members of the unlawful assembly to somehow do away with Manohar Lal and his wife Sushila.

12. It is a settled principle of the law of evidence that it is not the quantity, but the quality of evidence that has to be taken into consideration by the Court while deciding such matters. As already noticed, even in the year 1986, Rajender and Matadin had beaten Manohar Lal and his wife, for which they were also facing criminal trial. Again, they had abused and beaten Naresh, PW-4 on 3rd July, 1994, when he was putting earth in the street in front of his house. Thereafter, on 5th July, 1994, this unfortunate incident had taken place. When on 5th July, 1994, Manohar Lal and his wife returned from Delhi, even before they entered their house and when they were discussing the incident that took place on 3rd July, 1994 with their teenage children, the accused persons, armed with weapons, came there and started assaulting Manohar Lal and his wife. This clearly shows that Matadin and the other accused had been looking for an opportunity to fight with Manohar Lal and his family members, on one pretext or the other. Matadin exhorted the others to 'finish them', upon which the accused persons started assaulting the victims and continued till both Manohar Lal and his wife Sushila died. The circumstance deserving the attention of this Court is that, even when Manohar Lal fell on the ground as a result of a blow on his spine, still none of the accused person showed any mercy, they instead continued with the assault. The statements of Dr. G.S. Yadav, PW-1 and Dr. Kamal Mehra, PW2, and the post mortem reports of the deceased, Ext. PA and Ext. PC clearly demonstrate the intentional brutality and intent of the accused to kill the victims. They caused as many as 30 injuries on the person of Manohar Lal and 33 injuries on the person of Sushila, resulting in the death of both of them.

13. Both the deceased had tried to run away, but were chased by the accused. While Manohar Lal exhorted the others,

all accused persons, particularly accused No. 7, Kailash, effectively participated in inflicting injuries on the bodies of the deceased. Thus, a common intention came into existence at the spur of the moment, even if the same was not pre-existing. The existence of common object and intent is not only reflected from the circumstantial evidence, but is also clearly demonstrated in the statement of PW-4 and PW-5, respectively. The offenders, if have no common intention or object to kill the victim, they would normally stop assaulting the victim and leave him in the injured condition when he falls down on the ground. On the contrary, in the case in hand, all the accused, except those acquitted by the High Court, had participated with a common mind to cause fatal injuries upon both Manohar Lal and Sushila. PW-4, in his statement, has clearly and definitely explained the occurrence, by attributing specific role to each one of the accused. According to him, Rajender inflicted Jaily blow on the legs of Manohar Lal. Matadin gave Jaily blow on the head of Manohar Lal, which the deceased deflected with his hands. Krishan gave Jaily blow on the back of Manohar Lal, whereafter the victim fell on the ground. Thereafter, Bhim inflicted Kasola blow on the head of the deceased Manohar Lal and finally, all the other accused started mercilessly inflicting blows on the person of the deceased Manohar Lal.

14. The statement of PW-4 also shows that the accused persons had also inflicted injuries on the body of Sushila, with an intention to kill her. The version put forward by this witness is fully supported by that of PW-5 and from other documentary evidence placed on record. The medical evidence completely corroborates the story advanced by this witness for the prosecution. Once, the statement of a witness is found trustworthy and is duly corroborated by other evidence, there is no reason for the Court to reject the statement of such witness, merely on the ground that it was a statement of a related or interested witness. The learned counsel appearing for the accused relied upon the judgments of this Court in the case of *Waman & Ors. v. State of Maharashtra* [(2011) 7 SCC

295], *Jalpat Rai & Ors. v. State of Haryana* [JT 2011 8 SC 55] and *State of Haryana v. Ram Singh* [(2002) 2 SCC 426], to contend that the statement of a related or interested witnesses should not be relied upon and made the sole basis of conviction by the Court.

15. Firstly, none of these judgments state this principle as an absolute proposition of law. Each judgment deals with its own facts. In the case of Waman (supra), the Court clearly held that if the evidence of the related witnesses is found to be consistent and true, the same cannot be discarded. Similarly, in the case of Jalpat Rai (supra), the Court noticed that the presence of the witnesses at the time of incident would not guarantee their truthfulness. The question to be examined by the Court is whether their testimony is trustworthy and reliable insofar as complicity of the appellants in the crime is concerned, or whether they have tried to implicate the innocent along with the guilty.

16. In the case of *Ram Singh's* (supra), the circumstances were totally different. In that case, the interested and related witnesses were not only examined as witnesses to the incident but they were also witnesses to the arrests and in view of these facts, the Court felt that there existed a doubt about the trustworthiness of these witnesses, which must go to the benefit of the accused.

17. All these cases, in fact, would have no application to the present case. In the present case, it is more than clear that PW-4 and PW-5 were both present at the time of the incident. The prior animosity and clashes between the two families has come on record. In the cross-examination, no material was brought out to the contrary. On the other hand, there seems to be no challenge to vital facts. The facts of the cited cases being different and there being hardly any challenge to the vital aspects of the present case, ratio decidendi of those judgments would hardly further the case of the accused.

18. A Bench of this Court in the case of *Mano Dutt & Anr.*

v. State of U.P. [(2012) 4 SCC 79], (to which one of us, Hon. Swatanter Kumar, J. was a member), while dealing with the issue of credibility of testimony by interested witnesses, 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.

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. When we examine the facts of the present case in light of the above principles, it is clear that the presence of PW-4 and PW-5 at the place of occurrence was natural and their statements, are trustworthy, corroborated by other evidence and do not suffer from the vice of suspicion or uncertainty. The Court has to give credence to their statement as they have lost their close relations and have no reason to falsely implicate the accused persons, who are also their relations. Thus, we find no merit in this contention of the learned counsel for the accused.

20. Again, while relying on the judgment of *Waman* (supra) the learned counsel has contended that the accused persons

were not members of unlawful assembly and they had neither knowledge nor intention to commit any crime in prosecution of a common object.

"40. Even otherwise, A-12 was also charged under Section 149 IPC as a member of unlawful assembly with the requisite common object and knowledge. Inasmuch as the prosecution evidence insofar as women accused is not cogent, their acquittal cannot be applied to A-12 who was in the company of A-1 to A-6. As mentioned above, apart from conviction under Section 302 Dilip, A-12 was convicted under Section 149. Section 149 creates a specific offence and deals with punishment of the offence. The only thing is that whenever the court convicts any person or persons of any offence with the aid of Section 149, a clear finding regarding the common object of the assembly must be given and the evidence disclosed must show not only the nature of the common object but also that the object was unlawful. In order to attract Section 149 it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly. It must be within the knowledge of the other members as one likely to be committed in prosecution of common object. If members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of a common object, they would be liable for the same under Section 149."

21. To bring out this distinction somewhat more clearly, the learned counsel has relied upon the meaning given to the expression "assembly" and "assemble" in Black's Law Dictionary and Law Lexicon which reads as under:-

Black's Law Dictionary, Sixth Edition:

"Assembly" – The concourse or meeting together of a considerable number of persons at the same place. Also the persons so gathered.

"Assembly, unlawful" – The congregating of people which

results in antisocial bahavior of the group, i.e. blocking a sidewalk, obstructing traffic, littering streets; but, a law which makes such congregating a crime because people may be annoyed is violative of the right of free assembly.

Advanced Law Lexicon, 3rdEdition :

"Assemble" – To bring together; to collect in one place or as one body; to convene; to congregate.

"Assembly" – A company of persons assembled together in one place usually for a common purpose – generally, for deliberation, legislation, worship of social entertainment."

22. Besides relying on para 40 of the judgment of this Court in Waman (supra), reliance has also been placed on *Sarman & Ors. v. State of M.P.* [1993 Supp. (2) SCC 356] to argue that as all the appellants were armed with lathis, it was not clear from the statements of witnesses as to which injury had been inflicted by which accused. All the members of the unlawful assembly cannot be charged with offences under Sections 302 read with 149, IPC.

23. At the outset, we may notice that in the case of *Sarman* (supra), the Court had clearly noticed that on facts, the statement of PW-12 could not be accepted as it was not reliable. Secondly, it was not stated as to which of the accused had caused injuries to the deceased. In that case, only 17 injuries had been inflicted upon the body of the deceased. In contra-distinction thereto, in the present case, 30 and 33 injuries have respectively had been caused on the bodies of the deceased, but still, PW-4 and PW-5 have attributed specific role to each individual accused, particularly with regard to the grievous injuries caused by them.

24. In the case of *Ramchandran & Ors. v. State of Kerala* [(2011) 9 SCC 257], a Bench of this Court dealt, at some length, with the scope and object of Section 149 IPC. It was held that Section 149 IPC essentially has two ingredients, one,

that the offence must be committed by any member of unlawful assembly consisting of five or more members and second, such offence must be committed in prosecution of the common object under Section 141 IPC of that assembly or such as the members of that assembly knew was likely to be committed in prosecution of the common object. Clarifying the expression "common object", the Bench further said that it is not necessary that there should be a prior concert in the sense of a meeting of minds of the members of the unlawful assembly. The common object may form on the spur of the moment. It is enough if it is then adopted by all the members and is shared by all of them.

25. In the case of *Waman* (supra), the Court also stated that in order to attract Section 149 IPC, it must be shown that the incriminating act was done to accomplish the common object of the unlawful assembly. It must be within the knowledge of other members that the offence is likely to be committed in prosecution of the common object, and if such requirement is satisfied, then they would be held liable under Section 149 IPC.

26. It is not possible to define the constituents or dimensions of an offence under Section 149 simplicitor with regard to dictionary meaning of the words 'unlawful assembly' or 'assembly'. An "assembly" is a company of persons assembled together in a place, usually for a common purpose. This Court is concerned with an "unlawful assembly". Wherever five or more persons commit a crime with a common object and intent, then each of them would be liable for commission of such offence, in terms of Sections 141 and 149 IPC. The ingredients which need to be satisfied have already been spelt out unambiguously by us. 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.

28. Then the next argument advanced on behalf of the accused is that accused Kailash has neither been named in the FIR nor has been attributed responsibility for any injury and also, no material witness has been examined to attribute any role to Kailash in the commission of the crime. Thus, he is entitled to acquittal. Kailash is also related to the deceased as well as to PW-4 and PW-5. PW-4, in his statement, had clearly stated that accused Matadin, Rajender, Krishan and one of their other relations, who was later on identified to be Kailash, had reached there, armed with jailies. Even in the FIR, PW4 had

made a similar statement that one other relative of his, whose name he did not know, had also come there. Thus, it was a case where PW-4 had duly identified that person, but did not know the exact name of that person. Further, it is true that the witnesses have not attributed any specific role to Kailash, but their statement is clear that all the accused persons had started inflicting injuries upon the body of the deceased. In other words, being members of the unlawful assembly, Kailash, along with others, had also inflicted injuries upon the deceased, in furtherance to the common object and thus, would also be liable to be held guilty accordingly. Another important feature is that recovery of Ext. 11 Jaili was made at the behest of accused, Kailash and was taken into possession vide Ext. PUA/1.

29. Thus, it is not a case based on mere statements by the interested witnesses, but is also supported by other evidence. Further, if we examine this case from another point of view, i.e, if three persons whose plea of alibi has been accepted by the High Court were indeed absent and as per plea of alibi of other accused, namely, Krishan and Rajender along with Kailash, they were also not present there, then it could hardly have been possible for the remaining three persons to inflict 63 injuries on the bodies of the deceased in a short spam. Not that this is a determinative factor, but this is a rational manner of looking at the events, as they appear to have happened in the present case.

30. The prosecution also has examined other witnesses who have deposed unambiguously involving Kailash also in the crime

31. Lastly, the learned counsel appearing for the appellant has contended that the plea of alibi of Rajender, Krishan and Kailash should have been accepted by the High Court. The accused have led their defence and produced defence witnesses to prove their plea of alibi. It is also their contention that the evidence of the defence witnesses should be appreciated at par with the prosecution witnesses.

32. In this regard, reliance is also placed upon the judgment of this Court in *Munshi Prasad & Ors. v. State of Bihar* [(2002) 1 SCC 351].

33. The Trial Court as well as the High Court have disbelieved the plea of alibi of accused Rajender, Krishan and Kailash.

34. In paragraphs 62 to 67 of the judgment, the Trial Court has discussed, at some length, the reasons for disbelieving the pleas of alibi raised by the accused. In fact, the Trial Court noticed the contradictions appearing in the statement of DW-2 and DW-3. It also noticed that either Ext. DB, the certificate, was not correct or DW-3 Khem Chand was deposing falsely before the Court. The Trial Court also examined the possibility that keeping in view the distance between the factory and the place of occurrence, which was nearly 5 kilometers or so, the possibility of the accused going to the factory after the occurrence could not be ruled out. These findings recorded by the Trial Court have been accepted by the High Court. The High Court, keeping in view the evidence led by the defence witnesses accepted the plea of alibi as far as Shakuntla, Premwati and Sarjeeta are concerned. In respect of the other three accused, we see no reason to interfere with these concurrent findings, as they neither suffer from any perversity in law nor any error in appreciation of evidence. Thus, we also reject the plea of alibi of all these three accused.

35. The learned counsel appearing for the State has not been able to bring to our notice any rationale as to why this appreciation of evidence was improper. In order to disturb the findings of fact arrived at by the High Court, this Court has to have certain compelling reasons.

36. The High Court has acquitted some accused while accepting the plea of alibi taken by them. Against the judgment of acquittal, onus is on the prosecution to show that the finding recorded by the High Court is perverse and requires correction by this Court, in exercise of its powers under Article 136 of the

Constitution of India. This Court has repeatedly held that an appellate Court must bear in mind that in case of acquittal, there is a double presumption in favour of the accused. Firstly, the presumption of innocence is available to such accused under the fundamental principles of criminal jurisprudence, i.e., that every person shall be presumed to be innocent unless proved guilty before the court and secondly, that a lower court, upon due appreciation of all evidence has found in favour of his innocence. Merely because another view is possible, it would be no reason for this Court to interfere with the order of acquittal.

37. In *Girja Prasad (Dead) By Lrs. v. State of M.P.* [(2007) 7 SCC 625], this Court held as under:-

> "28. Regarding setting aside acquittal by the High Court, the learned Counsel for the appellant relied upon *Kunju Muhammed v. State of Kerala* (2004) 9 SCC 193, *Kashi Ram v. State of M.P.* AIR 2001 SC 2902 and *Meena v. State of Maharashtra* 2000 Cri LJ 2273. In our opinion, the law is well settled. An appeal against acquittal is also an appeal under the Code and an Appellate Court has every power to reappreciate, review and reconsider the evidence as a whole before it. It is, no doubt, true that there is presumption of innocence in favour of the accused and that presumption is reinforced by an order of acquittal recorded by the Trial Court. But that is not the end of the matter. It is for the Appellate Court to keep in view the relevant principles of law, to reappreciate and reweigh the evidence as a whole and to come to its own conclusion on such evidence in consonance with the principles of criminal jurisprudence."

38. In *Chandrappa v. State of Karnataka* [(2007) 4 SCC 415], this Court held as under:-

> "42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an

order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

39. In *C. Antony v. K.G. Raghavan Nair* [(2003) 1 SCC 1], this Court held :-

"6. This Court in a number of cases has held that though the appellate court has full power to review the evidence

upon which the order of acquittal is founded, still while exercising such an appellate power in a case of acquittal, the appellate court, should not only consider every matter on record having a bearing on the question of fact and the reasons given by the courts below in support of its order of acquittal, it must express its reasons in the judgment which led it to hold that the acquittal is not justified. In those line of cases this Court has also held that the appellate court must also bear in mind the fact that the trial court had the benefit of seeing the witnesses in the witness box and the presumption of innocence is not weakened by the order of acquittal, and in such cases if two reasonable conclusions can be reached on the basis of the evidence on record, the appellate court should not disturb the finding of the trial court. (See *Bhim Singh Rup Singh v. State of Maharashtra*[1] and *Dharamdeo Singh v. State of Bihar*.)"

40. The State has not been able to make out a case of exception to the above settled principles. It was for the State to show that the High Court has completely fallen in error of law or that judgment in relation to these accused was palpably erroneous, perverse or untenable. None of these parameters are satisfied in the appeal preferred by the State against the acquittal of three accused.

41. Thus, in these circumstances, we are of the considered view that this is not a case where the offence with which the accused have been charged and punished can be converted to an offence under Section 304 Part I or Part II of the IPC.

42. For the reasons afore-recorded, we are unable to find any error of law or error in appreciation of evidence and therefore, we decline to interfere with the judgment of the High Court.

43. The appeals filed by the accused, as well as the appeal filed by the State, against the judgment of conviction/acquittal are hereby dismissed.

B.B.B. Appeals dismissed.