GENERAL OFFICER COMMANDING
v.
CBI AND ANR.
(Criminal Appeal No. 257 of 2011)

MAY 1, 2012

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

ARMED FORCES J & K (SPECIAL POWERS) ACT, 1990:

ss.4, 6 - Powers conferred on the officers of Armed forces - Scope of.

s.7 - Interpretation of - Held: The scheme of the Act provides protection to Army personnel in respect of anything done or purported to be done in exercise of powers conferred by the Act - s.7 prohibits institution of legal proceedings against any Army personnel without prior sanction of the Central Government - The term "institution" contained in s.7 means taking cognizance of the offence and not mere presentation of chargesheet by the investigating agency - Therefore, chargesheet against the army personnel cannot be filed without prior sanction of the Central Government - This protection is available only when the alleged act done by the army personnel is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act - The question to examine as to whether the sanction is required or not under a statute has to be considered at the time of taking cognizance of the offence and not during enquiry or investigation - The Legislature has conferred "absolute power" on the statutory authority to accord sanction or withhold the same and the court has no role in this subject - In such a situation the court would not proceed without sanction of the competent statutory authority - Code

of Criminal Procedure, 1973 - s.197 - General Clauses Act, 1897 - s.3(22) -Army Act, 1950.

CODE OF CRIMINAL PROCEDURE, 1973: Institution of a case - Meaning of - Held: The term 'institution' has to be ascertained taking into consideration the scheme of the Act/ Statute applicable - So far as the criminal proceedings are concerned, "Institution" does not mean filing; presenting or initiating the proceedings, rather it means taking cognizance as per the provisions contained in the Cr.P.C.

GENERAL CLAUSES ACT, 1897: s.3(22) - Good faith - Held: A public servant is under a moral and legal obligation to perform his duty with truth, honesty, honour, loyality and faith etc. - He is to perform his duty according to the expectation of the office and the nature of the post for the reason that he is to have a respectful obedience to the law and authority in order to accomplish the duty assigned to him - Good faith is defined in s.3(22) to mean a thing which is, in fact, done honestly, whether it is done negligently or not - Anything done with due care and attention, which is not malafide, is presumed to have been done in good faith - Good faith and public good are though questions of fact, are required to be proved by adducing evidence.

ARMY ACT, 1950: s.125 - Exercise of option under - Held: The stage of making option to try an accused by a court-martial and not by the criminal court is after filing of the chargesheet and before taking cognizance or framing of the charges - If the Army chooses, it can prosecute the accused through court-martial instead of going through the criminal court - Once the option is made that accused is to be tried by a court-martial, further proceedings would be in accordance with the provisions of s.70 of the Army Act and for that purpose, sanction of the Central Government is not required.

WORDS AND PHRASES:

'Cognizance', 'prosecution', 'suit', 'legal proceedings', and expression 'institution of case' - Meaning of.

Except', 'purport', 'good faith' - Meaning of.

"Legal proceedings" and "judicial proceedings" - Distinction between.

The prosecution case was that in fake encounters, few civilians were killed by the army officers. The CBI was asked to conduct the investigation. The CBI conducted the investigation and filed charge-sheet against the army officers. The Magistrate granted opportunity to Army to exercise the option as to whether the competent authority would prefer to try the case by way of court martial by taking over the case under the provisions of Section 125 of the Army Act, 1950. The Army officers filed an application before the Magistrate that no prosecution could be instituted except with the previous sanction of the Central Government in view of the provisions of Section 7 of the Armed Forces J & K (Special Powers) Act, 1990 and, therefore, the proceedings be closed by returning the charge-sheet to the CBI. The Magistrate dismissed the application holding that it was for the trial court to find out whether the action complained of falls within the ambit of the discharge of official duty or not. The Sessions Court dismissed the revision. It, however, directed the Magistrate to give one more opportunity to the Army officials for exercise of option under Section 125 of the Army Act. The High Court affirmed the decisions of lower courts and held that the very objective of sanction is to enable the Army officers to perform their duties fearlessly by protecting them from vexatious, malafide and false prosecution for the act done in performance of their duties.

In the instant appeals, it was contended that Section

7 of the Act 1990 provides that no prosecution, suit or legal proceeding shall be instituted without prior sanction of the Central Government against any person in respect of anything done or purported to be done in exercise of powers conferred under the Act; that the prosecution would be deemed to have instituted/initiated at the moment the charge-sheet is filed and received by the court and such an acceptance/receipt is without jurisdiction; and that the previous sanction of the competent authority is a pre-condition for the court in taking the charge-sheet on record if the offence alleged to have been committed in discharge of official duty and such issue touches the jurisdiction of the court.

Disposing of the appeals, the Court

HELD: 1.1. The Armed Forces J & K (Special Powers) Act, 1990 confers certain special powers upon members of the Armed Forces in the disturbed area in the State of J & K. The disturbed area is defined and there is no dispute that the place where the incident occurred stood notified under the Act 1990. Section 4 of the Act 1990 confers special powers on the officer of armed forces to take measures, where he considers it necessary to do so, for the maintenance of public order. However, he must give due warning according to the circumstances and even fire upon or use force that may also result in causing death against any person acting in contravention of law and order in the disturbed area and prohibit the assembly of five or more persons or carrying of weapons etc. Such an officer has further been empowered to destroy any arms dump, arrest any person without warrant who has committed a cognizable offence and enter and search without warrant any premises to make any arrest. Section 6 of the Act 1990 requires that such arrested person and seized property

be handed over to the local police by such an officer. [Para 9] [627-H; 628-A-D]

1.2. Section 7 of the Act 1990 provides for umbrella protection to the Army personnel in respect of anything done or purported to be done in exercise of powers conferred by the Act. The scheme of the Act requires that any prosecution, suit or legal proceeding instituted against any Army official working under the Act 1990 has to be subjected to stringent test before any such proceeding can be instituted. Section 7 is required to be interpreted keeping the said objectives in mind. The 'prosecution' means a criminal action before the court of law for the purpose of determining 'guilt' or 'innocence' of a person charged with a crime. Civil suit refers to a civil action instituted before a court of law for realisation of a right vested in a party by law. The phrase 'legal proceeding' connotes a term which means the proceedings in a court of justice to get a remedy which the law permits to the person aggrieved. It includes any formal steps or measures employed therein. It is not synonymous with the 'judicial proceedings'. Every judicial proceeding is a legal proceeding but not vice-versa, for the reason that there may be a 'legal proceeding' which may not be judicial at all, e.g. statutory remedies like assessment under Income Tax Act, Sales Tax Act, arbitration proceedings etc. So, the ambit of expression 'legal proceedings' is much wider than 'judicial proceedings'. The expression 'legal proceeding' is to be construed in its ordinary meaning but it is quite distinguishable from the departmental and administrative proceedings. The terms used in Section 7 i.e. suit, prosecution and legal proceedings are not inter-changeable or convey the same meaning. The phrase 'legal proceedings' is to be understood in the context of the statutory provision applicable in a particular case, and considering the preceding words used therein. Legal

proceedings' means proceedings regulated or prescribed by law in which a judicial decision may be given; it means proceedings in a court of justice by which a party pursues a remedy which a law provides, but does not include administrative and departmental proceedings. The provision of Section 7 of the Act 1990 prohibits institution of legal proceedings against any Army personnel without prior sanction of the Central Government. Therefore, chargesheet cannot be instituted without prior sanction of the Central Government. The use of the words 'anything done' or 'purported to be done' in exercise of powers conferred by the Act 1990 is very wide in its scope and ambit and it consists of twin test. Firstly, the act or omission complained of must have been done in the course of exercising powers conferred under the Act, i.e., while carrying out the duty in the course of his service and secondly, once it is found to have been performed in discharge of his official duty, then the protection given under Section 7 must be construed liberally. Therefore, the provision contained under Section 7 of the Act 1990 touches the very issue of jurisdiction of launching the prosecution. [Paras 10, 11, 12] [628-D-E; 629-B-H; 630-A; 631-A-E]

Assistant Collector of Central Excise, Guntur v. Ramdev Tobacco Company, **AIR 1991 SC 506;** *Maharashtra Tubes Ltd. v. State Industrial & Investment Corporation of Maharashtra Ltd. & Anr.* **(1993) 2 SCC 144: 1993 (1) SCR 340;** *S.V. Kondaskar, Official Liquidator v. V.M. Deshpande, I.T.O. & Anr.* **AIR 1972 SC 878: 1972 (2) SCR 965;** *Babulal v. M/s. Hajari Lal Kishori Lal & Ors.* **AIR 1982 SC 818: 1982 (3) SCR 94;** *Binod Mills Co. Ltd., Ujjain v. Shri. Suresh Chandra Mahaveer Prasad Mantri, Bombay* **AIR 1987 SC 1739: 1987 (3) SCR 247 - relied on.**

2. INSTITUTION OF A CASE:

The meaning of the term 'institution' has to be

ascertained taking into consideration the scheme of the Act/Statute applicable. The expression may mean filing/ presentation or received or entertained by the court. Mere presentation of a complaint cannot be held to mean that the Magistrate has taken the cognizance. Thus, the expression "Institution" has to be understood in the context of the scheme of the Act applicable in a particular case. So far as the criminal proceedings are concerned, "Institution" does not mean filing; presenting or initiating the proceedings, rather it means taking cognizance as per the provisions contained in the Cr.P.C. [Paras 13, 20, 21] [631-F; 634-B-D]

M/s. Lakshmiratan Engineering Works Ltd. v. Asst. Commissioner (Judicial) I, Sales Tax, Kanpur Range, Kanpur & Anr. **AIR 1968 SC 488;** *Lala Ram v. Hari Ram,* **AIR 1970 SC** *1093 Hindustan Commercial Bank Ltd. v. Punnu Sahu (dead) through LRs.* **AIR 1970 SC 1384;** *Martin and Harris Ltd. v. VIth Additional District Judge & Ors.* **AIR 1998 SC 492;** *Jamuna Singh & Ors. v. Bhadai Shah* **AIR 1964 SC 1541** *Satyavir Singh Rathi ACP & Ors. v. State through CBI* **(2011) 6 SCC 1: 2011 (6) SCR 138;** *Kamalapati Trivedi v. The State of West Bengal* **AIR 1979 SC 777: 1979 (2) SCR 717;** *Devarapalli Lakshminarayana Reddy & Ors. v. V. Narayana Reddy & Ors.* **AIR 1976 SC 1672: 1976 (0) Suppl. SCR 524;** *Narsingh Das Tapadia v. Goverdhan Das Partani & Anr.* **AIR 2000 SC 2946: 2000 (3) Suppl. SCR 171 - relied on.**

3. SANCTION FOR PROSECUTION:

3.1. The protection given under Section 197 Cr.P.C. is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge

of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. Use of the expression "official duty" implies that the act or omission must have been done by the public servant in the course of his service and that it should have been done in discharge of his duty. The section does not extend its protective cover to every act or omission done by a public servant in service but restricts its scope of operation to only those acts or omissions which are done by a public servant in discharge of official duty. If on facts, therefore, it is prima facie found that the act or omission for which the accused was charged had reasonable connection with discharge of his duty, then it must be held to be official to which applicability of Section 197 Cr.P.C. cannot be disputed. The question to examine as to whether the sanction is required or not under a statute has to be considered at the time of taking cognizance of the offence and not during enquiry or investigation. There is a marked distinction in the stage of investigation and prosecution. The prosecution starts when the cognizance of offence is taken. The cognizance is taken of the offence and not of the offender. The sanction of the appropriate authority is necessary to protect a public servant from unnecessary harassment or prosecution. Such a protection is necessary as an assurance to an honest and sincere officer to perform his public duty honestly and to the best of his ability. The threat of prosecution demoralises the honest officer. However, performance of public duty under colour of duty cannot be camouflaged to commit a crime. The public duty may provide such a public servant an opportunity to commit

crime and such issue is required to be examined by the sanctioning authority or by the court. It is quite possible that the official capacity may enable the pubic servant to fabricate the record or mis-appropriate public funds etc. Such activities definitely cannot be integrally connected or inseparably inter-linked with the crime committed in the course of the same transaction. Thus, all acts done by a public servant in the purported discharge of his official duties cannot as a matter of course be brought under the protective umbrella of requirement of sanction. In fact, the issue of sanction becomes a question of paramount importance when a public servant is alleged to have acted beyond his authority or his acts complained of are in dereliction of the duty. In such an eventuality, if the offence is alleged to have been committed by him while acting or purporting to act in discharge of his official duty, grant of prior sanction becomes imperative. It is so, for the reason that the power of the State is performed by an executive authority authorised in this behalf in terms of the Rules of Executive Business framed under Article 166 of the Constitution of India insofar as such a power has to be exercised in terms of Article 162 thereof. In broad and literal sense `cognizance' means taking notice of an offence as required under Section 190 Cr.P.C. `Cognizance' indicates the point when the court first takes judicial notice of an offence. The court not only applies its mind to the contents of the complaint/police report, but also proceeds in the manner as indicated in the subsequent provisions of Chapter XIV of the Cr.P.C. [Paras 22-24, 39] [634-E-H; 635-A-B; D-H, 636-A-E; 646-D-F]

R. Balakrishna Pillai v. State of Kerala & Anr. **AIR 1996 SC 901: 1995 (6) Suppl. SCR 236;** *S.K. Zutshi & Anr. v. Bimal Debnath & Anr.* **AIR 2004 SC 4174;** *Center for Public Interest Litigation & Anr. v. Union of India & Anr.* **AIR 2005 SC 4413: 2005 (4) Suppl. SCR 77;** *Rakesh Kumar Mishra*

v. State of Bihar & Ors. **AIR 2006 SC 820: 2006 (1) SCR 124;** *Anjani Kumar v. State of Bihar & Ors.* **AIR 2008 SC 1992: 2008 (6) SCR 912;** *State of Madhya Pradesh v. Sheetla Sahai & Ors.* **(2009) 8 SCC 617: 2009 (12) SCR 1048;** *Bhanuprasad Hariprasad Dave & Anr. v. The State of Gujarat* **AIR 1968 SC 1323: 1969 SCR 22;** *Hareram Satpathy v. Tikaram Agarwala & Ors.* **AIR 1978 SC 1568: 1979 (1) SCR 349;** *State of Maharashtra v. Dr. Budhikota Subbarao* **(1993) 3 SCC 339: 1993 (2) SCR 311;** *Anil Saran v. State of Bihar & Anr.* **AIR 1996 SC 204: 1995 (3) Suppl. SCR 58;** *Shambhoo Nath Misra v State of U.P. & Ors.* **AIR 1997 SC 2102: 1997 (2) SCR 1139;** *Choudhury Parveen Sultana v. State of West Bengal & Anr.* **AIR 2009 SC 1404: 2009 (1) SCR 99;** *State of Punjab & Anr. v. Mohammed Iqbal Bhatti* **(2009) 17 SCC 92: 2009 (11) SCR 790;** *The State of Andhra Pradesh v. N. Venugopal & Ors.* **AIR 1964 SC 33: 1964 SCR 742;** *State of Maharashtra v. Narhar Rao* **AIR 1966 SC 1783: 1966 SCR 880;** *State of Maharashtra v. Atma Ram & Ors.* **AIR 1966 SC 1786;** *Prof. Sumer Chand v. Union of India & Ors.* **(1994) 1 SCC 64: 1993 (2) Suppl. SCR 123;** *State of Orissa & Ors. v. Ganesh Chandra Jew* **AIR 2004 SC 2179: 2004 (3) SCR 504;** *P. Arulswami v. State of Madras* **AIR 1967 SC 776: 1967 SCR 201;** *Suresh Kumar Bhikamchand Jain v. Pandey Ajay Bhushan & Ors.* **AIR 1998 SC 1524: 1997 (5) Suppl. SCR 524;** *Matajog Dobey v. H.C. Bhari* **AIR 1956 SC 44: 1955 SCR 925;** *Sankaran Moitra v. Sadhna Das & Anr.* **AIR 2006 SC 1599: 2006 (3) SCR 305;** *Rizwan Ahmed Javed Shaikh & Ors. v. Jammal Patel & Ors.* **AIR 2001 SC 2198: 2001 (3) SCR 766;** *S.B. Saha & Ors. v. M.S. Kochar* **AIR 1979 SC 1841: 1980 (1) SCR 111;** *Parkash Singh Badal & Anr. v. State of Punjab & Ors.* **AIR 2007 SC 1274: 2006 (10) Suppl. SCR 197;** *P.K. Choudhury v. Commander,* **48 BRTF (GREF) (2008) 13 SCC 229: 2008 (4) SCR 976;** *Nagraj v. State of Mysore* **AIR 1964 SC 269: 1964 SCR 671;** *Naga People's Movement of Human Rights v. Union of India* **AIR 1998 SC 431: 1997 (5) Suppl. SCR 469;** *Jamiruddin Ansari v. Central Bureau of Investigation &*

Anr. **(2009) 6 SCC 316: 2009 (7) SCR 759;** *Harpal Singh v. State of Punjab* **(2007) 13 SCC 387: 2007 (12) SCR 830;** *Rambhai Nathabhai Gadhvi & Ors. v. State of Gujarat* **AIR 1997 SC 3475: 1997 (3) Suppl. SCR 356;** *State of H.P. v. M.P. Gupta* **(2004) 2 SCC 349: 2003 (6) Suppl. SCR 541;** *R.R. Chari v. The State of Uttar Pradesh* **AIR 1951 SC 207: 1991 (1) SCC 57;** *State of W.B. & Anr. v. Mohd. Khalid & Ors.* **(1995) 1 SCC 684: 1994 (6) Suppl. SCR 16;** *Dr. Subramanian Swamy v. Dr. Manmohan Singh & Anr.* **AIR 2012 SC 1185: 2012 (3) SCC 64;** *Bhushan Kumar v. State (NCT of Delhi)* **(2012) 4 SCALE 191;** *State of Uttar Pradesh v. Paras Nath Singh* **(2009) 6 SCC 372: 2009 (8) SCR 85 - relied on.**

3.2. Section 7 of the Act 1990, puts an embargo on the complainant/investigating agency/person aggrieved to file a suit, prosecution etc. in respect of anything done or purported to be done by a Army personnel, in good faith, in exercise of power conferred by the Act, except with the previous sanction of the Central Government. Three expressions i.e. 'except', 'good faith' and 'purported' contained in the said provision require clarification/elaboration. (i) Except : To leave or take out: exclude; omit; save Not including; unless. The word has also been construed to mean until. Exception - Act of excepting or excluding from a number designated or from a description; that which is excepted or separated from others in a general rule of description; a person, thing, or case specified as distinct or not included; an act of excepting, omitting from mention or leaving out of consideration. (ii) Purport : Purport means to present, especially deliberately, the appearance of being; profess or claim, often falsely. It means to convey, imply, signify or profess outwardly, often falsely. In other words it means to claim (to be a certain thing, etc.) by manner or appearance; intent to show; to mean; to intend. Purport also means 'alleged'. 'Purporting' - When power is given

to do something 'purporting' to have a certain effect, it will seem to prevent objections being urged against the validity of the act which might otherwise be raised. Thus when validity is given to anything 'purporting' to be done in pursuance of a power, a thing done under it may have validity though done at a time when the power would not be really exercisable. 'Purporting to be done' - There must be something in the nature of the act that attaches it to his official character. Even if the act is not justified or authorised by law, he will still be purporting to act in the execution of his duty if he acts on a mistaken view of it." So it means that something is deficient or amiss: everything is not as it is intended to be. [Paras 42, 43] [647-F-H; 648-A-H; 649-A-B]

Azimunnissa and Ors. v. The Deputy Custodian, Evacuee Properties, District Deoria and Ors. **AIR 1961 SC 365: 1961 SCR 91;** *Haji Siddik Haji Umar & Ors. v. Union of India* **AIR 1983 SC 259: 1983 (2) SCR 249 - relied on.**

Dicker v. Angerstein, **3 Ch D 600 - referred to.**

4. GOOD FAITH:

4.1. A public servant is under a moral and legal obligation to perform his duty with truth, honesty, honour, loyality and faith etc. He is to perform his duty according to the expectation of the office and the nature of the post for the reason that he is to have a respectful obedience to the law and authority in order to accomplish the duty assigned to him. Good faith has been defined in Section 3(22) of the General Clauses Act, 1897, to mean a thing which is, in fact, done honestly, whether it is done negligently or not. Anything done with due care and attention, which is not malafide, is presumed to have been done in good faith. There should not be personal ill-will or malice, no intention to malign and scandalize. Good faith and public good are though the question of fact, it required to be proved by adducing evidence. The facts

of each case are, therefore, necessary to constitute the ingredients of an official act. The act has to be official and not private as it has to be distinguished from the manner in which it has been administered or performed. Then comes the issue of such a duty being performed in good faith. The act which proceeds on reliable authority and accepted as truthful is said to be in good faith. It is the opposite of the intention to deceive. A duty performed in good faith is to fulfil a trust reposed in an official and which bears an allegiance to the superior authority. Such a duty should be honest in intention, and sincere in professional execution. It is on the basis of such an assessment that an act can be presumed to be in good faith for which while judging a case the entire material on record has to be assessed. The allegations which are generally made are, that the act was not traceable to any lawful discharge of duty. That by itself would not be sufficient to conclude that the duty was performed in bad faith. It is for this reason that the immunity clause is contained in statutory provisions conferring powers on law enforcing authorities. This is to protect them on the presumption that acts performed in good faith are free from malice or ill will. The immunity is a kind of freedom conferred on the authority in the form of an exemption while performing or discharging official duties and responsibilities. The act or the duty so performed are such for which an official stands excused by reason of his office or post. It is for this reason that the assessment of a complaint or the facts necessary to grant sanction against immunity that the chain of events has to be looked into to find out as to whether the act is dutiful and in good faith and not maliciously motivated. It is the intention to act which is important. A sudden decision to do something under authority or the purported exercise of such authority may not necessarily be predetermined except for the purpose for which the official proceeds to accomplish. For example, while conducting a raid an

official may not have the apprehension of being attacked but while performing his official duty he has to face such a situation at the hands of criminals and unscrupulous persons. The official may in his defence perform a duty which can be on account of some miscalculation or wrong information but such a duty cannot be labelled as an act in bad faith unless it is demonstrated by positive material in particular that the act was tainted by personal motives and was not connected with the discharge of any official duty. Thus, an act which may appear to be wrong or a decision which may appear to be incorrect is not necessarily a malicious act or decision. The presumption of good faith therefore can be dislodged only by cogent and clinching material and so long as such a conclusion is not drawn, a duty in good faith should be presumed to have been done or purported to have been done in exercise of the powers conferred under the statute. There has to be material to attribute or impute an unreasonable motive behind an act to take away the immunity clause. It is for this reason that when the authority empowered to grant sanction is proceeding to exercise its discretion, it has to take into account the material facts of the incident complained of before passing an order of granting sanction or else official duty would always be in peril even if performed bonafidely and genuinely. [Paras 44-51] [649-E-H; 650-A; 651-B-H; 652-A-H]

Madhavrao Narayanrao Patwardhan v. Ram Krishna Govind Bhanu & Ors. **AIR 1958 SC 767: 1959 SCR 564;** *Madhav Rao Scindia Bahadur Etc. v. Union of India & Anr.* **AIR 1971 SC 530: 1971 (3) SCR 9;** *Sewakram Sobhani v. R.K. Karanjiya, Chief Editor, Weekly Blitz & Ors.* **AIR 1981 SC 1514;** *Vijay Kumar Rampal & Ors. v. Diwan Devi & Ors.* **AIR 1985 SC 1669;** *Deena (Dead) through Lrs. v. Bharat Singh (Dead) through LRs. & Ors.,* **(2002) 6 SCC 336: 2002 (1) Suppl. SCR 289;** *Goondla Venkateshwarlu v. State of Andhra Pradesh & Anr.* **(2008) 9 SCC 613: 2008 (12) SCR 608;**

Brijendra Singh v. State of U.P. & Ors. **AIR 1981 SC 636 - relied on.**

4.2. The protection and immunity granted to an official particularly in provisions of the Act 1990 or like Acts has to be widely construed in order to assess the act complained of. This would also include the assessment of cases like mistaken identities or an act performed on the basis of a genuine suspicion. Therefore, such immunity clauses have to be interpreted with wide discretionary powers to the sanctioning authority in order to uphold the official discharge of duties in good faith and a sanction therefore has to be issued only on the basis of a sound objective assessment and not otherwise. Use of words like 'No' and 'shall' in Section 7 of the Act 1990 denotes the mandatory requirement of obtaining prior sanction of the Central Government before institution of the prosecution, suit or legal proceedings. The conjoint reading of Section 197(2) Cr.P.C. and Section 7 of the Act 1990 would show that prior sanction is a condition precedent before institution of any of the said legal proceedings. Under the provisions of Cr.P.C. and Prevention of Corruption Act, it is the court which is restrained to take cognizance without previous sanction of the competent authority. Under the Act 1990, the investigating agency/complainant/person aggrieved is restrained to institute the criminal proceedings; suit or other legal proceedings. Thus, there is a marked distinction in the statutory provisions under the Act 1990, which are of much wider magnitude and are required to be enforced strictly. Thus, the question of sanction is of paramount importance for protecting a public servant who has acted in good faith while performing his duty. In order that the public servant may not be unnecessarily harassed on a complaint of an unscrupulous person, it is obligatory on the part of the executive authority to protect him. However, there must be a discernible

connection between the act complained of and the powers and duties of the public servant. The act complained of may fall within the description of the action purported to have been done in performing the official duty. Therefore, if the alleged act or omission of the public servant can be shown to have reasonable connection inter-relationship or inseparably connected with discharge of his duty, he becomes entitled for protection of sanction. If the law requires sanction, and the court proceeds against a public servant without sanction, the public servant has a right to raise the issue of jurisdiction as the entire action may be rendered void ab-initio for want of sanction. Sanction can be obtained even during the course of trial depending upon the facts of an individual case and particularly at what stage of proceedings, requirement of sanction has surfaced. The question as to whether the act complained of, is done in performance of duty or in purported performance of duty, is to be determined by the competent authority and not by the court. The Legislature has conferred "absolute power" on the statutory authority to accord sanction or withhold the same and the court has no role in this subject. In such a situation the court would not proceed without sanction of the competent statutory authority. Thus, sanction of the Central Government is required in the facts and circumstances of the case and the court concerned lacks jurisdiction to take cognizance unless sanction is granted by the Central Government. [Paras 52-56] [653-A-D; 654-C-H; 655-A-E]

5. The CJM Court gave option to the higher authorities of the Army to choose whether the trial be held by the court-martial or by the criminal court as required under Section 125 of the Army Act. File notings of Army Authorities revealed their decision that in case it is decided by this Court that sanction is required and the Central Government accords sanction, option would be

availed at that stage. Thus, Military Authority may ask the criminal court dealing with the case that the accused would be tried by the court-martial in view of the provisions of Section 125 of the Army Act. However, the option given by the Authority is not final in view of the provisions of Section 126 of the Army Act. Criminal court having jurisdiction to try the offender may require the competent military officer to deliver the offender to the Magistrate concerned to be proceeded according to law or to postpone the proceedings pending reference to the Central Government, if that criminal court is of the opinion that proceedings be instituted before itself in respect of that offence. Thus, in case the criminal court makes such a request, the Military Officer either has to comply with it or to make a reference to the Central Government whose orders would be final with respect to the venue of the trial. Therefore, the discretion exercised by the Military Officer is subject to the control of the Central Government. Such matter is being governed by the provisions of Section 475 Cr.P.C. read with the provisions of the J & K Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1983. Rule 6 of the said Rules, 1983, provides that in case the accused has been handed over to the Army authorities to be tried by a court-martial, the proceedings of the criminal court shall remain stayed. Rule 7 thereof, further provides that when an accused has been delivered by the criminal court to the Army authorities, the authority concerned shall inform the criminal court whether the accused has been tried by a court-martial or other effectual proceedings have been taken or ordered to be taken against him. If the Magistrate is informed that the accused has not been tried or other effectual proceedings have not been taken, the Magistrate shall report the circumstances to the State Government which may, in consultation with the Central Government, take appropriate steps to ensure that the accused person is dealt with in accordance with law.

Under Section 125 of the Army Act, the stage of making option to try an accused by a court-martial and not by the criminal court is after filing of the chargesheet and before taking cognizance or framing of the charges. Section 7 of the Act 1990 does not contain non-obstante clause. Therefore, once the option is made that accused is to be tried by a court-martial, further proceedings would be in accordance with the provisions of Section 70 of the Army Act and for that purpose, sanction of the Central Government is not required. [Paras 57-58, 62, 64] [655-E-H; 656-A-F; 657-F-G; 658-C-D]

Delhi Special Police Establishment, New Delhi v. Lt. Col. S.K. Loraiya **AIR 1972 SC 2548;** *Balbir Singh & Anr. v. State of Punjab* **1994 (5) Suppl. SCR 422;** *Ram Sarup v. Union of India & Anr.* **AIR 1965 SC 247;** *Union of India & Ors. v. Major A. Hussain* **AIR 1998 SC 577 - relied on.**

6. Sum up:

(i) The conjoint reading of the relevant statutory provisions and rules make it clear that the term "institution" contained in Section 7 of the Act 1990 means taking cognizance of the offence and not mere presentation of the chargesheet by the investigating agency.

(ii) The competent Army Authority has to exercise his discretion to opt as to whether the trial would be by a court-martial or criminal court after filing of the chargesheet and not after the cognizance of the offence is taken by the court.

(iii) Facts of this case require sanction of the Central Government to proceed with the criminal prosecution/trial.

(iv) In case option is made to try the accused by a

court-martial, sanction of the Central Government is not required. [Para 66] [658-F-H; 659-A-C]

7. In view of that, the following directions are passed:

I The competent authority in the Army shall take a decision within a period of eight weeks from today as to whether the trial would be by the criminal court or by a court-martial and communicate the same to the Chief Judicial Magistrate concerned immediately thereafter.

II In case the option is made to try the case by a court-martial, the said proceedings would commence immediately and would be concluded strictly in accordance with law expeditiously.

III In case the option is made that the accused would be tried by the criminal court, the CBI shall make an application to the Central Government for grant of sanction within four weeks from the receipt of such option and in case such an application is filed, the Central Government shall take a final decision on the said application within a period of three months from the date of receipt of such an application.

IV In case sanction is granted by the Central Government, the criminal court shall proceed with the trial and conclude the same expeditiously. [Para 67] [659-D-H; 670-A-B]

Case Law Reference:

AIR 1991 SC 506	**relied on**	**Para 12**
1993 (1) SCR 340	**relied on**	**Para 12**
1972 (2) SCR 965	**relied on**	**Para 12**
AIR 1982 SC 818	**relied on**	**Para 12**
AIR 1987 SC 1739	**relied on**	**Para 12**

AIR 1968 SC 488	**relied on**	**Para 14**
AIR 1970 SC 1093	**relied on**	**Para 15**
AIR 1970 SC 1384	**relied on**	**Para 16**
AIR 1998 SC 492	**relied on**	**Para 17**
AIR 1964 SC 1541	**relied on**	**Para 18**
2011 (6) SCR 138	**relied on**	**Para 18,25**
1979 (2) SCR 717	**relied on**	**Para 19**
1976 (0) Suppl. SCR 524	**relied on**	**Para 19**
2000 (3) Suppl. SCR 171	**relied on**	**Para 20**
1995 (6) Suppl. SCR 236	**relied on**	**Para 22**
AIR 2004 SC 4174	**relied on**	**Para 22**
2005 (4) Suppl. SCR 77	**relied on**	**Para 22**
2006 (1) SCR 124	**relied on**	**Para 22**
2008 (6) SCR 912	**relied on**	**Para 22**
2009 (12) SCR 1048	**relied on**	**Para 22**
1969 SCR 22	**relied on**	**Para 23**
1979 (1) SCR 349	**relied on**	**Para 23**
1993 (2) SCR 311	**relied on**	**Para 23**
1995 (3) Suppl. SCR 58	**relied on**	**Para 23**
1997 (2) SCR 1139	**relied on**	**Para 23**
2009 (1) SCR 99	**relied on**	**Para 23**
2009 (11) SCR 790	**relied on**	**Para 25**
1964 SCR 742	**relied on**	**Para 24**
1966 SCR 880	**relied on**	**Para 25**

AIR 1966 SC 1786	**relied on**	**Para 25**
1993 (2) Suppl. SCR 123	**relied on**	**Para 25**
2004 (3) SCR 504	**relied on**	**Para 26**
1967 SCR 201	**relied on**	**Para 26**
1997 (5) Suppl. SCR 524	**relied on**	**Para 27**
1955 SCR 925	**relied on**	**Para 28,56**
2006 (3) SCR 305	**relied on**	**Para 29, 56**
2001 (3) SCR 766	**relied on**	**Para 29**
1980 (1) SCR 111	**relied on**	**Para 30**
2006 (10) Suppl. SCR 197	**relied on**	**Para 31**
2008 (4) SCR 976	**relied on**	**Para 32**
1964 SCR 671	**relied on**	**Para 33**
1997 (5) Suppl. SCR 469	**relied on**	**Para 34**
2009 (7) SCR 759	**relied on**	**Para 35**
2007 (12) SCR 830	**relied on**	**Para 36**
1997 (3) Suppl. SCR 356	**relied on**	**Para 37**
2003 (6) Suppl. SCR 541	**relied on**	**Para 38**
1991 (1) SCC 57	**relied on**	**Para 39**
1994 (6) Suppl. SCR 16	**relied on**	**Para 39**
2012 (3) SCC 64	**relied on**	**Para 40**
(2012) 4 SCALE 191	**relied on**	**Para 40**
2009 (8) SCR 85	**relied on**	**Para 41**
1961 SCR 91	**relied on**	**Para 43**
1983 (2) SCR 249	**relied on**	**Para 43**

1959 SCR 564	**relied on**	**Para 44**
1971 (3) SCR 9	**relied on**	**Para 44**
AIR 1981 SC 1514	**relied on**	**Para 44**
AIR 1985 SC 1669	**relied on**	**Para 44**
2002 (1) Suppl. SCR 289	**relied on**	**Para 44**
2008 (12) SCR 608	**relied on**	**Para 44**
AIR 1981 SC 636	**relied on**	**Para 44**
AIR 1969 SC 414	**relied on**	**Para 59**
AIR 1972 SC 2548	**relied on**	**Para 60**
1994 (5) Suppl. SCR 422	**relied on**	**Para 61**
AIR 1965 SC 247	**relied on**	**Para 61**
AIR 1998 SC 577	**relied on**	**Para 65**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 257 of 2011 etc.

From the Judgment & Order dated 10.07.2007 of the High Court of Jammu & Kashmir in 561A 78 & 80 of 2006.

WITH

Crl. Appeal No. 55 of 2006.

P.P. Malhotra, Mohan Parasaran, H.P. Raval, ASG, M.S. Ganesh, Ashok Bhan, D.L. Chidananda, B.K. Prasad, Anil Katiyar, D.S. Mahra, R. Ayyam Perumal, Sukun K.S. Chandele, P.K. Dey, Dr. Chaudhary Shamsuddin Khan, Arvind Kumar Sharma for the appearing parties.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. Criminal Appeal No. 257 of 2011 has been preferred against the impugned judgment and

order dated 10.7.2007 passed by the High Court of Jammu and Kashmir in Petition Nos. 78 and 80 of 2006 under Section 561-A of the Code of Criminal Procedure, (J&K) (hereinafter called as `Code') by which the High Court upheld the order dated 30.11.2006 passed by the Additional Sessions Judge, Srinagar in File No. 16/Revision of 2006, and by the Chief Judicial Magistrate, Srinagar dated 24.8.2006, rejecting the appellant's application for not entertaining the chargesheet filed by the Central Bureau of Investigation (hereinafter called 'CBI').

2. Brief facts relevant to the disposal of this appeal are as under:

A. In Village Chittising Pora, District Anantnag, J&K, 36 Sikhs were killed by terrorists on 20.3.2000. Immediately thereafter, search for the terrorists started in the entire area and 5 persons, purported to be terrorists, were killed at village Pathribal Punchalthan, District Anantnag, J & K by 7 Rashtriya Rifles (hereinafter called as `RR') Personnel on 25.3.2000 in an encounter.

B. In respect of killing of 5 persons by 7 RR on 25.3.2000 at Pathribal claiming them to be responsible for Sikhs massacre at Chittising Pora, a complaint bearing No. 241/GS(Ops.) dated 25.3.2000 was sent to Police Station Achchabal, District Anantnag, J&K by Major Amit Saxena, the then Adjutant, 7 RR, for lodging FIR stating that during a special cordon and search operation in the forests of Panchalthan from 0515 hr. to 1500 hrs. on 25.3.2000, an encounter took place between terrorists and troops of that unit and in that operation, 5 unidentified terrorists were killed in the said operation. On the receipt of the complaint, FIR No. 15/2000 under Section 307 of Ranbir Penal Code (hereinafter called 'RPC') and Sections 7/25 Arms Act, 1959 was registered against unknown persons. A seizure memo was prepared by Major Amit Saxena (Adjutant) on 25.3.2000 showing seizure of arms and ammunition from all the 5 unidentified terrorists killed in the aforesaid operation which included AK-47 rifles (5), AK-47 Magazine rifles (12),

radio sets (2), AK-48 ammunition (44 rounds), hand grenades (2) detonators (4) and detonator time devices (2). The said seizure memo was signed by the witnesses Farooq Ahmad Gujjar and Mohd. Ayub Gujjar, residents of Wuzukhan, Panchalthan, J & K.

C. The 7 RR deposited the said recovered weapons and ammunition with 2 Field Ordnance Depot. However, the local police insisted that the Army failed to hand over the arms and ammunition allegedly recovered from the terrorists killed in the encounter, which tantamounts to causing of disappearance of the evidence, constituting an offence under Section 201 RPC. In this regard, there had been correspondence and a Special Situation Report dated 25.3.2000 was sent by Major Amit Saxena, the then Adjutant, to Head Quarter-I, Sector RR stating that, based on police inputs, a joint operation with STF was launched in the forest of Pathribal valley on 25.3.2000, as a consequence, the said incident occurred. However, it was added that ammunition allegedly recovered from the killed militants had been taken away by the STF.

D. There had been long processions in the valley in protest of killing of these 5 persons on 25.3.2000 by 7 RR alleging that they were civilians and had been killed by the Army personnel in a fake encounter. The local population treated it to be a barbaric act of violence and there had been a demand of independent inquiry into the whole incident. Thus, in view thereof, on the request of Government of J & K, a Notification dated 19.12.2000 under Section 6 of Delhi Police Special Establishment Act, 1946 (hereinafter called as `Act 1946') was issued. In pursuance thereof, Ministry of Personnel, Government of India, also issued Notification dated 22.1.2003 under Section 5 of the Act 1946 asking the CBI to investigate four cases including the alleged encounter at Pathribal resulting in the death of 5 persons on 25.3.2000.

E. The CBI conducted the investigation in Pathribal incident and filed a chargesheet in the court of Chief Judicial

Magistrate-cum-Special Magistrate, CBI, (hereinafter called the 'CJM') Srinagar, on 9.5.2006, alleging that it was a fake encounter, an outcome of criminal conspiracy hatched by Col. Ajay Saxena (A-1), Major Brajendra Pratap Singh (A-2), Major Sourabh Sharma (A-3), Subedar Idrees Khan (A-4) and some members of the troops of 7 RR were responsible for killing of innocent persons. Major Amit Saxena (A-5) (Adjutant) prepared a false seizure memo showing recovery of arms and ammunition in the said incident, and also gave a false complaint to the police station for registration of the case against the said five civilians showing some of them as foreign militants and false information to the senior officers to create an impression that the encounter was genuine and, therefore, caused disappearance of the evidence of commission of the aforesaid offence under Section 120-B read with Sections 342, 304, 302, 201 RPC and substantive offences thereof. Major Amit Saxena (A-5) (Adjutant) was further alleged to have committed offence punishable under Section 120-B read with Section 201 RPC and substantive offence under Section 201 RPC with regard to the aforesaid offences.

F. The learned CJM on consideration of the matter, found that veracity of the allegations made in the chargesheet and the analysis of the evidence cannot be gone into as it would tantamount to assuming jurisdiction not vested in him. It was so in view of the provisions of Armed Forces J & K (Special Powers) Act, 1990 (hereinafter called 'Act 1990'), which offer protection to persons acting under the said Act.

G. The CJM, Srinagar, granted opportunity to Army to exercise the option as to whether the competent military authority would prefer to try the case by way of court-martial by taking over the case under the provisions of Section 125 of the Army Act, 1950 (hereinafter called the `Army Act'). On 24.5.2006, the Army officers filed an application before the court pointing out that no prosecution could be instituted except with the previous sanction of the Central Government in view

of the provisions of Section 7 of the Act 1990 and, therefore, the proceedings be closed by returning the chargesheet to the CBI.

H. The CJM vide order dated 24.8.2006 dismissed the application holding that the said court had no jurisdiction to go into the documents filed by the investigating agency and it was for the trial court to find out whether the *action complained of falls within the ambit of the discharge of official duty or not.* The CJM himself could not analyse the evidence and other material produced with the chargesheet for considering the fact, as to whether the officials had committed the act in good faith in discharge of their official duty; otherwise the act of such officials was illegal or unlawful in view of the nature of the offence.

I. Aggrieved by the order of CJM dated 24.8.2006, the appellant filed revision petition before the Sessions Court, Srinagar and the same stood dismissed vide order dated 30.11.2006. However, the revisional court directed the CJM to give one more opportunity to the Army officials for exercise of option under Section 125 of the Army Act.

J. The appellant approached the High Court under Section 561-A of the Code. The Court vide impugned order dated 10.7.2007 affirmed the orders of the courts below and held that the very objective of sanctions is to enable the Army officers to perform their duties fearlessly by protecting them from vexatious, malafide and false prosecution for the act done in performance of their duties. However, it has to be examined as to whether their action falls under the Act 1990. The CJM does not have the power to examine such an issue at the time of committal of proceedings. At this stage, the Committal Court has to examine only as to whether any case is made out and, if so, the offence is triable by whom.

Hence, this appeal.

3. Criminal Appeal No. 55 of 2006 has been preferred against the impugned judgment and order dated 28.3.2005 passed by the High Court of Guwahati in Criminal Revision No.117 of 2004 by which it has upheld the order of the Special Judicial Magistrate, Kamrup dated 10.11.2003 rejecting the application of the appellant seeking protection of the provisions of Section 6 of the Armed Forces (Special Powers) Act, 1958 (hereinafter called the `Act 1958') in respect of the armed forces personnel.

4. Facts and circumstances giving rise to this appeal are as under:

A. In order to curb the insurgency in the North-East, the Parliament enacted the Act 1958 authorising the Central Government as well as the Governor of the State to declare, by way of Notification in the official Gazette, the whole or part of the State as disturbed area. Section 4 of the Act 1958 conferred certain powers on the Army personnel acting under the Act which include power to arrest without warrant on reasonable suspicion, destroy any arms, ammunitions dumped and hide out, and also to open fire or otherwise use powers even to the extent of causing death against any person acting in contravention of law and order and further to carry out search and seizure. The entire State of Assam was declared disturbed area under the Act 1958 vide Notification dated 27.11.1990 and Army was requisitioned and deployed in various parts of the State to fight insurgency and to restore law and order.

B. On 22.2.1994, the 18th Battalion of Punjab Regiment was deployed in Tinsukhia District of Assam to carry out the counter insurgency operation in the area of Saikhowa Reserve Forest. The said Army personnel faced the insurgents who opened fire from an ambush. The armed battalion returned fire and in the process, some militants died. The Battalion continued search at the place of encounter and consequently, 5 bodies of the militants alongwith certain arms and ammunitions were recovered. In respect of the said incident, an FIR was lodged

at P.S. Doom Dooma. Local Police also visited the place on 23.2.1994 and 1.3.1994 and investigated the case. The incident was investigated by the Army under the Army Court of enquiry as provided under the Army Act. Two Magisterial enquiries were held as per the directions issued by the State Government and as per the appellant, the version of the Army personnel was found to be true and a finding was recorded that 'the counter insurgency operation was done in exercise of the official duty'.

C. Two writ petitions were filed before the High Court by the non-parties alleging that the Army officials apprehended 9 individuals and killed 5 of them in a fake encounter. The High Court directed the CBI to investigate the matter.

D. The CBI completed the investigation and filed chargesheet against 7 Army personnel in the Court of Special Judicial Magistrate, Kamrup under Section 302/201 read with Section 109 of the Indian Penal Code, 1860 (hereinafter called `IPC'). The Special Judicial Magistrate issued notice dated 30.5.2002 to the appellant i.e. Army Headquarter to collect the said chargesheet. The appellant requested the said Court not to proceed with the matter as the action had been carried out by the Army personnel in performance of their official duty and thus, they were protected under the Act 1958 and in order to proceed further in the matter, sanction of the Central Government was necessary. The learned Special Judicial Magistrate rejected the case of the appellant vide order dated 10.11.2003. Being aggrieved, the appellant preferred the revision petition which has been rejected vide impugned order dated 28.3.2005 by the High Court.

Hence, this appeal.

5. As the facts and legal issues involved in both the appeals are similar, we decide both the appeals by a common judgment taking the Criminal Appeal No. 257 of 2011 as a leading case.

6. Shri Mohan Parasaran and Shri P.P. Malhotra, learned Addl. Solicitor Generals appearing on behalf of the Union of India and Army personnel, have contended that mandate of Section 7 of the Act 1990 is clear and it clearly provides that no prosecution shall be instituted and, therefore, cannot be instituted without prior sanction of the Central Government. It is contended that the prosecution would be deemed to have instituted/initiated at the moment the chargesheet is filed and received by the court. Such an acceptance/receipt is without jurisdiction. The previous sanction of the competent authority is a pre-condition for the court in taking the chargesheet on record if the offence alleged to have been committed in discharge of official duty and such issue touches the jurisdiction of the court.

7. On the other hand, Shri H.P. Raval, learned ASG, Shri Ashok Bhan, learned senior counsel appearing on behalf of the CBI, and Mr. M.S. Ganesh appearing for the interveners (though application for intervention not allowed) have vehemently opposed the appeals contending that the institution of a criminal case means taking cognizance of the case, mere presentation/ filing of the chargesheet in the court does not amount to institution. The court of CJM has not taken cognizance of the offence, therefore, the appeals are premature. Even otherwise, killing innocent persons in a fake encounter in execution of a conspiracy cannot be a part of official duty and thus, in view of the facts of the case no sanction is required. The appeals are liable to be dismissed.

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

9. The matter is required to be examined taking into consideration the statutory provisions of the Act 1990 and also considering the object of the said Act. It is to be examined as to whether the court, after the chargesheet is filed, can entertain the same and proceed to frame charges without previous sanction of the Central Government. The Act 1990 confers

certain special powers upon members of the Armed Forces in the disturbed area in the State of J & K. The disturbed area is defined and there is no dispute that the place where the incident occurred stood notified under the Act 1990. Section 4 of the Act 1990 confers special powers on the officer of armed forces to take measures, where he considers it necessary to do so, for the maintenance of public order. However, he must give due warning according to the circumstances and even fire upon or use force that may also result in causing death against any person acting in contravention of law and order in the disturbed area and prohibit the assembly of five or more persons or carrying of weapons etc. Such an officer has further been empowered to destroy any arms dump, arrest any person without warrant who has committed a cognizable offence and enter and search without warrant any premises to make any arrest. Section 6 of the Act 1990 requires that such arrested person and seized property be handed over to the local police by such an officer.

10. Section 7 of the Act 1990 provides for umbrella protection to the Army personnel in respect of anything done or purported to be done in exercise of powers conferred by the Act. The whole issue is regarding the interpretation of Section 7 of the Act 1990, as to whether the term *'institution'* used therein means filing/presenting/submitting the chargesheet in the court or taking cognizance and whether the court can proceed with the trial without *previous sanction* of the Central Government.

11. The analogous provision to Section 7 of the Act 1990 exists in Sections 45(1) and 197(2) of the Code of Criminal Procedure, 1973 (hereinafter called 'Cr.P.C.'). The provisions of Section 7 of the Act 1990 are mandatory and if not complied with in letter and spirit before institution of any suit, prosecution or legal proceedings against any persons in respect of anything done or purported to be done in exercise of the powers conferred by the Act 1990, the same could be rendered invalid

and illegal as the provisions require the previous sanction of the Central Government before institution of the prosecution.

According to the appellants, institution of prosecution is a stage prior to taking cognizance and, therefore, the word *'institution'* is different from the words taking *'cognizance'*.

The scheme of the Act requires that any legal proceeding instituted against any Army official working under the Act 1990 has to be subjected to stringent test before any such proceeding can be instituted. Special powers have been conferred upon Army officials to meet the dangerous conditions i.e. use of the armed forces in aid of civil force to prevent activities involving terrorist acts directed towards overawing the government or striking terror in people or alienating any section of the people or adversely affecting the harmony amongst different sections of the people. Therefore, Section 7 is required to be interpreted keeping the aforesaid objectives in mind.

12. The 'prosecution' means a criminal action before the court of law for the purpose of determining 'guilt' or 'innocence' of a person charged with a crime. Civil suit refers to a civil action instituted before a court of law for realisation of a right vested in a party by law. The phrase 'legal proceeding' connotes a term which means the proceedings in a court of justice to get a remedy which the law permits to the person aggrieved. It includes any formal steps or measures employed therein. It is not synonymous with the 'judicial proceedings'. Every judicial proceeding is a legal proceeding but not vice-versa, for the reason that there may be a 'legal proceeding' which may not be judicial at all, e.g. statutory remedies like assessment under Income Tax Act, Sales Tax Act, arbitration proceedings etc. So, the ambit of expression 'legal proceedings' is much wider than 'judicial proceedings'. The expression 'legal proceeding' is to be construed in its ordinary meaning but it is quite distinguishable from the departmental and administrative proceedings, e.g. proceedings for registration of trade marks etc. The terms used in Section 7 i.e. suit, prosecution and legal

proceedings are not inter-changeable or convey the same meaning. The phrase `legal proceedings' is to be understood in the context of the statutory provision applicable in a particular case, and considering the preceding words used therein. In *Assistant Collector of Central Excise, Guntur v. Ramdev Tobacco Company,* AIR 1991 SC 506, this Court explained the meaning of the phrase "other legal proceedings" contained in Section 40(2) of the Central Excises and Salt Act, 1944, wherein these words have been used after suit and prosecution. The Court held that these words must be read as ejusdem generis with the preceding words i.e. suit and prosecution, as they constitute a genus. Therefore, issuance of a notice calling upon the dealer to show cause why duty should not be demanded under the Rules and why penalty should not be imposed for infraction of the statutory rules and enjoin of consequential adjudication proceedings by the appellate authority would not fall within the expression "other legal proceedings" as in the context of the said statute. 'Legal proceedings' do not include the administrative proceedings.

In *Maharashtra Tubes Ltd. v. State Industrial & Investment Corporation of Maharashtra Ltd. & Anr.,* (1993) 2 SCC 144, this Court dealt with the expressions 'proceedings' and 'legal proceedings' and placed reliance upon the dictionary meaning of expression 'legal proceedings' as found in Black Law Dictionary (Fourth Edition) which read as under:

> "Any proceedings in court of justice ... by which property of debtor is seized and diverted from his general creditors .... This term includes all proceedings authorised or sanctioned by law, and brought or instituted in a court of justice or legal tribunal, for the acquiring of a right or the enforcement of a remedy."

The Court came to the conclusion that proceedings before statutory authorities under the provisions of the Act do not amount to legal proceedings.

'Legal proceedings' means proceedings regulated or prescribed by law in which a judicial decision may be given; it means proceedings in a court of justice by which a party pursues a remedy which a law provides, but does not include administrative and departmental proceedings. (See also: *S. V. Kondaskar, Official Liquidator v. V.M. Deshpande, I.T.O. & Anr.,* AIR 1972 SC 878; *Babulal v. M/s. Hajari Lal Kishori Lal & Ors.,* AIR 1982 SC 818; and *Binod Mills Co. Ltd., Ujjain v. Shri. Suresh Chandra Mahaveer Prasad Mantri, Bombay,* AIR 1987 SC 1739).

The provision of Section 7 of the Act 1990 prohibits institution of legal proceedings against any Army personnel without prior sanction of the Central Government. Therefore, chargesheet cannot be instituted without prior sanction of the Central Government. The use of the words 'anything done' or 'purported to be done' in exercise of powers conferred by the Act 1990 is very wide in its scope and ambit and it consists of twin test. Firstly, the act or omission complained of must have been done in the course of exercising powers conferred under the Act, i.e., while carrying out the duty in the course of his service and secondly, once it is found to have been performed in discharge of his official duty, then the protection given under Section 7 must be construed liberally. Therefore, the provision contained under Section 7 of the Act 1990

(i) <u>INSTITUTION OF A CASE:</u>

13. The meaning of the aforesaid term has to be ascertained taking into consideration the scheme of the Act/ Statute applicable. The expression may mean filing/ presentation or received or entertained by the court. The question does arise as to whether it simply means mere presentation/filing or something further where the application of the mind of the court is to be applied for passing an order.

14. In *M/s. Lakshmiratan Engineering Works Ltd. v. Asst. Commissioner (Judicial) I, Sales Tax, Kanpur Range, Kanpur*

& Anr., AIR 1968 SC 488, this Court dealt with the provisions of U.P. Sales Tax Act, 1948 and rules made under it and while interpreting the proviso to Section 9 thereof, which provided the mode of filing the appeal and further provided that appeal could be "entertained" on depositing a part of the assessed/admitted amount of tax. The question arose as what was the meaning of the word 'entertain' in the said context, as to whether it meant that no appeal would be received or filed or it meant that no appeal would be admitted or heard and disposed of unless satisfactory proof of deposit was available. This Court held that dictionary meaning of the word 'entertain' was either 'to deal with' or 'admit to consideration'. However, the court had to consider whether filing or receiving the memorandum of appeal was not permitted without depositing the required amount of tax or it could not be heard and decided on merits without depositing the same. The court took into consideration the words 'filed or received' in Section 6 of the Court Fees Act and held that in the context of the said Act it would mean 'admit for consideration'. Mere filing or presentation or receiving the memorandum of appeal was inconsequential. The provisions provided that the appeal filed would not be admitted for consideration unless the required tax was deposited.

15. In *Lala Ram v. Hari Ram,* AIR 1970 SC 1093, this Court considered the word 'entertain' contained in the provisions of Section 417(4) of the Code of Criminal Procedure, 1898 (analogous to Section 378 Cr.P.C.) providing for the period of limitation of 60 days for filing the application for leave to appeal against the order of acquittal. Thus, the question arose as to whether 60 days are required for filing/presenting the application for leave to appeal or the application should be heard by the court within that period. This Court held that in that context, the word 'entertain' meant 'filed or received by the court' and it had no reference to the actual hearing of the application for leave to appeal. So, in that context 'entertain' was explained to receive or file the application for leave to appeal.

16. In *Hindustan Commercial Bank Ltd. v. Punnu Sahu (dead) through LRs.,* AIR 1970 SC 1384, this Court dealt with the expression 'entertain' contained in the proviso to Order XXI Rule 90 Code of Civil Procedure, 1908 as amended by the High Court of Allahabad and rejected the contention that it meant initiation of the proceeding and not to the stage when the court takes up the application for consideration, observing that 'entertain' means to "adjudicate upon" or "proceed to consider on merits".

17. In *Martin and Harris Ltd. v. VIth Additional District Judge & Ors.,* AIR 1998 SC 492, while dealing with the provisions of Section 21(1) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, the word "entertain" was interpreted as considering the grounds for the purpose of adjudication on merits i.e. thereby taking cognizance of an application by the statutory authority. The Court rejected the contention that the term 'entertain' contained in the said statutory provision was synonymous with the word 'institute'.

18. In *Jamuna Singh & Ors. v. Bhadai Shah,* AIR 1964 SC 1541, this Court dealt with the expression 'institution of a case' and held that a case can be said to be instituted in a court only when the court takes cognizance of the offence alleged therein. Section 190(1) Cr.P.C. contains the provision for taking cognizance of offence (s) by Magistrate. Section 193 Cr.P.C. provides for cognizance of offence (s) being taken by courts of Sessions on commitment to it by a Magistrate duly empowered in that behalf.

This view has been reiterated, approved and followed by this Court in *Satyavir Singh Rathi, ACP & Ors. v. State through CBI,* (2011) 6 SCC 1.

19. A similar view has been reiterated by this Court in *Kamalapati Trivedi v. The State of West Bengal,* AIR 1979 SC 777, observing that when a Magistrate applies his mind under Chapter XVI, he must be held to have taken cognizance of the

offences mentioned in the complaint. Such a situation would not arise while passing order under Section 156(3) Cr.P.C. or while issuing a search warrant for the purpose of investigation. In *Devarapalli Lakshminarayana Reddy & Ors. v. V. Narayana Reddy & Ors.,* AIR 1976 SC 1672, this Court held that 'institution' means taking cognizance of the offence alleged in the chargesheet.

20. Mere presentation of a complaint cannot be held to mean that the Magistrate has taken the cognizance. (Vide: *Narsingh Das Tapadia v. Goverdhan Das Partani & Anr.,* AIR 2000 SC 2946).

21. Thus, in view of the above, it is evident that the expression "Institution" has to be understood in the context of the scheme of the Act applicable in a particular case. So far as the criminal proceedings are concerned, "Institution" does not mean filing; presenting or initiating the proceedings, rather it means taking cognizance as per the provisions contained in the Cr.P.C.

(ii) <u>SANCTION FOR PROSECUTION:</u>

22. The protection given under Section 197 Cr.P.C. is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. Use of the expression *"official duty" implies that the act or omission must have* been done

by the public servant in the course of his service and that it should have been done in discharge of his duty. The section does not extend its protective cover to every act or omission done by a public servant in service but restricts its scope of operation to only those *acts or omissions* which are done by a public servant in discharge of official duty. If on facts, therefore, it is prima facie found that the act or omission for which the accused was charged **had reasonable connection** with discharge of his duty, then it must be held to be official to which applicability of Section 197 Cr.P.C. cannot be disputed. (See: *R. Balakrishna Pillai v. State of Kerala & Anr.,* AIR 1996 SC 901; *S.K. Zutshi & Anr. v. Bimal Debnath & Anr.,* AIR 2004 SC 4174; *Center for Public Interest Litigation & Anr. v. Union of India & Anr.,* AIR 2005 SC 4413; *Rakesh Kumar Mishra v. State of Bihar & Ors.,* AIR 2006 SC 820; *Anjani Kumar v. State of Bihar & Ors.,* AIR 2008 SC 1992; and *State of Madhya Pradesh v. Sheetla Sahai & Ors.,* (2009) 8 SCC 617).

23. The question to examine as to whether the sanction is required or not under a statute has to be considered at the time of taking cognizance of the offence and not during enquiry or investigation. There is a marked distinction in the stage of investigation and prosecution. The prosecution starts when the cognizance of offence is taken. It is also to be kept in mind that the cognizance is taken of the offence and not of the offender. The sanction of the appropriate authority is necessary to protect a public servant from unnecessary harassment or prosecution. Such a protection is necessary as an assurance to an honest and sincere officer to perform his public duty honestly and to the best of his ability. The threat of prosecution demoralises the honest officer. However, performance of public duty under colour of duty cannot be camouflaged to commit a crime. The public duty may provide such a public servant an opportunity to commit crime and such issue is required to be examined by the sanctioning authority or by the court. It is quite possible that the official capacity may enable the pubic servant to fabricate the record or mis-appropriate public funds etc. Such activities

definitely cannot be integrally connected or inseparably inter-linked with the crime committed in the course of the same transaction. Thus, all acts done by a public servant in the purported discharge of his official duties cannot as a matter of course be brought under the protective umbrella of requirement of sanction. (Vide: *Bhanuprasad Hariprasad Dave & Anr. v. The State of Gujarat,* AIR 1968 SC 1323; *Hareram Satpathy v. Tikaram Agarwala & Ors.,* AIR 1978 SC 1568; *State of Maharashtra v. Dr. Budhikota Subbarao,* (1993) 3 SCC 339; *Anil Saran v. State of Bihar & Anr.,* AIR 1996 SC 204; *Shambhoo Nath Misra v State of U.P. & Ors.,* AIR 1997 SC 2102; and *Choudhury Parveen Sultana v. State of West Bengal & Anr.,* AIR 2009 SC 1404).

24. In fact, the issue of sanction becomes a question of paramount importance when a public servant is alleged to have acted beyond his authority or his acts complained of are in dereliction of the duty. In such an eventuality, if the offence is alleged to have been committed by him while acting or purporting to act in discharge of his official duty, grant of prior sanction becomes imperative. It is so, for the reason that the power of the State is performed by an executive authority authorised in this behalf in terms of the Rules of Executive Business framed under Article 166 of the Constitution of India insofar as such a power has to be exercised in terms of Article 162 thereof. (See : *State of Punjab & Anr. v. Mohammed Iqbal Bhatti,* (2009) 17 SCC 92).

25. In *Satyavir Singh Rathi,* (Supra), this Court considered the provisions of Section 140 of the Delhi Police Act 1978 which bars the suit and prosecution in any alleged offence by a police officer in respect of the act done under colour of duty or authority in exercise of any such duty or authority without the sanction and the same shall not be entertained if it is instituted more than 3 months after the date of the act complained of. A complaint may be entertained in this regard by the court if instituted with the previous sanction of the administrator within

one year from the date of the offence. This Court after considering its earlier judgments including *Jamuna Singh* (supra); *The State of Andhra Pradesh v. N. Venugopal & Ors.,* AIR 1964 SC 33; *State of Maharashtra v. Narhar Rao,* AIR 1966 SC 1783; *State of Maharashtra v. Atma Ram & Ors.,* AIR 1966 SC 1786; and *Prof. Sumer Chand v. Union of India & Ors.,* (1994) 1 SCC 64, came to the conclusion that the prosecution has been initiated on the basis of the FIR and it was the duty of the police officer to investigate the matter and to file a chargesheet, if necessary. If there is a discernible connection between the act complained of by the accused and his powers and duties as police officer, the act complained of may fall within the description of colour of duty. However, in a case where the act complained of does not fall within the description of colour of duty, the provisions of Section 140 of the Delhi Police Act 1978 would not be attracted.

26. This Court in *State of Orissa & Ors. v. Ganesh Chandra Jew,* AIR 2004 SC 2179, while dealing with the issue held as under:

> "….. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. *There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty.* If the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant." (Emphasis added)

(See also: *P. Arulswami v. State of Madras,* AIR 1967 SC 776).

27. This Court in *Suresh Kumar Bhikamchand Jain v. Pandey Ajay Bhushan & Ors.,* AIR 1998 SC 1524, held as under:

> "……The legislative mandate engrafted in sub-section (1) of Section 197 debarring a Court from taking cognizance of an offence except with a previous sanction of the concerned Government in a case where the acts complained of are alleged to have been committed by public servant in discharge of his official duty or purporting to be in the discharge of his official duty and such public servant is not removable from his office save by or with the sanction of the Government touches the jurisdiction of the Court itself. It is a prohibition imposed by the statute from taking cognizance, the accused after appearing before the Court on process being issued, by an application indicating that Section 197(1) is attracted merely assists the Court to rectify its error where jurisdiction has been exercised which it does not possess. In such a case there should not be any bar for the accused producing the relevant documents and materials which will be ipso facto admissible, for adjudication of the question as to whether in fact Section 197 has any application in the case in hand. It is no longer in dispute and has been indicated by this Court in several cases that the question of sanction can be considered at any stage of the proceedings." (Emphasis added)

28. In *Matajog Dobey v. H.C. Bhari,* AIR 1956 SC 44, the Constitution Bench of this Court held that requirement of sanction may arise at any stage of the proceedings as the complaint may not disclose all the facts to decide the question of immunity, but facts subsequently coming either to notice of the police or in judicial inquiry or even in the course of

prosecution evidence may establish the necessity for sanction. The necessity for sanction may surface during the course of trial and it would be open to the accused to place the material on record for showing what his duty was and also the acts complained of were so inter-related or inseparably connected with his official duty so as to attract the protection accorded by law. The court further observed that difference between "acting or purporting to act" in the discharge of his official duty is merely of a language and not of substance.

On the issue as to whether the court or the competent authority under the statute has to decide the requirement of sanction, the court held:

> "Whether sanction is to be accorded or not is a matter for the government to consider. *The absolute power to accord or withhold sanction conferred on the government is irrelevant and foreign to the duty cast on the Court,* which is the ascertainment of the true nature of the act……There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits. What we must find out is whether the act and the official duty are so inter-related that one can postulate reasonably that it was done by the accused in the performance of the official duty, though possibly in excess of the needs and requirements of the situation." (Emphasis added)

29. In *Sankaran Moitra v. Sadhna Das & Anr.,* AIR 2006 SC 1599, this Court held as under :

> "The High Court has stated that killing of a person by use of excessive force could never be performance of duty. It may be correct so far as it goes. But the question is whether that act was done in the performance of duty or

> in purported performance of duty. If it was done in performance of duty or purported performance of duty, Section 197(1) of the Code cannot be bypassed by reasoning that killing a man could never be done in an official capacity and consequently Section 197(1) of the Code could not be attracted."

(See also: *Rizwan Ahmed Javed Shaikh & Ors. v. Jammal Patel & Ors.,* AIR 2001 SC 2198).

30. In *S.B. Saha & Ors. v. M.S. Kochar,* AIR 1979 SC 1841, this Court dealt with the issue elaborately and explained the meaning of "official" as contained in the provisions of Section 197 Cr.P.C., observing:

> "In considering the question whether sanction for prosecution was or was not necessary, these criminal acts attributed to the accused are to be taken as alleged…….. The words 'any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty' employed in Section 197(1) of the Code, are capable of a narrow as well as a wide interpretation. If these words are construed too narrowly, the section will be rendered altogether sterile, for, 'it is no part of an official duty to commit an offence, and never can be'. In the wider sense, these words will take under their umbrella every act constituting an offence, committed in the course of the same transaction in which the official duty is performed or purports to be performed. The right approach to the import of these words lies between two extremes. While on the one hand, it is not every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection of Section 197 (1), an act constituting an offence, directly and reasonably connected with his official duty will require sanction for prosecution under the said provision."

31. In *Parkash Singh Badal & Anr. v. State of Punjab &*

Ors., AIR 2007 SC 1274, this Court reiterated the same view while interpreting the phrase "official duty", as under:

> "…Official duty therefore implies that the act or omission must have been done by the public servant in course of his service and such act or omission must have been performed as part of duty which further must have been official in nature. The Section has, thus, to be construed strictly, while determining its applicability to any act or omission in course of service. Its operation has to be limited to those duties which are discharged in course of duty. But once any act or omission has been found to have been committed by a public servant in discharge of his duty then it must be given liberal and wide construction so far its official nature is concerned……"

32. In *P.K. Choudhury v. Commander,* 48 BRTF (GREF), (2008) 13 SCC 229, this Court dealt with the issue wherein an Army officer had allegedly indulged in the offence punishable under Section 166 IPC - public servant disobeying law, with intent to cause injury to any person and Section 167 IPC - public servant framing incorrect document with intention to cause injury, and as to whether in such an eventuality sanction under Section 197 Cr.P.C. was required. The Court held as under:

> "As the offences under Sections 166 and 167 of the Penal Code have a direct nexus with commission of a criminal misconduct on the part of a public servant, indisputably an order of sanction was prerequisite before the learned Judicial Magistrate could issue summons upon the appellant."

The Court further rejected the contention that sanction was not required in view of the provisions of Sections 125 and 126 of the Army Act, which provided for a choice of the competent authorities to try an accused either by a criminal court or proceedings for court-martial. Section 126 provides for the power of the criminal court to require delivery of offender. The

Court held that in case the competent authority takes a decision that the accused was to be tried by ordinary criminal court, the provisions of the Cr.P.C. would be applicable including the law of limitation and the criminal court cannot take cognizance of offence if it is barred by limitation. In case, the delay is not condoned, the court will have no jurisdiction to take the cognizance. Similarly, unless it is held that a sanction was not required to be obtained, the court's jurisdiction will be barred.

33. This Court in *Nagraj v. State of Mysore,* AIR 1964 SC 269, held that:

> "The last question to consider is that if the Court comes at any stage to the conclusion that the *prosecution could not have been instituted without the sanction of the Government,* what should be the procedure to be followed by it, i e., whether the Court should discharge the *accused or acquit him of the charge* if framed against him or just *drop the proceedings and pass no formal order of discharge or acquittal as contemplated in the case of a prosecution under the Code.* The High Court has said that when the Sessions Judge be satisfied that the *facts proved bring the case within the mischief of S. 132 of the Code* then he is at liberty to reject the complaint holding that it is *barred by that section.* We consider this to be the right order to be passed in those circumstances. It is not essential that the Court must pass a formal order *discharging or acquitting the accused. In fact no such order can be passed. If S. 132 applies, the complaint could not have been instituted without the sanction of the Government and the proceedings on a complaint so instituted would be void, the Court having no jurisdiction to take those proceedings. When the proceedings be void, the Court is not competent to pass any order except an order that the proceedings be dropped and the complaint is rejected."* (Emphasis added)

34. In *Naga People's Movement of Human Rights v.*

Union of India, AIR 1998 SC 431, the Constitution Bench of this Court while dealing with the issue involved herein under the provisions of Section 6 of the Armed Forces (Special Powers) Act, 1958, held as under:

> "Under Section 6 protection has been given to the persons acting under the Central Act and it has been prescribed that no prosecution, suit or other legal proceeding shall be instituted against any person in respect of anything done or purported to be done in exercise of the powers conferred by the said Act except with the *previous sanction* of the Central Government. *The conferment of such a protection has been assailed on the ground that it virtually provides immunity to persons exercising the powers conferred under Section 4 inasmuch as it extends the protection also to "anything purported to be done in exercise of the powers conferred by this Act".* It has been submitted that adequate protection for members of armed forces from arrest and prosecution is contained in Sections 45 and 197 CrPC and that a separate provision giving further protection is not called for. It has also been submitted that even if sanction for prosecution is granted, the person in question would be able to plead a statutory defence in criminal proceedings under Sections 76 and 79 of the Indian Penal Code. The protection given under Section 6 cannot, in our opinion, be regarded as conferment of an immunity on the persons exercising the powers under the Central Act. Section 6 only gives protection in the form of *previous sanction* of the Central Government *before* a criminal prosecution or a suit or other civil proceeding is *instituted against such person.* Insofar as such protection against prosecution is concerned, the provision is similar to that contained in Section 197 CrPC which covers an offence alleged to have been committed by a public servant "while acting or purporting to act in the discharge of his official duty". Section 6 only extends this protection in the matter

> of institution of a suit or other legal proceeding.
>
> xx xx xx
>
> In order that the people may feel assured that there is an effective check against misuse or abuse of powers by the members of the armed forces it is necessary that a complaint containing an allegation about misuse or abuse of the powers conferred under the Central Act should be thoroughly inquired into and, if it is found that there is substance in the allegation, the victim should be suitably compensated by the State and the requisite sanction under Section 6 of the Central Act should be granted for institution of prosecution and/or a civil suit or other proceedings against the person/persons responsible for such violation." (Emphasis added)

35. In *Jamiruddin Ansari v. Central Bureau of Investigation & Anr.,* (2009) 6 SCC 316, this Court while dealing with the provision of Maharashtra Control of Organised Crime Act, 1999 (hereinafter called as 'MCOCA') held that:

> "As indicated hereinabove, the provisions of Section 23 are the safeguards provided against the invocation of the provisions of the Act which are extremely stringent and far removed from the provisions of the general criminal law. If, as submitted on behalf of some of the respondents, it is accepted that a private complaint under Section 9(1) is not subject to the rigours of Section 23, then the very purpose of introducing such safeguards lose their very raison d'être. At the same time, since the filing of a private complaint is also contemplated under Section 9(1) of MCOCA, for it to be entertained it has also to be subject to the rigours of Section 23. Accordingly, in view of the bar imposed under sub-section (2) of Section 23 of the Act, the learned Special Judge is precluded from taking cognizance on a private complaint upon a separate inquiry under Section 156(3) CrPC. The bar of Section 23(2)

continues to remain in respect of complaints, either of a private nature or on a police report.

In order to give a harmonious construction to the provisions of Section 9(1) and Section 23 of MCOCA, upon receipt of such private complaint the learned Special Judge has to forward the same to the officer indicated in clause (a) of sub-section (1) of Section 23 to have an inquiry conducted into the complaint by a police officer indicated in clause (b) of sub-section (1) and only thereafter take cognizance of the offence complained of, if sanction is accorded to the Special Court to take cognizance of such offence under sub-section (2) of Section 23." (Emphasis added)

36. This Court in *Harpal Singh v. State of Punjab,* (2007) 13 SCC 387, while dealing with the provision of Section 20A(2) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter called 'TADA') held as under:

"The important feature which is to be noted is that the prosecution did not obtain sanction of the Inspector General of Police or of the Commissioner of Police for prosecution of the appellant under TADA at any stage as is required by Section 20-A(2) of TADA. The trial of the appellant before the Designated Court proceeded without the sanction of the Inspector General of Police or the Commissioner of Police. In absence of previous sanction the Designated Court had no jurisdiction to take cognizance of the offence or to proceed with the trial of the appellant under TADA".(Emphasis added)

37. In *Rambhai Nathabhai Gadhvi & Ors. v. State of Gujarat,* AIR 1997 SC 3475, this Court while dealing with the same provisions of TADA, held that:

"…Thus a valid sanction is sine qua non for enabling the prosecuting agency to approach the Court in order to

enable the Court to take cognizance of the offence under TADA as disclosed in the report. The corollary is that, if there was no valid sanction the Designated Court gets no jurisdiction to try a case against any person mentioned in the report as the Court is forbidden from taking cognizance of the offence without such sanction. If the Designated Court has taken cognizance of the offence without a valid sanction, such action is without jurisdiction and any proceedings adopted thereunder will also be without jurisdiction."

38 In *State of H.P. v. M.P. Gupta,* (2004) 2 SCC 349, this Court while dealing with the issue held as under:

"Use of the words *"no" and "shall" makes it abundantly clear that the bar on the exercise of power of the court to take cognizance of any offence is absolute and complete. The very cognizance is barred. That is, the complaint cannot be taken notice of."*(Emphasis added)

39. In broad and literal sense 'cognizance' means taking notice of an offence as required under Section 190 Cr.P.C. `Cognizance' indicates the point when the court first takes judicial notice of an offence. The court not only applies its mind to the contents of the complaint/police report, but also proceeds in the manner as indicated in the subsequent provisions of Chapter XIV of the Cr.P.C. (Vide: *R.R. Chari v. The State of Uttar Pradesh,* AIR 1951 SC 207; and *State of W.B. & Anr. v. Mohd. Khalid & Ors.,* (1995) 1 SCC 684).

40. In *Dr. Subramanian Swamy v. Dr. Manmohan Singh & Anr.,* AIR 2012 SC 1185, this Court dealt with the issue elaborately and explained the meaning of the word 'cognizance' as under:

"In legal parlance cognizance is 'taking judicial notice by the court of law', possessing jurisdiction, on a cause or matter presented before it so as to decide whether there

is any basis for initiating proceedings and determination of the cause or matter judicially." (Emphasis added)

(See also: *Bhushan Kumar v. State (NCT of Delhi),* (2012) 4 SCALE 191)

41. In *State of Uttar Pradesh v. Paras Nath Singh,* (2009) 6 SCC 372, this Court explained the meaning of the term 'the very cognizance is barred' as that the complaint cannot be taken notice of or jurisdiction or exercise of jurisdiction or power to try and determine causes. In common parlance, it means taking notice of. The court, therefore, is precluded from entertaining a complaint or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have been committed during discharge of his official duty.

42. The relevant provisions in the Cr.P.C. read as under:

"45(1)- Notwithstanding anything contained in Sections 41 to 44 (both inclusive), no member of the Armed Forces of the Union shall be arrested for anything done or purported to be done by him in the discharge of his official duties except after obtaining the consent of the Central Government.

197(2)- No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government."

Section 7 of the Act 1990, puts an embargo on the complainant/investigating agency/person aggrieved to file a suit, prosecution etc. in respect of anything done or *purported* to be done by a Army personnel, in *good faith,* in exercise of power conferred by the Act, *except* with the previous sanction of the Central Government.

43. Three expressions i.e. 'except', 'good faith' and

'purported' contained in the aforesaid provision require clarification/elaboration.

(i) Except :

To leave or take out: exclude; omit; save

Not including; unless. The word has also been construed to mean until.

Exception - Act of excepting or excluding from a number designated or from a description; that which is excepted or separated from others in a general rule of description; a person, thing, or case specified as distinct or not included; an act of excepting, omitting from mention or leaving out of consideration.

(ii) Purport :

Purport means to present, especially deliberately, the appearance of being; profess or claim, often falsely. It means to convey, imply, signify or profess outwardly, often falsely. In other words it means to claim (to be a certain thing, etc.) by manner or appearance; intent to show; to mean; to intend.

Purport also means 'alleged'.

'Purporting' - When power is given to do something 'purporting' to have a certain effect, it will seem to prevent objections being urged against the validity of the act which might otherwise be raised. Thus when validity is given to anything 'purporting' to be done in pursuance of a power, a thing done under it may have validity though done at a time when the power would not be really exercisable. (Dicker v. Angerstein, 3 Ch D 600)

'Purporting to be done' - There must be something in the nature of the act that attaches it to his official character.

Even if the act is not justified or authorised by law, he will still be purporting to act in the execution of his duty if he acts on a mistaken view of it."

So it means that something is deficient or amiss: everything is not as it is intended to be.

In *Azimunnissa and Ors. v. The Deputy Custodian, Evacuee Properties, District Deoria and Ors.* AIR 1961 SC 365, Constitution Bench of this court held:

"The word 'purport' has many shades of meaning. It means *fictitious, what appears on the face of the instrument; the apparent and not the legal import* and therefore *any act which purports to be done in exercise of a power is to be deemed to be done within that power notwithstanding that the power is not exercisable*.....Purporting is therefore indicative of what appears on the face of it or is apparent even though in law it may not be so." (Emphasis added)

(See also: *Haji Siddik Haji Umar & Ors. v. Union of India,* AIR 1983 SC 259).

(iii) <u>GOOD FAITH:</u>

44. A public servant is under a moral and legal obligation to perform his duty with truth, honesty, honour, loyality and faith etc. He is to perform his duty according to the expectation of the office and the nature of the post for the reason that he is to have a respectful obedience to the law and authority in order to accomplish the duty assigned to him. Good faith has been defined in Section 3(22) of the General Clauses Act, 1897, to mean a thing which is, in fact, done honestly, whether it is done negligently or not. Anything done with due care and attention, which is not malafide, is presumed to have been done in good faith. There should not be personal ill-will or malice, no intention to malign and scandalize. Good faith and public good are though the question of fact, it required to be proved by adducing

evidence. (Vide: *Madhavrao Narayanrao Patwardhan v. Ram Krishna Govind Bhanu & Ors.,* AIR 1958 SC 767; *Madhav Rao Scindia Bahadur Etc. v. Union of India & Anr.,* AIR 1971 SC 530; *Sewakram Sobhani v. R.K. Karanjiya, Chief Editor, Weekly Blitz & Ors.,* AIR 1981 SC 1514; *Vijay Kumar Rampal & Ors. v. Diwan Devi & Ors.,* AIR 1985 SC 1669; *Deena (Dead) through Lrs. v. Bharat Singh (Dead) through LRs. & Ors.,* (2002) 6 SCC 336; and *Goondla Venkateshwarlu v. State of Andhra Pradesh & Anr.,* (2008) 9 SCC 613).

In *Brijendra Singh v. State of U.P. & Ors.,* AIR 1981 SC 636, this Court while dealing with the issue held:

".....The expression has several shades of meanings. In the popular sense, the phrase 'in good faith' simply means "honestly, without fraud, collusion, or deceit; really, actually, without pretence and without intent to assist or act in furtherance of a fraudulent or otherwise unlawful scheme". (See Words and Phrases, Permanent Edition, Vol. 18A, page 91). Although the meaning of "good faith" may vary in the context of different statutes, subjects and situations, honest intent free from taint of fraud or fraudulent design, is a constant element of its connotation. Even so, the quality and quantity of the honesty requisite for constituting 'good faith' is conditioned by the context and object of the statute in which this term is employed. It is a cardinal canon of construction that an expression which has no uniform, precisely fixed meaning, takes its colour, light and content from the context."

45. For the aforesaid qualities attached to a duty one can attempt to decipher it from a private act which can be secret or mysterious. An authorised act or duty is official and is in connection with authority. Thus, it cannot afford to be something hidden or non-transparent unless such a duty is protected under some law like the Official Secrets Act.

46. Performance of duty acting in good faith either done

or purported to be done in the exercise of the powers conferred under the relevant provisions can be protected under the immunity clause or not, is the issue raised. The first point that has to be kept in mind is that such a issue raised would be dependent on the facts of each case and cannot be a subject matter of any hypothesis, the reason being, such cases relate to initiation of criminal prosecution against a public official who has done or has purported to do something in exercise of the powers conferred under a statutory provision. The facts of each case are, therefore, necessary to constitute the ingredients of an official act. The act has to be official and not private as it has to be distinguished from the manner in which it has been administered or performed.

47. Then comes the issue of such a duty being performed in good faith. 'Good faith' means that which is founded on genuine belief and commands a loyal performance. The act which proceeds on reliable authority and accepted as truthful is said to be in good faith. It is the opposite of the intention to deceive. A duty performed in good faith is to fulfil a trust reposed in an official and which bears an allegiance to the superior authority. Such a duty should be honest in intention, and sincere in professional execution. It is on the basis of such an assessment that an act can be presumed to be in good faith for which while judging a case the entire material on record has to be assessed.

48. The allegations which are generally made are, that the act was not traceable to any lawful discharge of duty. That by itself would not be sufficient to conclude that the duty was performed in bad faith. It is for this reason that the immunity clause is contained in statutory provisions conferring powers on law enforcing authorities. This is to protect them on the presumption that acts performed in good faith are free from malice or illwill. The immunity is a kind of freedom conferred on the authority in the form of an exemption while performing or discharging official duties and responsibilities. The act or the

duty so performed are such for which an official stands excused by reason of his office or post.

49. It is for this reason that the assessment of a complaint or the facts necessary to grant sanction against immunity that the chain of events has to be looked into to find out as to whether the act is dutiful and in good faith and not maliciously motivated. It is the intention to act which is important.

50. A sudden decision to do something under authority or the purported exercise of such authority may not necessarily be predetermined except for the purpose for which the official proceeds to accomplish. For example, while conducting a raid an official may not have the apprehension of being attacked but while performing his official duty he has to face such a situation at the hands of criminals and unscrupulous persons. The official may in his defence perform a duty which can be on account of some miscalculation or wrong information but such a duty cannot be labelled as an act in bad faith unless it is demonstrated by positive material in particular that the act was tainted by personal motives and was not connected with the discharge of any official duty. Thus, an act which may appear to be wrong or a decision which may appear to be incorrect is not necessarily a malicious act or decision. The presumption of good faith therefore can be dislodged only by cogent and clinching material and so long as such a conclusion is not drawn, a duty in good faith should be presumed to have been done or purported to have been done in exercise of the powers conferred under the statute.

51. There has to be material to attribute or impute an unreasonable motive behind an act to take away the immunity clause. It is for this reason that when the authority empowered to grant sanction is proceeding to exercise its discretion, it has to take into account the material facts of the incident complained of before passing an order of granting sanction or else official duty would always be in peril even if performed bonafidely and genuinely.

52. It is in the aforesaid background that we wish to record that the protection and immunity granted to an official particularly in provisions of the Act 1990 or like Acts has to be widely construed in order to assess the act complained of. This would also include the assessment of cases like mistaken identities or an act performed on the basis of a genuine suspicion. We are therefore of the view that such immunity clauses have to be interpreted with wide discretionary powers to the sanctioning authority in order to uphold the official discharge of duties in good faith and a sanction therefore has to be issued only on the basis of a sound objective assessment and not otherwise.

53. Use of words like 'No' and 'shall' in Section 7 of the Act 1990 denotes the mandatory requirement of obtaining prior sanction of the Central Government before institution of the prosecution, suit or legal proceedings. From the conjoint reading of Section 197(2) Cr.P.C. and Section 7 of the Act 1990, it is clear that prior sanction is a condition precedent before institution of any of the aforesaid legal proceedings.

54. To understand the complicacy of the issue involved herein, it will be useful to compare the relevant provisions of different statutes requiring previous sanction.

CRIMINAL PROCEDURE CODE, 1973	**PREVENTION OF CORRUPTION ACT, 1988**	**ARMED FORCES (SPECIAL POWERS) ACT, 1990**
197. Prosecution of Judges and Public servants.- (1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is	**19. Previous sanction necessary for prosecution.-** (1) No court shall take cognizance of an offence punishable under Sections 7,10,11,13 and 15 alleged to have been committed by a public servant, except with the previous sanction.	**7. Protection to persons acting under Act.-** No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government,

accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction.	(a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government.	against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act. ....

Thus, it is evident from the aforesaid comparative chart that under the provisions of Cr.P.C. and Prevention of Corruption Act, it is the court which is restrained to take cognizance without previous sanction of the competent authority. Under the Act 1990, the investigating agency/complainant/person aggrieved is restrained to institute the criminal proceedings; suit or other legal proceedings. Thus, there is a marked distinction in the statutory provisions under the Act 1990, which are of much wider magnitude and are required to be enforced strictly.

55. Thus, in view of the above, the law on the issue of sanction can be summarised to the effect that the question of sanction is of paramount importance for protecting a public servant who has acted in good faith while performing his duty. In order that the public servant may not be unnecessarily harassed on a complaint of an unscrupulous person, it is obligatory on the part of the executive authority to protect him. However, there must be a discernible connection between the act complained of and the powers and duties of the public servant. The act complained of may fall within the description of the action purported to have been done in performing the official duty. Therefore, if the alleged act or omission of the public servant can be shown to have reasonable connection inter-relationship or inseparably connected with discharge of his

duty, he becomes entitled for protection of sanction. If the law requires sanction, and the court proceeds against a public servant without sanction, the public servant has a right to raise the issue of jurisdiction as the entire action may be rendered void ab-initio for want of sanction. Sanction can be obtained even during the course of trial depending upon the facts of an individual case and particularly at what stage of proceedings, requirement of sanction has surfaced. The question as to whether the act complained of, is done in performance of duty or in purported performance of duty, is to be determined by the competent authority and not by the court. The Legislature has conferred "absolute power" on the statutory authority to accord sanction or withhold the same and the court has no role in this subject. In such a situation the court would not proceed without sanction of the competent statutory authority.

56. The present case stands squarely covered by the ratio of the judgments of this Court in *Matajog Dobey* (Supra) and *Sankaran Moitra* (Supra). Thus, we have no hesitation to hold that sanction of the Central Government is required in the facts and circumstances of the case and the court concerned lacks jurisdiction to take cognizance unless sanction is granted by the Central Government.

57. The CJM Court gave option to the higher authorities of the Army to choose whether the trial be held by the court-martial or by the criminal court as required under Section 125 of the Army Act. Mr. P.P. Malhotra, learned ASG, has submitted the original file of the Army Authorities before the court, File notings reveal their decision that in case it is decided by this Court that sanction is required and the Central Government accords sanction, option would be availed at that stage.

58. Military Authority may ask the criminal court dealing with the case that the accused would be tried by the court-martial in view of the provisions of Section 125 of the Army Act. However, the option given by the Authority is not final in view of the provisions of Section 126 of the Army Act. Criminal court

having jurisdiction to try the offender may require the competent military officer to deliver the offender to the Magistrate concerned to be proceeded according to law or to postpone the proceedings pending reference to the Central Government, if that criminal court is of the opinion that proceedings be instituted before itself in respect of that offence. Thus, in case the criminal court makes such a request, the Military Officer either has to comply with it or to make a reference to the Central Govt. whose orders would be final with respect to the venue of the trial. Therefore, the discretion exercised by the Military Officer is subject to the control of the Central Govt. Such matter is being governed by the provisions of Section 475 Cr.P.C. read with the provisions of the J & K Criminal Courts and court-martial (Adjustment of Jurisdiction) Rules, 1983.

Rule 6 of the said Rules, 1983, provides that in case the accused has been handed over to the Army authorities to be tried by a court-martial, the proceedings of the criminal court shall remain stayed. Rule 7 thereof, further provides that when an accused has been delivered by the criminal court to the Army authorities, the authority concerned shall inform the criminal court whether the accused has been tried by a court-martial or other effectual proceedings have been taken or ordered to be taken against him. If the Magistrate is informed that the accused has not been tried or other effectual proceedings have not been taken, the Magistrate shall report the circumstances to the State Government which may, in consultation with the Central Government, take appropriate steps to ensure that the accused person is dealt with in accordance with law.

59. Constitution Bench of this Court in *Som Datt Datta v. Union of India & Ors.,* AIR 1969 SC 414, held that option as to whether the accused be tried by a criminal court or court-martial could be exercised after the police has completed the investigation and submitted the chargesheet. Therefore, for making such an option, the Army Authorities do not have to wait

till the criminal court takes cognizance of the offence or frames the charges, which commences the trial.

60. In *Delhi Special Police Establishment, New Delhi v. Lt. Col. S.K. Loraiya,* AIR 1972 SC 2548, a similar view has been reiterated by this Court observing that relevant Rules require that an option be given as to whether the accused be tried by a court-martial or by ordinary criminal court. The Magistrate has to give notice to the Commanding Officer and is not to make any order of conviction or acquittal or frame charges or commit the accused until the expiry of 7 days from the service of notice.

61. In *Balbir Singh & Anr. v. State of Punjab,* (1995) 1 SCC 90, this Court dealt with the provisions of the Air Force Act, 1950; provisions of Cr.P.C. and criminal court and court-martial (Adjustment of Jurisdiction) Rules, 1952 and reiterated the same view relying upon its earlier judgment in *Ram Sarup v. Union of India & Anr.,* AIR 1965 SC 247, wherein it has been held that there could be variety of circumstances which may influence the justification as to whether the offender be tried by a court-martial or by criminal court, and therefore, it becomes inevitable that the discretion to make such a choice be left to the Military Officers. Military Officer is to be guided by considerations of the exigencies of the service, maintenance of discipline in the Army, speedier trial, the nature of the offence and the persons against whom the offence is committed.

62. Thus, the law on the issue is clear that under Section 125 of the Army Act, the stage of making option to try an accused by a court-martial and not by the criminal court is after filing of the chargesheet and before taking cognizance or framing of the charges.

63. A question has further been raised by learned counsel for the appellant that the Act 1990 is a special Act and Section 7 thereof, provides full protection to the persons who are subject to the Army Act from any kind of suit, prosecution and legal

proceedings unless the sanction of the Central Government is obtained . Thus, in such a fact-situation, even if the Commanding Officer exercises his discretion and opts that the accused would be tried by the court-martial, the proceedings of court-martial cannot be taken unless the Central Government accords sanction.

64. Learned counsel for the CBI and interveners have opposed the submission contending that in case the accused are tried in the court-martial, sanction is not required at all. The provisions of the Act 1990 would apply in consonance with the provisions of the Army Act. Section 7 of the Act 1990 does not contain non-obstante clause. Therefore, once the option is made that accused is to be tried by a court-martial, further proceedings would be in accordance with the provisions of Section 70 of the Army Act and for that purpose, sanction of the Central Government is not required. The court-martial has been defined under Section 3(VII) of the Army Act which is definitely different from the suit and prosecution as explained hereinabove, and has not been referred to in the Act 1990.

65. Undoubtedly, the court-martial proceedings are akin to criminal prosecution and this fact has been dealt with elaborately by this Court in *Union of India & Ors. v. Major A. Hussain,* AIR 1998 SC 577. However, once the matter stands transferred to the Army for conducting a court-martial, the court-martial has to be as per the provisions of the Army Act. The Army Act does not provide for sanction of the Central Government. Thus, we do not find any force in the contention raised by the appellant and the same is rejected.

66. Sum up:

(i) The conjoint reading of the relevant statutory provisions and rules make it clear that the term "institution" contained in Section 7 of the Act 1990 means taking cognizance of the offence and not

mere presentation of the chargesheet by the investigating agency.

(ii) The competent Army Authority has to exercise his discretion to opt as to whether the trial would be by a court-martial or criminal court after filing of the chargesheet and not after the cognizance of the offence is taken by the court.

(iii) Facts of this case require sanction of the Central Government to proceed with the criminal prosecution/trial.

(iv) In case option is made to try the accused by a court-martial, sanction of the Central Government is not required.

67. In view of the above, the appeals stand disposed of with the following directions:

I. The competent authority in the Army shall take a decision within a period of eight weeks from today as to whether the trial would be by the criminal court or by a court-martial and communicate the same to the Chief Judicial Magistrate concerned immediately thereafter.

II. In case the option is made to try the case by a court-martial, the said proceedings would commence immediately and would be concluded strictly in accordance with law expeditiously.

III. In case the option is made that the accused would be tried by the criminal court, the CBI shall make an application to the Central Government for grant of sanction within four weeks from the receipt of such option and in case such an application is filed,

the Central Government shall take a final decision on the said application within a period of three months from the date of receipt of such an application.

IV. In case sanction is granted by the Central Government, the criminal court shall proceed with the trial and conclude the same expeditiously.

D.G. Appeals disposed of.

ARJUN
v.
STATE OF MAHARASHTRA
(Criminal Appeal No. 356 of 2007)

MAY 03, 2012

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

Penal Code, 1860 - ss. 96 to 106, 302, 300 Exception 4 and 304 (Part I) - Right of private defence - General principles - Explained - On facts, conviction of appellant u/s. 302 for causing murder of a person and u/s. 326 for causing grievous hurt to the wife of the deceased - Case of the defence that there was a property dispute between the parties; that the appellant as well as another accused sustained injuries; and that the deceased sustained fatal injuries due to sudden fight between the parties and the accused had to ward off the attack in his self defence - On appeal, held: Evidence clearly indicate that the appellant was armed with a knife with which he inflicted serious injuries on the head of the deceased, resulting in his death and also that the appellant inflicted injuries on the wife of the deceased as well when she tried to save her husband - Further, there is nothing to show that the deceased, his wife and his son or others had attacked the appellant, nor the surrounding circumstances indicate that there was a reasonable apprehension that the death or grievous hurt was likely to be caused to the appellant by them or others - Mere fact that the other seven accused were acquitted or that some of the prosecution witnesses were also convicted not sufficient to hold that the appellant was not the aggressor - Plea of private defence not sustainable - Considering the background facts as well as the fact that there was no pre-meditation and the act was committed in a heat of passion and that the appellant did not take any undue advantage or acted in a cruel manner and that there was a fight between the parties, case falls under the fourth exception

to s. 300 - Thus, conviction altered from s. 302 to s. 304 Part 1 with custodial sentence of 10 years.

There were some property disputes between the appellant and 'J'. On the fateful day, when 'J' came in front of the appellant's shop, the appellant abused 'J' and later on the appellant and his brothers (accused no. 2 to 8) armed with weapons attacked 'J' and his wife-(PW 8) and his son-(PW 1). The appellant inflicted three blows on the head of 'J' with a large knife and deceased fell down. When (PW 8) intervened to rescue her husband, the appellant inflicted blows on her head, back and shoulder and when PW 10 (brother-in-law of PW 8) and his son (PW 11) came to their rescue; the appellant assaulted both of them. 'J' succumbed to his injuries. PW 1 lodged FIR. The appellant also lodged an FIR against PW 1, PW 10 and PW 11 and other persons. Thereafter, the Sessions court tried the case. The appellants contended that the parties were on inimical terms; that the appellant as well as accused no. 8 sustained injuries; that the deceased J sustained fatal injuries due to sudden fight between the parties and the accused had to ward off the attack in his self defence. The Additional Sessions Judge acquitted accused no. 8, however, convicted the appellant for the offence punishable under Section 302 IPC for murder of 'J' and for the offence punishable under Section 326 IPC for causing grievous hurt to PW 8. Aggrieved, the appellant filed an appeal and the High Court upheld the order of the conviction and sentence passed by the trial court against the appellant. The State filed an appeal against acquittal and the High Court dismissed the same. Thus, the appellant filed the instant appeal.

Disposing of the appeal, the Court

HELD: 1.1 Law clearly spells out that the right of private defence is available only when there is a reasonable apprehension of receiving injury. Section 99

IPC explains that the injury which is inflicted by a person exercising the right should commensurate with the injury with which he is threatened. True, that the accused need not prove the existence of the right of private defence beyond reasonable doubt and it is enough for him to show as in a civil case that preponderance of probabilities is in favour of his plea. Right of private defence cannot be used to do away with a wrong doer unless the person concerned has a reasonable cause to fear that otherwise death or grievous hurt might ensue in which case that person would have full measure of right to private defence. [Para 12] [672-A-C]

1.2 It is for the accused claiming the right of private defence to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution, if a plea of private defence is raised. [Para 13] [672-D-E]

Munshi Ram and Ors. V. Delhi Administration **AIR (1968) SC 702;** *State of Gujarat v. Bai Fatima* **AIR (1975) SC 1478;** *State of U.P. v. Mohd. Musheer Khan* **AIR (1977) SC 2226;** *Mohinder Pal Jolly v. State of Punjab* **AIR (1979) SC 577;** *Salim Zia v. State of U.P.* **AIR (1979) SC 39114 - relied on.**

1.3 A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting. [Para 14] [672-F-G]

1.4 Section 97 deals with the subject matter of right of private defence. The plea of right comprises the body or property of the person exercising the right or of any other person, and the right may be exercised in the case

of any offence against the body, and in the case of offences of theft, robbery, mischief or criminal trespass, and attempts at such offences in relation to the property. Section 99 lays down the limits of the right of private defence. Sections 96 and 98 give a right of private defence against certain offences and acts. The right given under Sections 96 to 98 and 100 to 106 is controlled by Section 99. To plea a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. [Para 15] [672-H; 673-A-C]

2.1 The evidence of PWs 1, 8, 10 and 11 with regard to the assault of the appellant on the deceased, was fully corroborated by the medical evidence as well as evidence of independent witnesses. PW 9 proved the recovery of the weapon of offence. PW 8-wife of the deceased had also sustained injuries due to the attack of the appellant, when she intervened to protect her husband. The facts would clearly indicate that the appellant harboured grudge against the victims in view of the property dispute. The evidence of PW 12 indicates that the deceased had sustained serious injuries on the brain. The facts would indicate that PW 1 and others had, in fact, obstructed the appellant but he was having a knife with which he could inflict three fatal injuries on the head of the deceased. The mere fact that the other seven accused were acquitted or that some of the prosecution witnesses were also convicted would not be sufficient to hold that the appellant was not the aggressor. True, there were some minor injuries on the accused and some serious injuries on PW 8 as well. Evidence of PWs 1, 8, 10 and 11 would clearly indicate that the appellant was armed with a knife and it was with that knife he had inflicted serious injuries on the head of the deceased and

which was the cause of death of 'J'. Further, there is also sufficient evidence to show that the appellant had inflicted injuries on the wife of the deceased as well when she tried to save her husband. The deceased was unarmed so also his wife and the son. At the same time, the accused was armed with a knife. No explanation is forthcoming either in his statement u/s 313 Cr.P.C. or otherwise as to why he was having a knife (sura) in his hand at the time of the incident. There is no evidence to show that the deceased, his wife (PW 8) or his son (PW 1) had ever attacked the accused. [Para 11] [671-B-H; 672-A]

2.2 In the instant case, as rightly held by the High Court and trial court, there is nothing to show that the deceased, his wife (PW 8), his son (PW 1) or others had attacked the appellant, nor the surrounding circumstances would indicate that there was a reasonable apprehension that the death or grievous hurt was likely to be caused to the appellant by them or others. The plea of private defence is, therefore, has no basis and the same is rejected. [Para 16] [673-D-E]

2.3 Considering the background facts as well as the fact that there was no pre-meditation and the act was committed in a heat of passion and that the appellant had not taken any undue advantage or acted in a cruel manner and that there was a fight between the parties, the instant case falls under the fourth exception to Section 300 IPC and thus, the conviction is altered from Section 302 IPC to Section 304 Part 1 IPC. The appellant is in custody since 30.07.2003. The custodial sentence of 10 years to the accused-appellant would meet the ends of justice and it is ordered accordingly. [Paras 17 and 18] [673-E-G]

Lakshmi Singh and Ors. v. State of Bihar **1976 (4) SCC 394:** *Darshan Singh v. State of U.P.* **2004 (7) SCC 408: 2004**

(3) Suppl. SCR 561 - referred to.

Case Law Reference:

1976 (4) SCC 394	**Referred to**	**Para 8**
2004 (3) Suppl. SCR 561	**Referred to**	**Para 8**
AIR (1968) SC 702	**Relied on**	**Para 13**
AIR (1975) SC 1478	**Relied on**	**Para 13**
AIR (1977) SC 2226	**Relied on**	**Para 13**
AIR (1979) SC 577	**Relied on**	**Para 13**
AIR (1979) SC 391	**Relied on**	**Para 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 356 of 2007.

From the Judgment & Order dated 24.11.2006 of the High Court of Judicature at Bombay Bench at Aurangabad in Criminal Appeal No. 646 of 2006.

Sudhanshu S. Choudhari for the Appellant.

Asha G. Nair for the Respondent.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. The appellant, herein, was convicted by the 2nd Ad-hoc Additional Sessions Judge for the offence punishable under Section 302 of Indian Penal Code (for short 'IPC') for murder of one Jagannath Rambhau Shirsath and for the offence punishable under Section 326 IPC for causing grievous hurt to Muktabai, wife of deceased - Jagannath.

2. Aggrieved by the order of conviction and sentence, the appellant preferred Criminal Appeal No. 646/2004 and the State preferred Criminal Appeal No.828/2004 against acquittal of accused No.8 - Babasaheb Maruti Shirsath before the High

Court of Bombay Bench at Aurangabad. The High Court vide its judgment dated 24.11.2006 dismissed Criminal Appeal No. 646/2004 and confirmed the conviction and sentence passed by the trial court against the appellant. Criminal Appeal No. 828/2004 preferred by the State against acquittal of accused No.8 was also dismissed by the High Court vide judgment dated 24.11.2006. Aggrieved by the judgment in Criminal Appeal No. 646/2004, this appeal has been preferred by the first accused, Arjun.

3. The prosecution story, in a nutshell, is as follows:

The deceased Jagannath and Muktabai (PW 8) parents of Rangnath (PW 1), his brothers Ashok Gahininath and Rajendra -were all living together at Taklimanur, Taluka Pathardi, District Ahmednagar. There were some property disputes between the first accused (appellant) and the deceased - Jagannath for which the appellant had filed Civil Suit being RCS No. 291/2001 before Taluka Court for an order of injunction and possession and the court had ordered status quo. The appellant was in the army service and after retirement, about 5 to 6 years prior to the incident on 30.07.2002, he started a stationery shop at Taklimanur situated adjacent to the subject matter of the suit.

4. In the village Taklimanur, there was an annual fair on 30.07.2002. At about 4 PM, on that date when the deceased came in front of the appellant's shop, the appellant abused the deceased. Later, when the deceased, his wife - Muktabai and son Rangnath were going to Ambikanagar for worship of the Goddess, the appellant, his brothers Babasaheb (accused No.8), Buvasaheb (accused No.2), Suresh - son of Buvasaheb (accused No.7), Dnyandeo (accused No.4), Bhimrao (accused No.5), Patilba (accued No.3), Ramnath (accused No.6) attacked the deceased on the road near Tamarind tree. The appellant was armed with a large knife, accused No.3 was armed with an axe and others were carrying sticks. The appellant inflicted three blows on the head of the deceased with a large knife (Sura - Article No.13)and deceased fell down.

When PW 8 Muktabai intervened to rescue her husband, the appellant inflicted blows on her head, back and shoulder. Again, when PW 10 Karbhari (brother-in-law of PW 8) and his son Ambadas (PW 11) came to their rescue; the appellant assaulted both of them. Due to the injuries, the deceased died on the spot. Police arrived at the scene of occurrence; the victims were taken to the nearby hospital.

5. PW 1, son of the deceased, lodged a report of the incident with Pathardi Police Station at about 8.30PM on the date of the incident. Based on that report, Crime No. 127/2002 was registered under Sections 147, 148, 302, 326, 324 r/w Section 149 IPC and investigation was entrusted to P.I. Randive (PW 14). Later, all the accused were arrested by 04.08.2002. The appellant made a confessional statement and produced a large knife (sura - article no.13) concealed in a pit on the bund of the field of Ramkisan Shinde, which is near the scene of occurrence.

6. The appellant had also lodged an FIR on 30.07.2002 at 8.50 P.M. against the complainant Rangnath, Karbhari (PW 10), Ambadas (PW 11) and other persons. The Sessions Court tried the case registered against some of the prosecution witnesses and they were convicted for offences punishable under Section 307 r/w Section 149, Section 324 r/w Section 149, Section 147, Section 148, and Section 149 IPC for five years with fine.

7. The appellant herein took up the defence that the parties were on inimical terms since he had filed Civil Suit No. 291/2001 before the Civil Judge, Junior Division, Pathardi. He also stated that pressure was also exerted on him to withdraw the civil suit. Further, it was stated that on 30.07.2002, when he was opening the shop, the deceased, PW 10 and PW 11 came in front of the shop and asked him to come out. Sensing some trouble, he accosted accused No.8, who was at the market. PW 1, by that time, also joined his father. They were armed with weapons. Hence, he had to flee but they chased him. PW 1

inflicted a blow with Gupti on the stomach of accused No.8 near a Pipal tree and the other accused continued to assault him. Fearing that he would be killed, he snatched iron rod from the hands of Gahininath and waived iron rod in the air. PW 1 had also inflicted injury on the stomach of accused No.2 with a Gupti. In that melee, the appellant and accused no. 8 were also injured and they were taken to the nearby hospital. The appellant had sustained CLW on occipital region 2X1X1 cms and an abrasion on forearm 3X1/4 cm. Accused No.8 had sustained incised wound on the abdomen from which the intestines were protruding with omentum.

8. Learned counsel appearing for the appellant Mr. Sudhanshu S. Chaudhari submitted that the incident had occurred in front of the shop of the accused and there was previous rivalry between the parties due to the fact that he had filed civil case against the deceased and others. Learned counsel further submitted that the fact that the appellant as well as accused No.8 had also sustained injuries, would indicate that the appellant and others were also attacked by the deceased and others. Learned counsel, therefore, pointed out the fact that the appellant as well as accused No.8 had sustained injuries during the course of incident was a relevant factor which should have been taken into consideration by the courts below. Learned counsel pointed out that the above facts would also indicate that there was a fight between both the parties and the prosecution had miserably failed to explain the injuries sustained by the appellant and accused No. 8. The non-explanation on the injuries is a relevant factor which should have been taken note of for evaluating the prosecution evidence. In support of his contention, reliance was placed on judgment of this Court in *Lakshmi Singh and Ors. v. State of Bihar;* 1976 (4) SCC 394 and *Dashrath Singh v. State of U.P.;* 2004 (7) SCC 408. Learned counsel also pointed out that injuries sustained by the appellant as well as accused No.8 would positively show that the appellant was not the aggressor and, consequently, the fatal injuries sustained by the deceased was

due to a sudden fight between the parties and the accused had to ward off the attack in his self defence. Learned counsel further pointed out that the findings rendered by the courts below that it was the appellant who was the aggressor and hence the plea of private defence was not available, was not correct. Further, it was pointed out that the injuries sustained by the appellant and accused No. 8 would clearly indicate that the appellant is entitled to raise the plea of private defence.

9. Learned counsel, Ms. Asha G. Nair, appearing for the State supported the conviction of the appellant by the trial judge as well as the High Court. Learned counsel took us elaborately to the prosecution evidence. Learned counsel pointed out that the facts narrated by PW 1 - complainant would clearly indicate that the deceased died due to the blows inflicted on his head by the accused. The other witnesses had corroborated the same and stated that it was the accused - appellant, who had opened the attack by inflicting blows on the head of the deceased by a large knife (sura). Reference was also made to the evidence of PW 12 - Dr. Kulkarni, the autopsy surgeon, who had stated that injury Nos. 1, 2 and 5 were caused by hard and sharp weapon such as Sura - article no. 13, injury no. 3 was caused by hard and blunt weapon and injury Nos. 7, 8 and 9 were caused by hard and rough surface. In his opinion, the death was caused on account of shock due to the injuries on the head and on the brain of the deceased. The plea of private defence, as stated by the learned counsel, is not available to the appellant. PW 1 and PW 8 had clearly stated that it was the appellant who had first inflicted three blows on the head of the deceased by a knife which was the cause of death of Jaganath.

10. Learned counsel for the State took us to the evidence of PWs 1, 8, 10 and 11 which according to the counsel, would establish beyond doubt that it was the appellant who was the aggressor and had inflicted fatal injuries on the head of the deceased. Further, it was pointed out that the fact that all the

accused persons including the appellant were armed with lethal weapons would clearly indicate that it was pre-planned and deliberate. The plea of private defence, it was submitted was rightly negatived by the trial court as well as the High Court.

11. We have heard the learned counsel on either side at length and critically examined the oral evidence adduced in the case. The evidence of PWs 1, 8, 10 and 11 with regard to the assault, of the appellant on the deceased, has been fully corroborated by the medical evidence as well as evidence of independent witnesses. PW 9 has proved the recovery of the weapon of offence. PW 8 - wife of the deceased had also sustained injuries due to the attack of the appellant, when she intervened to protect her husband. The facts would clearly indicate that the appellant harboured grudge against the victims in view of the property dispute. The evidence of PW 12 indicates that the deceased had sustained serious injuries on the brain. The facts would indicate that PW 1 and others had, in fact, obstructed the appellant but he was having a knife with which could inflict three fatal injuries on the head of the deceased. The mere fact that the other seven accused were acquitted or that some of the prosecution witnesses were also convicted would not be sufficient to hold that the appellant was not the aggressor. True, there were some minor injuries on the accused and some serious injuries on PW 8 as well. Evidence of PWs 1, 8, 10 and 11 would clearly indicate that the appellant was armed with a knife and it was with that knife he had inflicted serious injuries on the head of the deceased and which was the cause of death of Jagannath. Further, there is also sufficient evidence to show that the appellant had inflicted injuries on the wife of the deceased as well when she tried to save her husband. The deceased was unarmed so also his wife and the son. At the same time, the accused was armed with a knife. No explanation is forthcoming either in his statement u/s 313 Cr.P.C. or otherwise as to why he was having a knife (sura) in his hand at the time of the incident. There is no evidence to

show that the deceased, his wife (PW 8) or his son (PW 1) had ever attacked the accused.

12. Law clearly spells out that the right of private defence is available only when there is a reasonable apprehension of receiving injury. Section 99 IPC explains that the injury which is inflicted by a person exercising the right should commensurate with the injury with which he is threatened. True, that the accused need not prove the existence of the right of private defence beyond reasonable doubt and it is enough for him to show as in a civil case that preponderance of probabilities is in favour of his plea. Right of private defence cannot be used to do away with a wrong doer unless the person concerned has a reasonable cause to fear that otherwise death or grievous hurt might ensue in which case that person would have full measure of right to private defence.

13. It is for the accused claiming the right of private defence to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution, if a plea of private defence is raised. (*Munshi Ram and Others V. Delhi Administration,* AIR (1968) SC 702; *State of Gujarat v. Bai Fatima,* AIR (1975) SC 1478; *State of U.P. v. Mohd. Musheer Khan,* AIR (1977) SC 2226 and *Mohinder Pal Jolly v. State of Punjab,* AIR (1979) SC 577 and *Salim Zia v. State of U.P.,* AIR (1979) SC 391.

14. A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting.

15. Section 97 deals with the subject matter of right of private defence. The plea of right comprises the body or

property of the person exercising the right or of any other person, and the right may be exercised in the case of any offence against the body, and in the case of offences of theft, robbery, mischief or criminal trespass, and attempts at such offences in relation to the property. Section 99 lays down the limits of the right of private defence. Sections 96 and 98 give a right of private defence against certain offences and acts. The right given under Sections 96 to 98 and 100 to 106 is controlled by Section 99. To plea a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him.

16. We are of the view that in the instant case, as rightly held by the High Court and Trial Court, there is nothing to show that the deceased, his wife (PW 8), his son (PW 1) or others had attacked the appellant, nor the surrounding circumstances would indicate that there was a reasonable apprehension that the death or grievous hurt was likely to be caused to the appellant by them or others. The plea of private defence is, therefore, has no basis and the same is rejected.

17. Considering the background facts as well as the fact that there was no premeditation and the act was committed in a heat of passion and that the appellant had not taken any undue advantage or acted in a cruel manner and that there was a fight between the parties, we are of the view that this case falls under the fourth exception to Section 300 IPC and hence it is just and proper to alter the conviction from Section 302 IPC to Section 304 Part 1 IPC and we do so.

18. We are informed that the appellant is in custody since 30.07.2003. In our view, custodial sentence of 10 years to the accused-appellant would meet the ends of justice and it is ordered accordingly. The appeal is accordingly disposed of, altering the sentence awarded.

N.J. Appeal disposed of.

RASHMI REKHA THATOI & ANR.
v.
STATE OF ORISSA & ORS.
(Criminal Appeal No. 750 of 2012)

MAY 04, 2012

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

Code of Criminal Procedure, 1973: s.438 - Bail application - High Court while entertaining applications u/s.438 expressing its opinion that it was not inclined to grant anticipatory bail to the accused, yet directing that on their surrender some of the accused would be enlarged on bail on such terms and conditions as may be deemed fit and proper by Magistrate concerned - Propriety of such order - Held: The Court of Session or the High Court cannot pass an order that on surrendering of the accused before the Magistrate he shall be released on bail on such terms and conditions as the Magistrate may deem fit and proper - When the High Court in categorical terms expressed the view that it was not inclined to grant anticipatory bail to the accused, it could not have issued such direction which would tantamount to conferment of benefit by which the accused would be in a position to avoid arrest - Court cannot issue a blanket order restraining arrest and it can only issue an interim order and the interim order must also conform to the requirement of the section and suitable conditions should be imposed - Direction to admit the accused persons to bail on their surrendering has no sanction in law and, in fact, creates a dent in the sacrosanctity of law - By passing such kind of orders, the interest of the collective at large and that of the individual victim is jeopardised - That apart, it curtails the power of the regular court dealing with the bail applications - A court of law has to act within the statutory command and not deviate from it - It is a well settled proposition of law what cannot be done

directly, cannot be done indirectly - The statutory exercise of power stands on a different footing than exercise of power of judicial review - Judging on the foundation of said well settled principles, the irresistible conclusion is that the impugned orders directing enlargement of bail of the accused persons by the Magistrate on their surrendering are wholly unsustainable and bound to founder and accordingly the said directions are set aside - Accused persons, however, entitled to move applications for grant of bail u/s.439 which shall be considered on their own merits.

By impugned orders, the High Court while entertaining applications filed under Section 438, Cr.P.C. had expressed its opinion that it was not inclined to grant anticipatory bail to the petitioners, yet it directed that on their surrender some of the accused petitioners would be enlarged on bail on such terms and conditions as may be deemed fit and proper by concerned SDJM and cases of certain other accused persons on surrender would be dealt with on their own merits.

The question which arose for consideration in the instant appeal was whether the orders passed by the High Court were legally sustainable within the ambit and sweep of Section 438, Cr.P.C.

Disposing of the appeals, the Court

HELD: 1. Individual liberty is a very significant aspect of human existence but it has to be guided and governed by law. Liberty is to be sustained and achieved when it is sought to be taken away by permissible legal parameters. A court of law is required to be guided by the defined jurisdiction and not deal with matters being in the realm of sympathy or fancy. [Para 7] [681-D-E]

2. The Court of Session or the High Court cannot pass an order that on surrendering of the accused before

the Magistrate he shall be released on bail on such terms and conditions as the Magistrate may deem fit and proper or the superior court would impose conditions for grant of bail on such surrender. When the High Court in categorical terms expressed the view that it did not incline to grant anticipatory bail to the accused petitioners it could not have issued such a direction which would tantamount to conferment of benefit by which the accused would be in a position to avoid arrest. It is in clear violation of the language employed in the statutory provision and in flagrant violation of the dictum laid down in the case of *Gurbaksh Singh Sibbia and the principles culled out in the case of **Savitri Agarwal. It is clear as crystal the court cannot issue a blanket order restraining arrest and it can only issue an interim order and the interim order must also conform to the requirement of the section and suitable conditions should be imposed. [Para 30] [693-C-F]

Gurbaksh Singh Sibbia etc. v. The State of Punjab* **AIR 1980 SC 1632:1980 (3) SCR 383 - followed.

***Savitri Agarwal v. State of Maharashtra and Anr.* **(2009) 8 SCC 325:2009 (10) SCR 978 - relied on.**

3. The direction to admit the accused persons to bail on their surrendering has no sanction in law and, in fact, creates a dent in the sacrosanctity of law. It is contradictory in terms and law does not countenance paradoxes. It gains respectability and acceptability when its solemnity is maintained. Passing such kind of orders the interest of the collective at large and that of the individual victims is jeopardised. That apart, it curtails the power of the regular court dealing with the bail applications. [Para 31] [694-E-F]

Dr. Narendra K. Amin v. State of Gujarat and another

2008 (6) SCALE415; *Puran v. Rambilas and another* **(2001) 6 SCC 338: 2001 (3) SCR432 - relied on.**

4. A court of law has to act within the statutory command and not deviate from it. It is a well settled proposition of law what cannot be done directly, cannot be done indirectly. While exercising a statutory power, a court is bound to act within the four corners thereof. The statutory exercise of power stands on a different footing than exercise of power of judicial review. Judging on the foundation of said well settled principles, the irresistible conclusion is that the impugned orders directing enlargement of bail of the accused persons by the Magistrate on their surrendering are wholly unsustainable and bound to founder and accordingly the said directions are set aside. Consequently the bail bonds of the accused persons are cancelled and they shall be taken into custody forthwith. They are, however, entitled to move applications for grant of bail under Section 439 of the Code which shall be considered on their own merits. [Paras 32- 33] [694-G-H; 695-A-D]

Bay Berry Apartments (P) Ltd. and Anr. v. Shobha and Ors. **(2006) 13SCC 737: 2006 (7) Suppl. SCR 738;** *U.P. State Brassware Corporation Ltd. and Anr. v. Uday Narain Pandey* **(2006) 1 SCC 479: 2005 (5) Suppl. SCR 609 - relied on.**

Balchand Jain v. State of Madhya Pradesh **AIR 1976 SC 366;** *Salauddin Abdulsamad Shaikh v. State of Maharashta* **AIR 1996 SC 1042: 1995 (6) Suppl. SCR 556;** *K.L. Verma v. State and Anr.* **(1998) 9 SCC 348;** *Nirmal Jeet Kaur v. State of M. P. and Another* **(2004) 7 SCC 558: 2004 (3) Suppl. SCR 1006;** *Adri Dharan Das v. State of West Bengal* **(2005) 4 SCC 303: 2005 (2) SCR 188;** *Niranjan Singh and Anr. v. Prabhakar Rajaram Kharote and Ors.* **(1980) 2 SCC 559: 1980 (3) SCR 15;** *Union of India v. Padam Narain Agarwal* **AIR 2009 SC 254: 2008 (14) SCR 179;** *State of Mahrashtra*

v. Mohd. Rashid and Anr. **(2005) 7 SCC 56: 2005 (1) Suppl. SCR 817;** *Sunita Devi v. State of Bihar & Anr.* **(2005) 1 SCC 608: 2004 (6) Suppl. SCR 707;** *Siddharam Satlingappa Mhetre v. State of Maharashtra and Ors.* **(2011) 1 SCC 694: 2010 (15) SCR 201 - referred to.**

Case Law Reference:

1980 (3) SCR 383	**followed**	**Para 18,22,28, 29, 30**
AIR 1976 SC 366	**referred to**	**Para 19**
2009 (10) SCR 978	**relied on**	**Para 22**
1995 (6) Suppl. SCR 556	**referred to**	**Para 23, 27,29**
(1998) 9 SCC 348	**referred to**	**Para 24,25,27**
2004 (3) Suppl. SCR 1006	**referred to**	**Para 25,27**
2005 (2) SCR 188	**referred to**	**Para 26,28,29**
1980 (3) SCR 15	**referred to**	**Para 27**
2008 (14) SCR 179	**referred to**	**Para 28**
2005 (1) Suppl. SCR 817	**referred to**	**Para 28**
2004 (6) Suppl. SCR 707	**referred to**	**Para 29**
2010 (15) SCR 201	**referred to**	**Para 29**
2008 (6) SCALE 415	**relied on**	**Para 31**
2001 (3) SCR 432	**relied on**	**Para 31**
2006 (7) Suppl. SCR 738	**relied on**	**Para 32**
2005 (5) Suppl. SCR 609	**relied on**	**Para 32**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 750 of 2012 etc.

From the Judgment & Order dated 22.07.2011 of the High Court of Orissa at Cuttack in BLAPL No. 13036 of 2011.

WITH

Crl. A. No. 751 of 2012.

Rekha Pandey, Ambika Das, Sailaja V. for the Appellants.

Sandhya Goswami, M.P.S. Tomar, Jabar Singh, Jitendra Mohapatra, Chandra Bhushan Prasad, Syed Rehan for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted in both the petitions.

2. "Liberty is to the collective body, what health is to every individual body. Without health no pleasure can be tasted by man; without Liberty, no happiness can be enjoyed by society."

Thus spoke Bolingbroke.

3. Liberty is the precious possession of the human soul. No one would barter it for all the tea in China. Not for nothing Patrick Henry thundered:

> "Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery? Forbid it, Almighty God ! I know not what course others may take, but as for me, give me liberty, or give me death !"

The thought of losing one's liberty immediately brings in a feeling of fear, a shiver in the spine, an anguish of terrible trauma, an uncontrollable agony, a penetrating nightmarish perplexity and above all a sense of vacuum withering the very essence of existence. It is because liberty is deep as eternity and deprivation of it, infernal. May be for this protectors of liberty ask, "How acquisition of entire wealth of the world would be of any consequence if one's soul is lost?" It has been quite often

said that life without liberty is eyes without vision, ears without hearing power and mind without coherent thinking faculty.

4. Almost two centuries and a decade back thus spoke Edmund Burke: -

> "Men are qualified for civil liberty, in exact proportion to their disposition to put moral chains upon their own appetites; in proportion as their love to justice is above their rapacity; in proportion as their soundness and sobriety of understanding is above their vanity and presumption; in proportion as they are more disposed to listen to the counsel of the wise and good, in preference to the flattery of knaves. Society cannot exist unless a controlling power upon will and appetite be placed somewhere and the less of it there is within, the more there must be without. It is ordained in the eternal constitution of things that men of intemperate minds cannot be free. Their passions forge their fetters."

5. Similar voice was echoed by E. Barrett Prettyman, a retired Chief Judge of U.S. Court of Appeals:-

> "In an ordered society of mankind there is no such thing as unrestricted liberty, either of nations or of individuals. Liberty itself is the product restraints; it is inherently a composite of restraints; it dies when restraints are withdrawn. Freedom, I say, is not an absence of restraints; it is a composite of restraints. There is no liberty without order. There is no order without systematized restraint. Restraints are the substance without which liberty does not exist. They are the essence of liberty. The great problem of the democratic process is not to strip men of restraints merely because 'they are restraints. The great problem is to design a system of restraints which will nurture the maximum development of man's capabilities, not in a massive globe of faceless animations but as a perfect realization, of each separate human mind, soul and body;

not in mute, motionless meditation but in flashing, thrashing activity."

6. Keeping the cherished idea of liberty in mind, the fathers of our Constitution engrafted in its Preamble: "Liberty of thought, expression, belief, faith and worship." After a lot of debate in the Constituent Assembly, Article 21 of the Constitution came into existence in the present form laying down in categorical terms that no person shall be deprived of his life and personal liberty except according to the procedure established by law.

7. We have begun with the aforesaid prologue, as the seminal question that falls for consideration in these appeals is whether the High Court, despite the value attached to the concept of liberty, could afford to vaporise the statutory mandate enshrined under Section 438 of the Code of Criminal Procedure (for short 'the Code'). It is not to be forgotten that liberty is not an absolute abstract concept. True it is, individual liberty is a very significant aspect of human existence but it has to be guided and governed by law. Liberty is to be sustained and achieved when it sought to be taken away by permissible legal parameters. A court of law is required to be guided by the defined jurisdiction and not deal with matters being in the realm of sympathy or fancy.

8. Presently to the narration. In these two appeals arising out of SLP No. 7281 of 2011 and 7286 of 2011, the challenge is to the orders dated 22.07.2011 and 05.08.2011 in BLAPL No. 13036 of 2011 and 12975 of 2011 respectively passed by the High Court of Judicature of Orissa at Cuttack in respect of five accused persons under Section 438 of the Code pertaining to offences punishable under Section 341/294/506 and 302 read with Section 34 of the Indian Penal Code (for short "the IPC") in connection with Binjharpur PS Case No. 88/2011 corresponding to GR Case No. 343 of 2011 pending in the Court of learned SDJM, Jajpur.

9. The present appeals have been preferred by the sister of the deceased and the complainant, an eye witness, seeking quashing of the orders on the foundation that the High Court has extended the benefit of Section 438 (1) of the Code in an illegal and impermissible manner.

10. The facts that had formed the bedrock in setting the criminal law in motion need not be stated, for the nature of orders passed by High Court in both the cases have their own peculiarity. If we allow ourselves to say they have the enormous potentiality to create colossal puzzlement as regards the exercise of power under Section 438 of the Code.

11. While dealing with the case of accused Uttam Das and Ranjit Das, vide order dated 22.07.2011 the High Court, as stated, perused the case file and passed the following order.

> "Considering the facts and circumstances of the case and the materials available on record, this Court is not inclined to grant anticipatory bail to the petitioners. *This court directs that if petitioner No. 1 Uttam Das surrenders before the learned S.D.J.M., Jajpur and moves an application for bail in the aforesaid case, in such event the learned S.D.J.M. shall release him on bail on such terms and conditions as he may deem fit and proper.*
>
> So far as petitioner No. 2 Ranjit Das is concerned, this court directs him to surrender before the learned S.D.J.M., Jajpur and move an application for bail in connection with the aforesaid case, in such event his application shall be considered by the learned S.D.J.M., on its own merits.
>
> The Bail Application is accordingly disposed of."
>
> [Underlining is ours]

12. In the case of the other accused persons, namely,

Abhimanyu Das, Murlidhar Patra and Bhagu Das the High Court on 05.08.2011 passed the order on following terms.

> "Considering the facts and circumstances of the case this Court is not inclined to grant anticipatory bail to the petitioners. Since there are some materials against Bhagu Das @ Sanjit Kumar Das petitioner No. 3, this Court directs that in case petitioner No. 3 surrenders before the leaned S.D.J.M., Jajpur and moves an application for bail, the learned S.D.J.M. shall consider and dispose of the same on its own merit in accordance with law.
>
> *So far as the prayer for bail of petitioner Nos. 1 and 2 is concerned since one of the co-accused namely, Uttam Das has been released on bail in pursuance of order dated 02.07.2011 passed by this Court in BLAPL No. 13036 of 2011 and petitioner Nos. 1 and 2 stands on similar footing with co-accused Uttam Das, this Court directs that in case petitioner Nos. 1 and 2 surrender before the learned S.D.J.M., Jajpur and move an application for bail, the learned S.D.J.M., shall release them on bail on such terms and conditions as he may deem fit and proper with further condition that petitioner Nos. 1 and 2 shall give an undertaking before the Court below that they will not commit any similar type of offence.* In case any complaint is received against them that will amount to cancellation of bail"
>
> [Emphasis supplied]

13. On a perusal of both the orders it is perceivable that the commonality in both the orders is that while the High Court had expressed its opinion that though it is not inclined to grant anticipatory bail to the petitioners yet it has directed on their surrender some of the accused petitioners would be enlarged on bail on such terms and conditions as may be deemed fit and proper by the concerned Sub Divisional Judicial Magistrate

and cases of certain accused persons on surrender shall be dealt with on their own merits.

14. The learned counsel for the petitioner has contended that the High Court has gravely flawed in passing such kind of orders in exercise of power under Section 438 of the Code which the law does not countenance and, therefore, they deserved to be lancinated. It is his further submission that when the accused persons are involved in such serious offences the High Court could not have dealt with them by taking recourse to an innovative method which has no sanction in law.

15. The learned counsel for the respondent made a very feeble attempt to support the orders.

16. The pivotal issue that emanates for consideration is whether the orders passed by the High Court are legitimately acceptable and legally sustainable within the ambit and sweep of Section 438 of the Code. To appreciate the defensibility of the order it is condign to refer to Section 438 of the Code which reads as follows.

> **"438. Direction for grant of bail to person apprehending arrest.**--(1) Where any person has reason to believe that he may be arrested on 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:

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.

(1A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(1B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may thinks fit, including -

(i) a condition that the person shall make himself

available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the court;

(iv) such other condition as may be imposed under sub-section (3) of section 437, as if the bail were granted -under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the court under sub-section (1)."

17. The aforesaid provision in its denotative compass and connotative expanse enables one to apply and submit an application for bail where one anticipates his arrest in a non-bailable offence. Though the provision does not use the expression anticipatory bail, yet the same has come in vogue by general usage and also has gained acceptation in the legal world.

18. The Constitution Bench in *Gurbaksh Singh Sibbia etc. v. The State of Punjab*[1], has drawn a distinction between an order of ordinary bail and order of anticipatory bail by stating

1. AIR 1980 SC 1632.

that the former is granted when the accused is in custody and, therefore, means release from the custody of the Police, and the latter is granted in anticipation of arrest and hence, effective at the very moment of arrest. It has been held therein, an order of anticipatory bail constitutes, so to say, an insurance against Police custody falling upon arrest for offences in respect of which the order is issued. Their Lordships clarifying the distinction have observed that unlike a post-arrest order of bail, it is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail.

19. The Constitution Bench partly accepted the verdict in *Balchand Jain v. State of Madhya Pradesh*[2] by stating as follows:-

> "We agree, with respect, that the power conferred by S. 438 is of an extraordinary character in the sense indicated above, namely, that it is not ordinarily resorted to like the power conferred by Ss. 437 and 439. We also agree that the power to grant anticipatory bail should be exercised with due care and circumspection."

20. Thereafter, the larger Bench referred to the concept of liberty engrafted in Article 21 of the Constitution, situational and circumstantial differences from case to case and observed that in regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. On the other hand, if it appears likely, considering the antecedents of the applicant, that taking advantage of the order of anticipatory bail he will flee from justice, such an order would not be made. However, it cannot

2. AIR 1976 SC 366.

be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala fides; and equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond. The Constitution Bench also opined the Court has to take into consideration the combined effect of several other considerations which are too numerous to enumerate and the legislature has endowed the responsibility on the High Court and the Court of Session because of their experience.

21. The Constitution Bench proceeded to state the essential concept of exercise of jurisdiction under Section 438 of the Code on following terms:-

> "Exercise of jurisdiction under Section 438 of Code of Criminal Procedure is extremely important judicial function of a judge and must be entrusted to judicial officers with some experience and good track record. Both individual and society have vital interest in orders passed by the courts in anticipatory bail applications."

22. In *Savitri Agarwal v. State of Maharashtra and Anr.*[3], the Bench culled out the principles laid down in *Gurbaksh Singh* (supra). Some principles which are necessary to be reproduced are as follows:-

> " (i) Before power under Sub-section (1) of Section 438 of the Code is exercised, the Court must be satisfied that the applicant invoking the provision has reason to believe that he is likely to be arrested for a non-bailable offence and that belief must be founded on reasonable grounds. Mere "fear" is not belief, for which reason, it is not enough for the applicant to show that he has some sort of vague apprehension that some one is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable

3. (2009) 85 SCC 325..

offence, must be capable of being examined by the Court objectively. Specific events and facts must be disclosed by the applicant in order to enable the Court to judge of the reasonableness of his belief, the existence of which is the sine qua non of the exercise of power conferred by the Section.

ii) The provisions of Section 438 cannot be invoked after the arrest of the accused. After arrest, the accused must seek his remedy under Section 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested.

viii) An interim bail order can be passed under Section 438 of the Code without notice to the Public Prosecutor but notice should be issued to the Public Prosecutor or to the Government advocate forthwith and the question of bail should be re-examined in the light of respective contentions of the parties. The ad-interim order too must conform to the requirements of the Section and suitable conditions should be imposed on the applicant even at that stage."

23. At this juncture we may note with profit that there was some departure in certain decisions after the Constitution Bench decision. In *Salauddin Abdulsamad Shaikh v. State of Maharashta*[4], it was held that it was necessary that under certain circumstances anticipatory bail order should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the Court granting anticipatory bail should leave it to the regular court to deal with the matter on appreciation of material placed before it.

24. In *K. L. Verma v. State and Anr.*[5], it was ruled that limited duration must be determined having regard to the facts of the case and the need to give the accused sufficient time to

4. AIR 1996 SC 1042.

5. (1998) 9 SCC 348.

move the court for regular bail and to give the regular court sufficient time to determine the bail application. It was further observed therein that till the bail application is disposed of one way or the other, the Court may allow the accused to remain on anticipatory bail.

25. In *Nirmal Jeet Kaur v. State of M. P. and Another*[6], the decision in K. L. Verma's case (supra) was clarified by stating that the benefit of anticipatory bail may be extended few days thereafter to enable the accused persons to move the High Court if they so desire.

26. In *Adri Dharan Das v. State of West Bengal*[7], a two-Judge Bench while accepting for grant of bail for limited duration has held that arrest is a part of the process of investigation intended to secure several purposes. The accused may have to be questioned in detail regarding various facets of motive, preparation, commission and aftermath of the crime and the connection of other persons, if any, in the crime. There may be circumstances in which the accused may provide information leading to discovery of material facts. It may be necessary to curtail his freedom in order to enable the investigation to proceed without hindrance and to protect witnesses and persons connected with the victim of the crime, to prevent his disappearance to maintain law and order in the locality. For these or other reasons, arrest may become inevitable part of the process of investigation. The legality of the proposed arrest cannot be gone into in an application under Section 438 of the Code. The role of the investigator is well-defined and the jurisdictional scope of interference by the Court in the process of investigation is limited. The Court ordinarily will not interfere with the investigation of a crime or with the arrest of accused in a cognizable offence. An interim order restraining arrest, if passed while dealing with an application under Section 438 of the Code will amount to interference in

6. (2004) 7 SCC 558.

7. (2005) 4 SCC 303.

the investigation, which cannot, at any rate, be done under Section 438 of the Code.

27. After analysing the ratio in the cases of *Salauddin Abdulsamad Shaikh* (supra), *K. L. Verma* (supra), *Nirmal Jeet Kaur* (supra), *Niranjan Singh and Anr. v. Prabhakar Rajaram Kharote and Ors.*[8] the Bench opined thus:-

> "14. After analyzing the crucial question is when a person is in custody, within the meaning of Section 439 of the Code, it was held in *Nirmal Jeet Kaur's* case (supra) and *Sunita Devi's* case (supra) that for making an application under Section 439 the fundamental requirement is that the accused should be in custody. As observed in *Salauddin's* case (supra) the protection in terms of Section 438 is for a limited duration during which the regular Court has to be moved for bail. Obviously, such bail is bail in terms of Section 439 of the Code, mandating the applicant to be in custody. Otherwise, the distinction between orders under Sections 438 and 439 shall be rendered meaningless and redundant.
>
> 15. If the protective umbrella of Section 438 is extended beyond what was laid down in *Salauddin's* case (supra) the result would be clear bypassing of what is mandated in Section 439 regarding custody. In other words, till the applicant avails remedies up to higher Courts, the requirements of Section 439 become dead letter. No part of a statute can be rendered redundant in that manner."

28. In *Union of India v. Padam Narain Agarwal*[9] this Court while dealing with an order wherein the High Court had directed that the respondent therein shall appear before the concerned customs authorities in response to the summons issued to them and in case the custom authorities found a non-bailable against

8. (1980) 2 SCC 559.

9. AIR 2009 SC 254.

the accused persons they shall not arrest without ten days prior notice to them. The two-Judge Bench relied on the decisions in *Gurbaksh Singh Sibbia* (supra), *Adri Dharan Das* (supra), and *State of Mahrashtra v. Mohd. Rashid and Anr.*[10] and eventually held thus:-

> "In our judgment, on the facts and in the circumstances of the present case, neither of the above directions can be said to be legal, valid or in consonance with law. *Firstly,* the order passed by the High Court is a *blanket* one as held by the Constitution Bench of this Court in Gurbaksh Singh and seeks to grant protection to respondents in respect of *any non-bailable offence. Secondly,* it illegally obstructs, interferes and curtails the authority of Custom Officers from exercising statutory power of arrest a person said to have committed a non-bailable offence by imposing a condition of giving *ten days prior notice,* a condition not warranted by law. The order passed by the High Court to the extent of directions issued to the Custom Authorities is, therefore, liable to be set aside and is hereby set aside."

29. Be it noted, the principle of grant of anticipatory bail for a limited duration in cases of *Salauddin Abdulsamad Shaikh* (supra), *K. L. Verma* (supra), *Adri Dharan Das* (supra), *Sunita Devi v. State of Bihar & Anr.*[11] was held to be contrary to the Constitution decision in *Gurbaksh Singh Sibbia's* case (supra) by a two-Judge Bench in *Siddharam Satlingappa Mhetre v. State of Maharashtra and Ors.*[12] and accordingly the said decisions were treated as per incurium. It is worth noting though the Bench treated Adri Dharan Das (supra) to be per incuriam, as far as it pertained to grant of anticipatory bail for limited duration, yet it has not held that the view expressed therein that the earlier decisions pertaining to the concept of

10. (2005) 7 SCC 56.

11. (2005) 1 SCC 608.

12. (2011) 1 SCC 694.

deemed custody as laid down in *Salauddin Abdulsamad Shaikh* (supra) and similar line of cases was per incuriam. It is so as the controversy involved in *Siddharam Satlingappa Mhetre* (supra) did not relate to the said arena.

30. We have referred to the aforesaid pronouncements to highlight how the Constitution Bench in the case of *Gurbaksh Singh Sibbia* (supra) had analysed and explained the intrinsic underlying concepts under Section 438 of the Code, the nature of orders to be passed while conferring the said privilege, the conditions that are imposable and the discretions to be used by the courts. On a reading of the said authoritative pronouncement and the principles that have been culled out in *Savitri Agarwal* (supra) there is remotely no indication that the Court of Session or the High Court can pass an order that on surrendering of the accused before the Magistrate he shall be released on bail on such terms and conditions as the learned Magistrate may deem fit and proper or the superior court would impose conditions for grant of bail on such surrender. When the High Court in categorical terms has expressed the view that it not inclined to grant anticipatory bail to the accused petitioners it could not have issued such a direction which would tantamount to conferment of benefit by which the accused would be in a position to avoid arrest. It is in clear violation of the language employed in the statutory provision and in flagrant violation of the dictum laid down in the case of *Gurbaksh Singh Sibbia* (supra) and the principles culled out in the case of *Savitri Agarwal* (supra). It is clear as crystal the court cannot issue a blanket order restraining arrest and it can only issue an interim order and the interim order must also conform to the requirement of the section and suitable conditions should be imposed. In the case of *Gurbaksh Singh Sibbia* (supra) the Constitution Bench has clearly observed that exercise of jurisdiction under Section 438 of the Code is an extremely important judicial function of a judge and both individual and

25. 1950 SCR 88.

26. (1994) 3 SCC 1.

society have vital interest in the orders passed by the court in anticipatory bail applications.

31. In this context it is profitable to refer to a three-Judge Bench decision in *Dr. Narendra K. Amin v. State of Gujarat and another*[13]. In the said case a learned Judge of the Gujarat High Court cancelled the bail granted to the appellant therein in exercise of power under Section 439(2) of the Code. It was contended before this Court that the High Court had completely erred by not properly appreciating the distinction between the parameters for grant of bail and cancellation of bail. The Bench referred to the decision in *Puran v. Rambilas and another*[14] wherein it has been noted that the concept of setting aside an unjustified, illegal or perverse order is totally different from the cancelling an order of bail on the ground that the accused has misconducted himself or because of some supervening circumstances warranting such cancellation. The three-Judge Bench further observed that when irrelevant materials have been taken into consideration the same makes the order granting bail vulnerable. In essence, the three-Judge Bench has opined that if the order is perverse, the same can be set at naught by the superior court. In the case at hand the direction to admit the accused persons to bail on their surrendering has no sanction in law and, in fact, creates a dent in the sacrosanctity of law. It is contradictory in terms and law does not countenance paradoxes. It gains respectability and acceptability when its solemnity is maintained. Passing such kind of orders the interest of the collective at large and that of the individual victims is jeopardised. That apart, it curtails the power of the regular court dealing with the bail applications.

32. In this regard it is to be borne in mind that a court of law has to act within the statutory command and not deviate from it. It is a well settled proposition of law what cannot be done directly, cannot be done indirectly. While exercising a statutory

13. 2008 (6) SCALE 415.

14. (2001) 6 SCC 338.

power a court is bound to act within the four corners thereof. The statutory exercise of power stands on a different footing than exercise of power of judicial review. This has been so stated in *Bay Berry Apartments (P) Ltd. and Anr. v. Shobha and Ors.*[15] and *U.P. State Brassware Corporation Ltd. and Anr. v. Uday Narain Pandey*[16].

33. Judging on the foundation of aforesaid well settled principles, the irresistible conclusion is that the impugned orders directing enlargement of bail of the accused persons, namely, Uttam Das, Abhimanyu Das and Murlidhar Patra by the Magistrate on their surrendering are wholly unsustainable and bound to founder and accordingly the said directions are set aside. Consequently the bail bonds of the aforenamed accused persons are cancelled and they shall be taken into custody forthwith. It needs no special emphasis to state that they are entitled to move applications for grant of bail under Section 439 of the Code which shall be considered on their own merits.

34. The appeals are accordingly disposed of.

D.G. Appeals disposed of.

15. (2006) 13 SCC 737.

16. (2006) 1 SCC 479.

NEEL KUMAR @ ANIL KUMAR

v.

THE STATE OF HARYANA

(Criminal Appeal No. 523 of 2010)

MAY 7, 2012

[DR. B.S. CHAUHAN AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Penal Code, 1860 - ss. 302, 376(2)(f) and 201 - Rape and murder -Allegation that appellant raped his 4 year old daughter and thereafter murdered her - FIR lodged by victim's mother (i.e. appellant's wife) -Trial court enumerated number of incriminating circumstances against the appellant and convicted him - High Court affirmed the conviction - On appeal, held: Appellant was guardian of the child and was duty bound to safeguard the victim - He kept mum and did not give any information to any law enforcing agency or even to the mother of the victim - If somebody else would have committed the offence it was but natural that appellant would have taken steps to initiate legal action to find out the culprit - Silence on his part in spite of such grave harm to his daughter was again a very strong incriminating circumstance against him - The provisions of s.106 of the Evidence Act, 1872 were fully applicable in this case - A shirt and pant belonging to appellant recovered on the basis of his disclosure statement and taken into possession were sent to the FSL for examination - Report of FSL showed that shirt and pant of the appellant were stained with blood - However, no explanation was given by appellant as to how the blood was present on his clothes - Recovery of incriminating material at his disclosure statement, duly proved, was a very positive circumstance against him - No cogent reason to take a view different from the view taken by the courts below - Conviction accordingly upheld - Evidence Act, 1872 - s.106.

Sentence / Sentencing - Father (appellant) raping and murdering his 4 year old daughter - Conviction of appellant u/ss. 302, 376(2)(f) and 201 IPC and death sentence imposed by Courts below - Conviction upheld by Supreme Court - Question regarding imposition of death sentence on appellant - Held: So far as the sentence part is concerned, the case does not fall within the rarest of rare cases - But, considering the nature of offence, age and relationship of the victim with the appellant and gravity of injuries caused to her, appellant cannot be awarded a lenient punishment - In the facts and circumstances of the case, death sentence set aside and life imprisonment imposed, however, appellant directed to serve a minimum of 30 years in jail without remissions, before consideration of his case for pre-mature release - Penal Code, 1860 - ss. 302, 376(2)(f) and 201.

Sentence / Sentencing - Death sentence - When warranted - Held: The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability - Before opting for death penalty the circumstances of the offender also require to be taken into consideration alongwith the circumstances of the crime for the reason that life imprisonment is the rule and death sentence is an exception - The penalty of death sentence may be warranted only in a case where the court comes to the conclusion that imposition of life imprisonment is totally inadequate having regard to the relevant circumstances of the crime - The balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances before option is exercised - For awarding the death sentence, there must be existence of aggravating circumstances and the consequential absence of mitigating circumstances - As to whether death sentence should be awarded, would depend upon the factual scenario of the case in hand.

Code of Criminal Procedure, 1973 - s.313 - Statement under - Duty of accused - Held: It is the duty of the accused to explain the incriminating circumstance proved against him while making a statement u/s.313 CrPC - Keeping silent and not furnishing any explanation for such circumstance is an additional link in the chain of circumstances to sustain the charges against him.

The prosecution case was that the appellant raped his 4 year old daughter and thereafter killed her. The appellant's wife (PW.3) lodged the FIR giving the complete version regarding both the criminal acts i.e. rape as well as murder. The trial court enumerated incriminating circumstances against the appellant as under: (i) The victim was in custody of appellant; (ii) No explanation from the side of appellant as to how such severe injuries were suffered by the victim and how she met with death as these facts were in his special knowledge alone. (III) Non information of the crime by appellant to the police or other members of the family; (iv) Recovery of blood stained clothes of the victim and the appellant from possession of appellant on his disclosure statement; (v) presence of blood on the clothes of appellant and no explanation thereof; (vi) abscondence of appellant after the occurrence and (vii) strong motive against appellant for murder as charges of rape were being raised against him and accordingly convicted the appellant under Sections 302, 376(2)(f) and 201 IPC and awarded death sentence. The High Court affirmed the conviction of the appellant as also the death sentence. Hence the present appeal.

Disposing of the appeal, the Court

HELD: 1. The provisions of Section 106 of the Indian Evidence Act, 1872 were fully applicable in this case. Appellant was guardian of the child and was duty bound to safeguard the victim. The accused had kept mum and

had not given any information to any law enforcing agency or even to the mother of the victim. It comes out from the statement of PW.3 that the information about rape and murder to her was telephonically given by co-accused 'R'. If somebody else would have committed the offence it was but natural that appellant must have taken steps to initiate the legal action to find out the culprit. The silence on his part in spite of such grave harm to his daughter is again a very strong incriminating circumstance against him. The High Court has agreed with the findings recorded by the trial court and confirmed the death sentence after re-appreciating the evidence. The courts below have taken a correct view so far as the application of Section 106 of the Evidence Act is concerned. [Paras 16, 17] [709-C-G]

Prithipal Singh & Ors. v. State of Punjab & Anr. **(2012) 1 SCC 10;** *Santosh Kumar Singh v. State through CBI* **(2010) 9 SCC 747: 2010 (13) SCR 901 and** *Manu Sao v. State of Bihar* **(2010) 12 SCC 310: 2010 (8) SCR 811 - relied on.**

State of West Bengal v. Mir Mohammad Omar & Ors. etc.etc. **AIR 2000 SC 2988: 2000 (2) Suppl. SCR 712;** *Sahadevan @ Sagadevan v. State rep. by Inspector of Police, Chennai* **AIR 2003 SC 215: 2003 (1) SCC 534 - referred to.**

2. A shirt and pant belonging to the appellant recovered on the basis of his disclosure statement (Ext. P23) and taken into possession vide Memo Ext. P25 were sent to the FSL for examination. Report of FSL (Ext.P18) shows that shirt and pant of the appellant were stained with blood. However, no explanation has been given by the appellant as to how the blood was present on his clothes. It is the duty of the accused to explain the incriminating circumstance proved against him while making a statement under Section 313 Cr.P.C. Keeping silence and not furnishing any explanation for such circumstance is an additional link in the chain of

circumstances to sustain the charges against him. Recovery of incriminating material at his disclosure statement, duly proved, is a very positive circumstance against him. There is no cogent reason to take a view different from the view taken by the courts below. [Paras 18, 19, 20] [710-F-G; 711-A-D]

Pradeep Singh v. State of Rajasthan **AIR 2004 SC 3781: 2004 (10) SCC 743 and** *Aftab Ahmad Anasari v. State of Uttaranchal* **AIR 2010 SC 773: 2010 (1) SCR 1027 - relied on.**

3.1. The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability. Before opting for the death penalty the circumstances of the offender also require to be taken into consideration alongwith the circumstances of the crime for the reason that life imprisonment is the rule and death sentence is an exception. The penalty of death sentence may be warranted only in a case where the court comes to the conclusion that imposition of life imprisonment is totally inadequate having regard to the relevant circumstances of the crime. The balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances before option is exercised. [Para 21] [711-E-G]

3.2. It is evident that for awarding the death sentence, there must be existence of aggravating circumstances and the consequential absence of mitigating circumstances. As to whether death sentence should be awarded, would depend upon the factual scenario of the case in hand. There is no reason to disbelieve the above evidence and circumstances nor there is any reason to doubt the commission of offence by the appellant and the

recovery of incriminating material on his disclosure statement. The incriminating circumstances taken into consideration by the courts below can reasonably be inferred. However, so far as the sentence part is concerned, the case does not fall within the rarest of rare cases. But, considering the nature of offence, age and relationship of the victim with the appellant and gravity of injuries caused to her, appellant cannot be awarded a lenient punishment. In the facts and circumstances of the case, the death sentence is set aside and life imprisonment is imposed, however, the appellant must serve a minimum of 30 years in jail without remissions, before consideration of his case for pre-mature release. [Paras 24, 27] [713-D-G; 714-C]

State of Maharashtra v. Goraksha Ambaji Adsul **AIR 2011 SC 2689: 2011 (9) SCR 41;** *Bachan Singh v. State of Punjab* **AIR 1980 SC 898;** *Machchi Singh & Ors. v. State of Punjab* **AIR 1983 SC 957: 1983 (3) SCR 413;** *Devender Pal Singh v. State NCT of Delhi & Anr.* **AIR 2002 SC 1661: 2002 (2) SCR 767;** *Haresh Mohandas Rajput v. State of Maharashtra* **(2011) 12 SCC 56;** *Swami Shraddananda @ Murali Manohar Mishra v. State of Karnataka* **AIR 2008 SC 3040: 2008 (11) SCR 93** *Ramraj v. State of Chattisgarh* **AIR 2010 SC 420: 2009 (16) SCR 367 - relied on.**

Case Law Reference:

(2012) 1 SCC 10	**relied on**	**Para 17**
2000 (2) Suppl. SCR 712	**referred to**	**Para 17**
2003 (1) SCC 534	**referred to**	**Para 17**
2010 (13) SCR 901	**relied on**	**Para 17**
2010 (8) SCR 811	**relied on**	**Para 17**
2004 (10) SCC 743	**relied on**	**Para 19**

2010 (1) SCR 1027	**relied on**	**Para 19**
2011 (9) SCR 41	**relied on**	**Para 22**
AIR 1980 SC 898	**relied on**	**Para 22**
1983 (3) SCR 413	**relied on**	**Para 22**
2002 (2) SCR 767	**relied on**	**Para 22**
2011 (12) SCC 56	**relied on**	**Para 23**
2008 (11) SCR 93	**relied on**	**Para 25**
2009 (16) SCR 367	**relied on**	**Para 26**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 523 of 2010.

From the Judgment & Order dated 17.07.2009 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 268/DB of 2009 in Murder Reference No. 1/09.

Shekhar Prit Jha, Vikrant Bhardwaj for the Appellant.

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

The Judgment of the Court was delivered by

DR. B. S. CHAUHAN, J. 1. This criminal appeal has been preferred against the judgment and order dated 17.7.2009 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 268-DB of 2009, by which it has affirmed the conviction of the appellant under Sections 302/376(2)(f) and 201 of Indian Penal Code, 1860 (hereinafter referred as 'IPC') and accepted the death reference made by the Additional Sessions Judge, Yamuna Nagar at Jagadhari vide judgments and orders dated 2.3.2009/6.3.2009 and confirmed the sentence of death.

2. Facts and circumstances giving rise to this appeal are that :

A. Smt. Roopa Devi (PW.3) wife of Neel Kumar @ Anil Kumar – appellant, had gone to her parental home at village Kesri alongwith her minor son on 26.6.2007 leaving her two children i.e. Sanjana, daughter, 4 years old and Vishal, son, 2 years old at her matrimonial home with her husband – appellant. She had to return back on the same day but could not return and stayed at her parental home. On the same day, she received information by telephone at 4.00 p.m. from her brother-in-law Ramesh Kumar that her husband had committed rape upon her 4 years old daughter Sanjana. Roopa Devi (PW.3) came back to her matrimonial home on the next day i.e. 27.6.2007 alongwith 5-7 persons including her family members and neighbours and found her daughter Sanjana, victim, in an injured condition. The Panchayat was convened to resolve the problems. However, the Panchayat could not resolve the dispute, therefore, Roopa Devi (PW.3), complainant, returned to her parental home alongwith accompanying persons leaving her injured daughter Sanjana and son Vishal in the custody of the appellant at her matrimonial home. Roopa Devi (PW.3) wanted to take her injured daughter for medical help, but the appellant and his family members restricted her and even tried to snatch her 15 days old son from her.

B. Roopa Devi (PW.3) received a telephone call again from her brother-in-law Ramesh Kumar on 28.6.2007 informing her that appellant had killed her daughter Sanjana. She came there alongwith her brother Gulla (PW.4) and lodged the report to P.S. Bilaspur against the appellant for committing the rape on her 4 years old daughter Sanjana on 26.6.2007 and against her brother-in-laws and appellant for committing her murder on 27/28.6.2007 and concealing her dead body. Thus, on her complaint, a case under Sections 376(2)(f), 302, 201/34 IPC vide FIR No. 91 dated 28.6.2007 at Police Station Bilaspur (Haryana) was registered.

C. Immediately, thereafter, on the same day i.e. 28.6.2007, on the application moved by the Investigation Officer, the Deputy Commissioner, Yamuna Nagar, authorised Shri Narender Singh, SDM, Jagadhari to pass an order of exhumation of the dead body from the graveyard and on such order being passed, the dead body was recovered from the graveyard. It was photographed and an inquest report was prepared. Dead body was sent for post-mortem examination. The requisite plan of place of recovery of dead body was prepared. The Investigating Officer inspected the place of occurrence on 29.6.2007 and prepared the site plan. The appellant and his brothers were arrested on 30.6.2007. Appellant was medically examined and on his disclosure statement, the Investigating Officer recovered one blood stained bed sheet from his house and further a gunny bag containing one Pajama, blood stained piece of cloth, pant, shirt and one pillow from a rainy culvert near Majaar of Peer on Kapal Mochan Road (Exts. P-23 and P-25).

D. After filing the chargesheet, the case was committed to the Court of Sessions and on conclusion of the trial, the learned Sessions Judge vide judgment and order dated 2.3.2009 acquitted all other co- accused but convicted the appellant under Sections 302, 376(2)(f) and 201 IPC and vide order dated 6.3.2009 awarded death sentence under Section 302 IPC, life imprisonment under Section 376(2)(f) IPC and rigorous imprisonment for 3 years for the offence under Section 201 IPC.

E. Being aggrieved, the appellant preferred Criminal Appeal No. 268-DB of 2009 in the High Court of Punjab and Haryana at Chandigarh, which was dismissed by the impugned judgment and order dated 17.7.2009 confirming the death sentence upon reference.

Hence, this appeal.

3. Mr. Shekhar Prit Jha, learned counsel appearing for the

appellant, has submitted that appellant has falsely been enroped in the offence by the complainant Roopa Devi (PW.3) as the relationship between the husband and wife had been very strained. Even, subsequently, she filed divorce petition against the appellant. It is quite unnatural that once the complainant Roopa Devi (PW.3) had come from her parental house to her matrimonial home, then, on being informed about the rape by the appellant upon their minor daughter of 4 years of age, the complainant would go back to her parental house leaving the girl in the custody of the appellant and that too, when she was suffering from serious vaginal injuries. Since, the evidence of the complainant and her brother Gulla (PW.4) has been disbelieved in respect of four brothers of the appellant and they have been acquitted, the same evidence could not have been relied upon for convicting the appellant. When the complainant left for her parental house on 27.6.2007, the children had been in the custody of appellant's brother Ramesh Kumar and, therefore, there was no possibility of the appellant committing Sanjana's murder. It is by no means a case which falls in the category of rarest of rare cases warranting the death sentence. The appeal deserves to be allowed.

4. On the contrary, Mr. Kamal Mohan Gupta, learned counsel appearing for the respondent State, has vehemently opposed the appeal contending that the appellant has committed most heinous crime, if he can commit the rape of his own 4 years old daughter, the society cannot be safeguarded from such a person. The manner in which the offence has been committed and the nature of injuries caused to the prosecutrix makes it evident that it is a rarest of rare case wherein no punishment other than death sentence could be awarded, thus, the appeal lacks merit and is liable to be dismissed.

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

6. Smt. Roopa Devi (PW.3), complainant has lodged the

FIR dated 28.6.2007, giving the complete version regarding both the criminal acts i.e. rape as well as murder of Sanjana. This witness also gave details of the Panchayat convened to resolve the dispute and as the same was not resolved, Roopa Devi (PW.3), complainant, went back to her parental home leaving the two minor children with appellant. She came back on receiving the information about the death of her daughter next day and lodged the complaint. On the basis of the said complaint, FIR was registered on 28.6.2007 at 3.20 p.m. and investigation ensued. There is evidence on record to show that after getting the permission on the order of Deputy Commissioner, Yamuna Nagar, the SDM concerned passed the order of exhumation of the dead body of Sanjana and it was sent for post-mortem examination. The post-mortem report suggested the following injuries on her body:

> "Lacerated wound present in vagina extending from anus to urethral opening admitting four fingers of size 6 x 4 cms. Underlying muscles and ligaments were exposed and anus was also torned and on dissection uterus was perforated in the abdomen".

7. The prosecution case has been supported by Gulla (PW.4), brother of the complainant, and further got support from the contents of the divorce petition filed by Roopa Devi (PW.3) complainant, subsequently, wherein it had clearly been stated that the appellant had raped and murdered their 4 years old daughter Sanjana and in that respect, the case was pending in the criminal court. The recoveries had been made by Shri Suraj Bhan (PW.17), Investigating Officer on the basis of disclosure statement made voluntarily by the appellant.

8. Accused Ramesh Kumar, brother of the appellant who had also faced trial had supported the case of the prosecution to the extent that he informed Roopa Devi (PW.3), complainant at Kesri about the commission of rape by the appellant on his daughter and further deposed that on hearing such a news she had come to Bilaspur.

9. Dr. Ashwani Kashyap (PW.2) conducted autopsy on the dead body of the deceased victim and as per his testimony and the post- mortem report (Ext.P3) the cause of death was asphyxia because of throttling which was ante-mortem in nature and sufficient to cause death in ordinary course of events. He also found vaginal and anal wounds on the deceased.

10. Dr. Rajeev Mittal (PW.1) medically examined the appellant and as per his report there was no external injury on the genitals of the appellant. However, he opined that mere absence of injury on private parts of the appellant was no ground to draw an inference that he had not committed forcible sexual intercourse with the victim.

11. Mukesh Garg (PW.11), Sarpanch of village Bilaspur has stated that the S.H.O. has narrated the facts of the case to him and the exhumation of the dead body from the graveyard was done in pursuance of the order of the SDM, Jagadhari. The dead body had been buried by Neel Kumar (appellant) after committing rape and murder of the victim. Thus, this witness was associated in the investigation at the time of exhumation of the dead body.

12. Narender Singh (PW.12), SDM proved the report of ex-humation of the dead body (Ext. P11) and stated that he carried out the same on getting the direction from the Deputy Commissioner. Ish Pal Singh (PW.15), Head Constable and Joginder Singh (PW.16) have supported the prosecution case being the witnesses of arrest and recovery of incriminating material at the voluntary disclosure statement of the appellant.

13. Madan (PW.14) was examined by the prosecution as an eye-witness for the murder of Sanjana. However, he turned hostile and he did not support the case of the prosecution.

14. Suraj Bhan (PW.17), Investigating Officer deposed that he had recovered the dead body from the graveyard on the written permission of the SDM and the same was sent for the

post-mortem after preparing the inquest report under Section 174 of Code of Criminal Procedure, 1973 (hereinafter called 'Cr.P.C.') He had recorded the statement of witnesses under Section 161 Cr.P.C. He inspected the spot of occurrence on 29.6.2007, prepared the site plan and on the next day i.e. on 30.6.2007, arrested the appellant alongwith his brothers. It was at that time the appellant in interrogation made disclosure statement (Ext. P-23) and in pursuance thereof, he recovered the incriminating material as referred to hereinabove. The said articles were taken into possession vide recovery memo Ext. P-25 and sent for FSL report. Subsequently, the positive report was received.

15. The trial court found the testimonies of Roopa Devi (PW.3) complainant, Gulla (PW.4), maternal uncle of the victim, Dr. Ashwani Kashyap (PW.2), Dr. Rajiv Mittal (PW.1) fully reliable and came to the conclusion that it was quite natural that Sanjana deceased could have made oral dying declaration before her mother Roopa Devi (PW.3), complainant. However, even if it is ignored, there were various circumstances against the appellant. The court enumerated the said incriminating circumstances as under:

(I) The victim was in the custody of accused Neel Kumar @ Anil Kumar.

(II) No explanation from the side of this accused as to how such severe injuries were suffered by the victim and how she met with death as these facts were in his special knowledge alone.

(III) Non information of the crime by the accused to the police or other members of the family.

(IV) Recovery of the blood stained clothes of the victim and the accused from the possession of accused on his disclosure statement.

(V) Presence of blood on the clothes of the accused and no explanation thereof.

(VI) Abscondance of the accused after the occurrence.

(VII) Strong motive against the accused for murder as charges of rape were being raised against him.

16. The learned Sessions Court further remarked that as the victim was in the custody of the appellant, there had been no explanation from the side of the accused as to how such severe injuries were suffered by the victim and how she met with death as these facts were in his special knowledge alone. The provisions of Section 106 of the Indian Evidence Act, 1872 (hereinafter called 'Evidence Act') were fully applicable in this case. Appellant was guardian of the child and was duty bound to safeguard the victim. The accused had kept mum and had not given any information to any law enforcing agency or even to the mother of the victim. It comes out from the statement of Roopa Devi (PW.3) that the information about rape and murder to her was telephonically given by co-accused Ramesh Kumar. If somebody else would have committed the offence it was but natural that appellant Neel Kumar@ Anil Kumar must have taken steps to initiate the legal action to find out the culprit. The silence on his part in spite of such grave harm to his daughter is again a very strong incriminating circumstance against him.

The High Court has agreed with the findings recorded by the trial court and confirmed the death sentence after re-appreciating the evidence.

17. In our opinion, the courts below have taken a correct view so far as the application of Section 106 of the Evidence Act is concerned. This Court in *Prithipal Singh & Ors. v. State of Punjab & Anr.* (2012) 1 SCC 10, considered the issue at length placing reliance upon its earlier judgments including *State of West Bengal v. Mir Mohammad Omar & Ors. etc.etc.,* AIR 2000 SC 2988; and *Sahadevan @ Sagadevan v. State*

rep. by Inspector of Police, Chennai, AIR 2003 SC 215 and held as under:

> "That if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused".

(See also: *Santosh Kumar Singh v. State through CBI,* (2010) 9 SCC 747; and Manu *Sao v. State of Bihar,* (2010) 12 SCC 310).

Thus, findings recorded by the courts below in this regard stand fortified by the aforesaid judgments.

18. A shirt and pant belonging to the appellant recovered on the basis of his disclosure statement (Ext. P23) and taken into possession vide Memo Ext. P25 were sent to the FSL for examination. Report of FSL (Ext.P18) shows that shirt and pant of the appellant were stained with blood. However, no explanation has been given by the appellant as to how the blood was present on his clothes.

19. In *Pradeep Singh v. State of Rajasthan* AIR 2004 SC 3781, accused had not given any explanation for the presence

of blood stains on his pant and shirt. He had simply pleaded false implication. Presence of blood on his clothes was found to be incriminating circumstance against him.

It is the duty of the accused to explain the incriminating circumstance proved against him while making a statement under Section 313 Cr.P.C. Keeping silent and not furnishing any explanation for such circumstance is an additional link in the chain of circumstances to sustain the charges against him. Recovery of incriminating material at his disclosure statement duly proved is a very positive circumstance against him. (See also: *Aftab Ahmad Anasari v. State of Uttaranchal,* AIR 2010 SC 773).

20. In view of the above, we do not find any cogent reason to take a view different from the view taken by the courts below and this leads us to the further question regarding the sentence as to whether it could be a rarest of rare case where imposition of death penalty is warranted.

21. The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability. Before opting for the death penalty the circumstances of the offender also require to be taken into consideration alongwith the circumstances of the crime for the reason that life imprisonment is the rule and death sentence is an exception. The penalty of death sentence may be warranted only in a case where the court comes to the conclusion that imposition of life imprisonment is totally inadequate having regard to the relevant circumstances of the crime. The balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances before option is exercised.

22. After considering the issue at length, this court in *State*

of Maharashtra v. Goraksha Ambaji Adsul, AIR 2011 SC 2689, held as under:

> "Awarding of death sentence amounts to taking away the life of an individual, which is the most valuable right available, whether viewed from the constitutional point of view or from the human rights point of view. The condition of providing special reasons for awarding death penalty is not to be construed linguistically but it is to satisfy the basic features of a reasoning supporting and making award of death penalty unquestionable. The circumstances and the manner of committing the crime should be such that it pricks the judicial conscience of the court to the extent that the only and inevitable conclusion should be awarding of death penalty."

(See also: *Bachan Singh v. State of Punjab* AIR 1980 SC 898; *Machchi Singh & Ors. v. State of Punjab* AIR 1983 SC 957; and *Devender Pal Singh v. State NCT of Delhi & Anr.* AIR 2002 SC 1661).

23. A similar view has been taken by this Court in *Haresh Mohandas Rajput v. State of Maharashtra* (2011) 12 SCC 56 observing as under:

> "The rarest of the rare case" comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of the society. The crime may be heinous or brutal but may not be in the category of "the rarest of the rare case". There must be no reason to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. The accused may be a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence. The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the

society. Where an accused does not act on any spur-of-the-moment provocation and indulges himself in a deliberately planned crime and [pic]meticulously executes it, the death sentence may be the most appropriate punishment for such a ghastly crime. The death sentence may be warranted where the victims are innocent children and helpless women. Thus, in case the crime is committed in a most cruel and inhuman manner which is an extremely brutal, grotesque, diabolical, revolting and dastardly manner, where his act affects the entire moral fibre of the society e.g. crime committed for power or political ambition or indulging in organised criminal activities, death sentence should be awarded."

24. Thus, it is evident that for awarding the death sentence, there must be existence of aggravating circumstances and the consequential absence of mitigating circumstances. As to whether death sentence should be awarded, would depend upon the factual scenario of the case in hand.

The instant case is required to be examined in the light of the aforesaid settled legal propositions. There is no reason to disbelieve the above evidence and circumstances nor there is any reason to doubt the commission of offence by the appellant and the recovery of incriminating material on his disclosure statement. The incriminating circumstances taken into consideration by the courts below can reasonably be inferred. However, so far as the sentence part is concerned, in view of the law referred to hereinabove, we are of the considered opinion that the case does not fall within the rarest of rare cases. However, considering the nature of offence, age and relationship of the victim with the appellant and gravity of injuries caused to her, appellant cannot be awarded a lenient punishment.

25. A three Judge Bench of this Court in *Swami Shraddananda @ Murali Manohar Mishra v. State of Karnataka,* AIR 2008 SC 3040, considering the facts of the

case, set aside the sentence of death penalty and awarded the life imprisonment but further explained that in order to serve the ends of justice, the appellant therein would not be released from prison till the end of his life.

26. Similarly, in *Ramraj v. State of Chattisgarh,* AIR 2010 SC 420, this Court while setting aside the death sentence made a direction that the appellant therein would serve minimum period of 20 years including remissions earned and would not be released on completion of 14 years imprisonment.

27. Thus, in the facts and circumstances of the case, we set aside the death sentence and award life imprisonment. The appellant must serve a minimum of 30 years in jail without remissions, before consideration of his case for pre-mature release.

28. The appeal stands disposed of.

B.B.B. Appeal disposed of.

UNION OF INDIA & ORS.
v.
RAFIQUE SHAIKH BHIKAN & ANR.
(Special Leave Petition (Civil) No. 28609 of 2011)

MAY 8, 2012

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

Hajj Policy:

Registration of Private Tour Operators (PTOs) for ferrying Hajj Pilgrims - Eligibility conditions - Reasonableness of restrictions imposed for registration as PTO - Held: Object of registering PTOs is not to distribute the Hajj seats to PTOs for making business profits but to ensure that the pilgrim may be able to perform his religious duty without undergoing any difficulty, harassment or suffering - Restriction would not be unreasonable merely because in a given case it operates harshly - Therefore, no objection can be taken to high standards and stringent conditions being set up for registration as PTOs and the court's interference would be called for only if it is shown that any of the conditions was purely subjective or designed to exclude any individual or group of private operators/travel agents i.e. bordering on malice.

Registration of Private Tour Operators - Conditions laid down in the 2012 Hajj Policy - Restriction of minimum requirement of 250 sq. ft. office area (carpet) - Held: There is no arbitrariness or unreasonableness in the requirement of minimum office area - This condition ensures that only genuine operators approach for Hajj Quota i.e. those who have a proper and well maintained office and those who are genuinely interested in taking the pilgrims to Saudi Arabia - The condition is further meant to scrutinize the PTOs who sell their Quota to other PTOs.

Registration of Private Tour Operators - Restriction of minimum annual turnover of Rs.1crore and refundable security deposit of Rs.25 lakhs - Held: Each PTO is to be given quota of at least 50 pilgrims as per the bilateral agreement between Government of India and Kingdom of Saudi Arabia - Admittedly, the turnover on the basis of a quota of 50 Hajj pilgrims alone would not be less than Rs.75 lakhs - this would mean that if a private operator/travel agent is asking for a readymade business package worth Rs.75 lakhs in turnover, he should have at least a turnover of Rs.1 crore from his own business - Thus, the turnover fixed in the Policy is a modest figure - Similarly security deposit of Rs.25 lakhs is reasonable - PTOs should be financially sound to face the unforeseen situation arising during Hajj - This condition would be necessary to keep PTOs under check so that they provide the promised facilities to the pilgrims.

Registration of Private Tour Operators - Condition of disqualification in case of court case against the private operator - Held: Court case that might render a private operator/travel agent ineligible for registration means a case instituted against the private operator/travel agent as an accused or in regard to some liability against him.

Hajj subsidy - Central Government directed to progressively reduce the amount of subsidy so as to completely eliminate it within a period of 10 years as subsidy money can be more profitably used for upliftment of the community in education and other indices of social development.

Goodwill Delegation - Nomination of members of Delegation - Held: Was in complete violation of Article 14 of the Constitution - No purpose can be served by sending large, unwieldy, amorphous and randomly selected delegation - Practice of sending Delegation must come to stop.

Reservation of 11,000 seats for different categories by

Government of India - Union of India directed to file affidavit stating in greater detail the way the quota of 11,000 seats is being allocated for 2012 Hajj, the procedure followed by Hajj Committee of India and State Hajj Committee in making selection for sending pilgrims for Hajj

Prem Printing Press v. Bihar State Text Book Publishing Corporation Ltd. & Ors., **2001 (4) PLJR 311;** *Ranjit Kumar Ghosh v. State of Bihar and Others* **2004 (3) BLJR 2242;** *Tata Cellular v. Union of India* **(1994) 6 SCC 651: 1994 (2) Suppl. SCR 122;** *Union of India and another v. International Trading Co. and another* **(2003) 5 SCC 437: 2003 (1) Suppl. SCR 55 - relied on**

Case Law Reference:

2001 (4) PLJR 311	**relied on**	**Para 11**
2004 (3) BLJR 2242	**relied on**	**Para 12**
1994 (2) Suppl. SCR 122	**relied on**	**Para 13**
2003 (1) Suppl. SCR 55	**relied on**	**Para 14**

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 28609 of 2011.

From the Judgment & Order dated 05.10.2011 of the High Court of Bombay in Writ Petition (L) No. 1945 of 2011.

WITH

SLP (C) No. 33190-33217 of 2011.

T.P. (C) Nos. 191, 192, 196, 197, 198 & 199 of 2012.

G.E. Vahanvati, AG, L. Nageshwar Rao, Fakhruddin, V. Giri, P.S. Narasimha, K.V. Viswanathan, Colin Gonsalves, Harris Beern, Nishanth Patil, Mushtaq Salim, B.V. Balram Das, Gaurav Agrawal, Shankar Narayanan, Abdul Karim Ansari,

Surya Kamal Mishra, Harshad V. Hameed, Mohammed Saddique, Neeraj Shekhar, Sridhar Potaraju, Gaichangpou Ganmei, D. Sri Rao, Zulfier Ali, P. George Giri, Pooja Sharma, Niolfar Qureshi, Khushi Moho, Vijendra Kumar, Shaikh Chand Saheb, Biju P. Raman, Usha Nandani, Nikhil Goel, Marsook Bafaki, Naveen Goel, Shakeel Ahmed, Sadiya Shakeel, Ajay Veer Singh Jain, Atul Agarwal, Anish Jain, Nitin Jain, Divya Garg, Mohd. Irshad Hanif, Anand Mishra, Amarendra K. Singh, Dr. Vipin Gupta, B.V. Deepak, A.K. Singh, Toshika Katare, Rana Parveen Siddiqui, Sudarshan Rajan, Mohd. Qamar Ali, S. Ritam Khare, A. Karim Ansari, Pradhuman Gohil, Vikash Singh, Satish Aggarwal, Praveen Agrawal, Shakil Ahmed Syed, C.N. Sreekumar, E.M.S. Anam, P. Narasimhan, Jayasree Narasimhan, Samina-In-Person for the appearing parties.

The order of the Court was delivered by

AFTAB ALAM, J.

SLP (CIVIL) NO.28609/2011

1. This special leave petition has been filed by the Union of India against an order passed by Bombay High Court on October 5, 2011 in a batch of writ petitions challenging the Government of India 2011 Haj Policy that required a private operator/travel agent to have "minimum office area of 250 sq. ft." as one of the eligibility conditions for registration for ferrying pilgrims for Hajj. The High Court rejected the challenge but gave directions to the Government of India to allocate certain seats to some of the writ petitioners from the eight hundred seats from the Central Government quota that had not been allocated to anyone till the time of passing of the order by the court. Aggrieved by the directions given by the High Court, the Union of India filed this special leave petition and by order dated October 14, 2011 this Court stayed the operation of the directions given by the High Court. In any event, by the time the

matter came before this Court, the directions could not be acted upon as there was very little time left for the commencement of Hajj for that year.

2. By a subsequent order dated February 17, 2012 this Court declared its intent to examine the Haj policy of the Government in all its aspects and not to limit the matter to the issue of Private Tour Operators (PTOs).

3. As directed by the Court, the Government of India has filed its affidavit enclosing, among other documents, its Haj Policy for the year 2012 (2012 Haj Policy). A number of intervention petitions are filed in which many issues are raised; IAs are also filed in very large numbers on behalf of private operators/ travel agents (either individually or through associations) in which objections are raised against one or the other condition for eligibility for registration as PTOs for ferrying Hajj pilgrims.

4. By this interim order, we propose to deal with some of the issues arising from the 2012 Haj Policy on a priority basis leaving others to be dealt with in due course.

THE PTOs

5. The dispute between private operators/travel agents and the Government of India for registration as PTO for carrying Hajj Pilgrims is of a recent origin but is tending to become an annual feature. It is, therefore, necessary to address the issue and to conclusively resolve it.

6. In order to clearly understand the context in which the dispute arises a few facts are required to be taken into account. Under a bilateral agreement signed between the Government of India and the Kingdom of Saudi Arabia every year, the latter Government assigns a fixed number of pilgrims that are permitted to visit Saudi Arabia for performing Hajj. Out of the overall number, a relatively small portion is specified for the PTOs and the rest for the Haj Committee of India. Before 2002,

the PTOs were allocated Hajj seats directly by the Kingdom of Saudi Arabia and there was, therefore, no involvement of the Government of India in the allocation of any Hajj quota to the PTOs. After Hajj 2001, the Kingdom of Saudi Arabia made it mandatory for the PTOs to come through their respective Governments. From 2002, therefore, the Government of India was obliged to evolve a system under which private operators/ travel agents would be registered as PTOs and following the registration would be allocated quotas from the overall number of pilgrims specified for PTOs. It is, thus, to be seen that a private operator/travel agent needs first to get registered as PTO and it would then get a fixed number of pilgrims for carrying for Hajj. For registration of a private operator/travel agent as PTO, the Government of India frames policy laying down conditions subject to which registration would be given. It further frames a policy for allocation of quotas to the registered PTOs from the overall number of pilgrims assigned to PTOs in the bilateral agreement with the Kingdom of Saudi Arabia. As noted above, this arrangement began from 2002 when the Kingdom of Saudi Arabia made it mandatory for the PTO to come through their respective Governments. Initially, there were not many private operators/travel agents coming forward to claim any share in the seats allocated in the bilateral agreements for the PTOs but around the year 2006 more and more private operators/travel agents started claiming allocation from the Hajj seats reserved for PTOs. It appears that it took three or four years for the people in this line of business to realize that this was the opening up of a new highly lucrative commercial venture. It is, thus, to be seen that though for the past four or five years the number of pilgrims reserved for PTOs in the bilateral agreement has slightly gone down, there has been a large increase in the number of registered PTOs and an even larger increase in the number of applications for registration as PTOs. This would be evident from the following chart:-

Sl. No.	Haj Year	Number of PTOs	Total seats for PTOs
1	2005	239	35,960
2	2006 I	277	45,455
3	2006 II	293	46,930
4	2007	297	47,000
5	2008	298	47,080
6	2009	615(*)	47,405
7	2010	602(**)	45,637
8	2011	567(***)	45,441
9	2012	-	45,000

(* comprising 297 old PTOs and 315 new ones)

(** 13 PTOs were disqualified in 2010 because of adverse reports on them)

(*** excluding Duplication of one PTO).

7. It is stated in the affidavit filed by the Union of India that for Hajj 2011, 1322 applications were received from private operators/travel agents, out of which, only 567 were found eligible and the 45,491 seats were distributed to them as per the PTO policy for Haj 2011. Some of the private operators/ travel agents who failed to get registration approached the Bombay High Court in a batch of Writ Petitions in which the High Court passed the order from which this special leave petition arises.

8. From these facts, it is not difficult to deduce that the

dispute between the private operators/travel agents and the Government of India in regard to registration as PTOs arises from a conflict of object and purpose. For most of the private operators/travel agents registration as PTOs is mainly a question of more profitable business. Under the bilateral agreement no PTO can be given a quota of less than fifty pilgrims. Normally, a quota of fifty pilgrims would mean, on an average and by conservative standards, a profit of rupees thirty five to fifty lakhs. This in turn means that any private operator/ travel agent, successful in getting registered as a PTO with the Government of India would easily earn rupees thirty five to fifty lakhs in one and a half to two months and may then relax comfortably for the rest of the year without any great deal of business from any other source. For the Government of India, on the other hand the registration of the PTOs, is for the purpose to ensure a comfortable, smooth and trouble-free journey, stay and performance of Hajj by the pilgrims going through the PTOs.

9.The pilgrim is actually the person behind all this arrangement. For many of the pilgrims Hajj is once in a life time pilgrimage and they undertake the pilgrimage by taking out the savings made over a life time, in many cases especially for this purpose. Hajj consists of a number of parts and each one of them has to be performed in a rigid, tight and time-bound schedule. In case due to any mismanagement in the arrangements regarding the journey to Saudi Arabia or stay or traveling inside Saudi Arabia any of the parts is not performed or performed improperly then the pilgrim loses not only his life savings but more importantly he loses the Hajj. It is not unknown that on landing in Saudi Arabia a pilgrim finds himself abandoned and completely stranded.

10. It is, thus, clear that in making selection for registration of PTOs the primary object and purpose of the exercise cannot be lost sight of. The object of registering PTOs is not to distribute the Hajj seats to them for making business profits but to ensure that the pilgrim may be able to perform his religious

duty without undergoing any difficulty, harassment or suffering. A reasonable profit to the PTO is only incidental to the main object.

11. In *Prem Printing Press v. Bihar State Text Book Publishing Corporation Ltd. & Ors.,* 2001 (4) PLJR 311 relating to the grant of contract for printing of text books by the Bihar State Text Book Publishing Corporation Ltd., coming up before Patna High Court one of us (Aftab Alam J.) considered question of the importance of the work and its objective in granting contracts by statutory bodies and made the following observations:

> "3. During the past three decades a substantial amount of case law has accumulated on the question of award of government contracts and a lawyer with sufficient skills may without difficulty press into service certain observations from the earlier decisions in any dispute relating to the award of government *contracts. But while hearing learned arguments from the counsel appearing for the parties I was unable to keep out of my mind for a moment the fact that the contract in dispute was for printing of school text books for the academic year 2001 and though two out of the three parts of the year is already over, the school children are yet to receive the books intended for them.* While lengthy arguments were advanced on the plea of upholding the rights-of the individual and much reliance was placed on a number of Supreme Court decisions, I was unable to relinquish the thought that *the contract for printing of school text books for a particular academic year was basically different* from and could not be viewed in the same way as a contract for ten years for extraction of resin from forests (Kasturi Lal; (1980) 4 SCC 1) or the contract for the supply of fresh milk for the Military Farms (Harminder Singh Arora; (1986) 3 SCC 247) or the contract for allotment of damaged stocks of rice (Food Corporation of India; A.I.R. 1993 SC 1601) or the grant of licence for the operation of 'Cellular Mobile Telephone

> Service' (Tata Cellular: A.I.R. 1996 SC 11) or the contract for publication of telephone directories of Mahanagar Telephone Nigam Limited (Sterling Computers Ltd; A.I.R. 1996 SC 51) or the contract for development and exploration of oil fields (Centre for Public Interest Litigation; A.I.R. 2001 SC 80).
>
> 4. *To my mind, upholding of individual rights and the enforcement of the individual's rights by the intervention of the writ court is undoubtedly important but in doing so the court must not over look the damage that might be caused to a larger public cause, as in this case.* Speaking for myself I would not have entertained this writ petition and thrown it out at the very threshold, indeed leaving it open for the Petitioner to claim damages by bringing an action against the Corporation before a Civil Court. Such a course would not have rendered the Petitioner remediless and at the same time it would also have saved this Court from finding itself in a position where it may be seen as causing obstruction in the expeditious and timely supply of text books to school children."
>
> (emphasis added)

12. In another case *Ranjit Kumar Ghosh v. State of Bihar and Others* [2004 (3) BLJR 2242] dealing with the purchase of indelible ink by the Election Commission for proper conduct of election Aftab Alam J. (once again as a judge of Patna High Court) made the following observations:-

> "15. What was observed in the case of printing of text-books applies with greater force to this case. Democracy is basic to and inseparable from our constitutional scheme. The survival of democracy depends upon proper conduct of elections and the importance of indelible ink is quite obvious for the proper conduct of elections. The purchase of indelible ink therefore cannot be taken in the same way as the purchase of other common materials such as office furniture, stationary and

other articles of ordinary use by the Election Commission. Putting the purchase of indelible ink at par with the other regular purchases would throw the field open to private players and one predictable out-come of it would be that the purchase of indelible ink would inevitably get embroiled in Court cases. On each occasion one or the other of the unsuccessful tenders would drag the dispute with regard to the grant of the supply order to Court. This would be at a time when elections are very near and all the resources and attention of the Election Commission should be focussed on holding the elections properly. At that stage a notice from the Court to meet the objections of the unsuccessful tenders in the matter of purchase of ink would naturally have a debilitating effect on the Commission and it may also be reflected in the conduct of elections by it. Such a situation, the Court would like to avoid at all costs.

16. What is discussed above are important considerations in the matter of purchase of indelible ink for holding elections. Nevertheless, this Court should have put aside these considerations, howsoever, weighty, had it been satisfied that the present arrangement for the purchase of the ink was tainted with arbitrariness or unreasonableness or it had the slightest tinge of mala fide but on an over all examination of the matter the Court feels satisfied that the arrangement does not suffer from any of those vices. The arrangement was evolved by the Election Commission, with the aid of Government controlled agencies when the constitutional republic of India was only twelve years old and when no private trader might have come forward to help the commission in its work on his expenses. The Commission has stuck to the arrangement that was evolved forty years ago. The arrangement does not confer any material benefits upon anyone and it does not lead to the profiteering by any individual person, inasmuch as, M/s. Mysore Paints and Varnishes Ltd. is a Government concern. In these circumstances, the

purchase of indelible ink by the Commission from the Government owned company cannot be described as distribution of any largess by the State."

13. In *Tata Cellular v. Union of India* (1994) 6 SCC 651, a three Judge Bench of this Court in paragraph 70 of the judgment made the following observations:-

> "It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. *There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down."*
>
> (emphasis added)

14. In a more recent decision in *Union of India and another v. International Trading Co. and another* (2003) 5 SCC 437, relating to the renewal of the permit granted under the provisions of the Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981, while reversing the decision of the High Court, this Court, in paragraphs 22 and 23 of the judgment, held and observed as follows:-

> "22. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities and adopt trade policies. As noted above, the ultimate test is whether on

the touchstone of reasonableness the policy decision comes out unscathed.

23. Reasonableness of restriction is to be determined in an objective manner *and from the standpoint of interests of the general public and not from the standpoint of the interests of persons upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved; the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the relevant time, enter into judicial verdict.* The reasonableness of the legitimate expectation has to be determined with respect to the circumstances relating to the trade or business in question. Canalisation of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country. (See *Parbhani Transport Coop. Society Ltd. v. Regional Transport Authority,* AIR 1960 SC 801, *Shree Meenakshi Mills Ltd. v. Union of India* (1974) 1 SCC 468, *Hari Chand Sarda v. Mizo District Council,* AIR 1967 SC 829 and *Krishnan Kakkanth v. Govt. of Kerala,* (1997) 9 SCC 495."

(emphasis added)

15. Seen in the light of the aforesaid decisions, no objection can be taken to high standards and stringent conditions being set up for registration as PTOs and the court's interference would be called for only if it is shown that any condition(s) was purely subjective or designed to exclude any individual or group of private operators/travel agents, i.e., bordering on malice.

16. After this rather long preface, we now proceed to examine the conditions laid down for registration of PTOs in the 2012 Haj Policy.

17. First of all a young lady appearing-in-person, stated before us that she worked as a private operator/travel agent and she was aggrieved by clause 4 of the press release for registration of Private Tour Operators - Hajj 2012, that put a restriction over more than one member of a family getting registration as PTO. Clause 4 of the press release reads as under:-

> "4. In case more than one member of a family applies which includes wife and dependent children, only one member of such family will be eligible for registration for Hajj-2012."

18. The lady submitted that though her husband was also in the same business but she worked as private operator/travel agent separately and independently from her husband. She further submitted that simply because her husband was also in the same business, there was no reason to deny her registration as PTO.

19. In response to the lady's apprehension, the learned Attorney General in his most amiable manner assured the lady and the Court that in case more than one member of a family satisfied the eligibility conditions and one of them was a woman, she would be given preference for registration to the exclusion of others and if there was no woman, preference would be given to the member of the family who was oldest in the business.

20. In regard to clause 4, another objection was raised that it does not define "family" comprehensively and the Court was asked to give direction for a comprehensive definition of the term "family". There is no substance in the objection and we find that there is sufficient clarity as to what means "family". In case anyone makes a complaint that in the process of registration he/she was eliminated arbitrarily and in a mala fide

way by abusing the restrictive provision of clause 4, that complaint may be examined on its own merits.

Minimum requirement of 250 sq. ft. office area (carpet)

21. A number of individuals and groups joined in the objection against the condition that requires a minimum office area (carpet) of 250 sq. ft. and submitted that the condition was arbitrary and was aimed at excluding the smaller operators. It was submitted that the requirement of having such a large area for office was quite harsh especially for a place like Mumbai.

22. This condition must also be viewed keeping the interest of the pilgrim as paramount. Learned Attorney General submitted that according to the Saudi Regulations, a PTO must be allotted a minimum of 50 pilgrims. He further pointed out that Hajj is a pilgrimage on foreign soil and it comprises a number of rituals. Since a majority of the pilgrims would be going for Hajj for the first time, the PTO needs to extensively brief the pilgrims about the rituals and the procedure to be followed during Hajj. Separate classes for briefing the pilgrims need to be conducted by the PTO. Individual agreements are required to be made with the pilgrims by the PTO for which the pilgrims need to visit the office of the PTO. All logistics including ticketing, accommodation, visa processing etc. has to be made by the PTO for which they need the presence of pilgrims. Further, this condition is laid down to make sure that only genuine operators approach the Ministry for Hajj quota, i.e. those who have a proper and well maintained office and who are genuinely interested in taking the pilgrims to Saudi Arabia. The condition was further meant to scrutinize the PTOs who sell their quota to other PTOs. The Attorney General stated that during the 2010 Hajj, the Ministry got complaints from various quarters regarding black marketing of seats by some of the PTOs. It was informed that some of the PTOs after getting registration and allocation of seats instead of carrying the pilgrims themselves sold the seats to other PTOs. The Ministry decided to take action against such unscrupulous PTOs but it found that many of them had no offices at all. The addresses

furnished by them were fake and they were all fly by night operators. A genuine PTO should be having an office with a reasonable area. The condition is provided to protect the interests of the pilgrims.

23. On a consideration of submissions made on behalf the parties, we see no arbitrariness and unreasonableness in the requirement of a minimum office area (carpet) of 250 sq. feet.

Annual turnover of Rs.1 crore.

24. Many objections were raised against the requirement to furnish documents showing minimum annual turnover of Rs.1 crore for the years 2009-2010 or 2010-2011.

25. Mr. N. Rao, senior advocate appearing for a group of private operators/ travel agents, in course of his submissions, admitted that the turnover on the basis of a quota of 50 Hajj pilgrims alone would not be less than Rs.75 lakhs. This means that if a private operator/travel agent is asking for a readymade business package worth Rs.75 lakhs in turn over he/she should at least show a turn over of rupees one crore from his own business. Seen, thus, the turn over fixed in the Government policy appears to be a modest figure.

Security deposit of Rs.25 lakhs

26. What is stated above in regard to the annual turnover would equally apply in respect of the refundable security deposit of Rs.25 Lakhs.

27. In addition, the learned Attorney General pointed out that in case any unforeseen situation arises during Hajj, the PTO should be financially sound enough to face it. The Attorney General further informed the Court that it was often seen in the past that PTOs left the pilgrims in Kingdom of Saudi Arabia and what is worse left them unattended even while hospitalised in Kingdom of Saudi Arabia. There were instances when pilgrims who met with an accident during their stay in Kingdom of Saudi Arabia were not given any medical aid or any kind of help or assistance. In many cases the PTOs did not provide

even the promised facilities and this condition was, therefore, necessary to keep them under a check.

28. We see no unreasonableness in the condition.

Court cases

29. The learned Attorney General clarified that a court case against a private operator/travel agent that would disqualify him/her for registration did not mean a case instituted by him/her for enforcement of any constitutional or legal rights. The court case that might render a private operator/travel agent ineligible for registration means a case instituted against the private operator/travel agent as an accused or in regard to some liability against him.

On-line applications

30. It may be recorded here that the learned Attorney General accepted one of the suggestions made by Mr. P.S. Narasimha, learned senior counsel appearing for a group of private operators/ travel agents, that applications may be made on-line, subject to the condition that the on-line application must be complete in all respects.

31. On hearing all sides on the conditions for registration, we are satisfied that none of the conditions can be said to be arbitrary or unreasonable and the conditions prescribed in the Government of India 2012 Haj Policy do not warrant any interference by this Court. The 2012 Haj Policy for registration of PTO as contained in Annexure P5 to the affidavit filed on behalf of the Union of India is, accordingly, approved for the 2012 Hajj.

32. The grant of approval to Annexure P5, however, is not to say that there is no scope for improvement in the policy of registration for PTOs. We feel that there is a serious omission in the policy in that it does not require the applicants for registration to disclose the kind of arrangements they proposed to offer to the pilgrims and the charges they would levy from the pilgrims. We realize that at the stage of applying for

registration the applicant may give only a basic idea of the standard of arrangements and an approximate quotation of charges but even that would provide some check against fixing inflated and arbitrary prices on seats once registration is granted.

33. We would further like to point out that there is another way of looking at the process of registration. The Government of India has presently adopted an open ended approach under which any private operator/travel agent who satisfies the conditions in the Haj Policy is found eligible and granted registration. Now, it is undeniable that the number of PTOs cannot exceed 900, because in that case the number of seats allotted to each of them would go below 50, which is impermissible under the bilateral agreement. In other words, there is an inbuilt ceiling on the number of PTOs. If that be so, why cannot the ceiling be put on a more manageable number such as 600 to 700 and selection be made from the applicants on a competitive basis applying a uniform criteria.

THE HAJJ SUBSIDY

34. As regards the Hajj subsidy, from the figures for the past 19 years given in the affidavit filed by the Union of India, it appears that the amount of subsidy has been increasing every year. This is on account of increase both in the number of pilgrims and the travel cost/air fare. In the year 1994, the number of pilgrims going for Hajj from India was as low as 21035; in 2011, the number of pilgrims increased to 125000. In the year 1994, the cost of travel per pilgrim was only Rs.17000.00; in the year 2011, it went up to Rs.54800.00. As a result, the total Hajj subsidy that was Rs.10.51 crores in the year 1994 swelled up to Rs.685 crores in the year 2011.

35. The Union of India has justified the grant of subsidy stating, in paragraph 21 of the affidavit, as follows:

> "The Ministry of Civil Aviation floats a tender to select an airline to get a competitive fare to ferry the Haj pilgrims. For the year 2010, the fare per pilgrim was Rs.47,675/-

and in 2011 was Rs.54,800/-. *The higher fares charged by the Airlines during the Haj period vis-à-vis other times of the year is due to regulations imposed by the Saudi Arabian Authorities during the Haj period. The norm is that the Airline should carry pilgrims to Jeddah and return with zero load and vice versa.* This forces the Airlines to increase the fares, which otherwise come to around Rs.25,000/. Therefore, the Government thought it fit to collect a reasonable fare from the pilgrim and the additional fare charged because of the Haj specific logistics is paid by the Government to the airline. The Government also decided not to pass on and burden the additional amount charged by the airline, purely on logistics, to the pilgrims. During the Haj of 2011, each pilgrim was charged Rs.16,000/- towards airfare and the additional amount of Rs.38,000/- per Haji is what is termed "subsidy". It is submitted that the subsidy is given only to those pilgrims who go through the Haj Committee of India."

36. It is further stated in paragraph 24 that the grant of Hajj subsidy by the Government of India was challenged before this Court in a petition under Article 32 of the Constitution of India registered as Writ Petition (Civil) No.1 of 2007 (*Prafull v. Union of India*). This Court by a reasoned judgment and order dated January 28, 2011, dismissed the writ petition upholding the constitutional validity of the Haj Committee Act, 2002 and the grant of subsidy by the Government of India in the air fare of the pilgrims.

37. From the statement made in paragraph 21 of the affidavit, as quoted above, it is clear that the Government of India has no control on the cost of travel for Hajj. The air fare to Jeddah for traveling for Hajj is increased by airlines to more than double as a result of the regulations imposed by the Saudi Arabian Authorities. It is illustratively stated in the affidavit that in the year 2011, the air fare for Hajj was Rs.58,800/- though the normal air fare to and from Jeddah should have been

around Rs.25,000/. In the same paragraph, it is also stated that for the Hajj of 2011, each pilgrim was charged Rs.16,000/- towards air fare. In other words, what was charged from the pilgrims is slightly less than 2/3rd of the otherwise normal fare. We see no justification for charging from the pilgrims an amount that is much lower than even the normal air fare for a return journey to Jeddah.

38. As regards the difference between the normal air fare and increased fare, we appreciate the intent of the Government of India to provide subsidy to cover the additional burden resulting from the stringent regulation imposed by the Saudi Arabian Authorities. We also take note of the fact that the grant of subsidy has been found to be constitutionally valid by this Court. We are also not oblivious of the fact that in many other purely religious events there are direct and indirect deployment of state funds and state resources. Nevertheless, we are of the view that Hajj subsidy is something that is best done away with.

39. This Court has no claim to speak on behalf of all the Muslims of the country and it will be presumptuous for us to try to tell the Muslims what is for them a good or bad religious practice. Nevertheless, we have no doubt that a very large majority of Muslims applying to the Haj Committee for going to Hajj would not be aware of the economics of their pilgrimage and if all the facts are made known a good many of the pilgrims would not be very comfortable in the knowledge that their Hajj is funded to a substantial extent by the Government. We remind ourselves that the holy Quran in verse 97 in Surah 3, Al-e-Imran ordains as under:

> " 97. In it are manifest signs (for example), the Maqam (place) of Ibrahim (Abraham); whosoever enters it, he attains security. And Hajj (pilgrimage to Makkah) to the House (Ka'bah) is a duty that mankind owes to Allah, *those who can afford the expenses (for one's conveyance, provision and residence);* and whoever disbelieves [i.e. denies Hajj (pilgrimage to Makkah), then he is a disbeliever of Allah], then Allah stands not in need of any of the Alamin

(mankind, jinn and all that exists)."[1]

1. The Noble Qur'an (English Translation of the meaning and commentary) published by the Ministry of Islamic Affairs, Endowments, Da'wahand Guidance of the Kingdom of Saudi Arabia which supervises King Fahd Complex For The Printing of the Holy Qur'an in Madinah Munawwarah.

On being asked the meaning of the word "Al Sabeel' occurring in the verse, the Prophet is reported to have said, 'provisions for journey and the means of transport' (Bulughul Muram by Ibne Hajr, 667 & 713: Jassas Razi, Ahkam-ul-Quran, Darul-Kitab-ul Arabi Vol.2 Page 23 : also in Tafseer Ibne Kaseer published by Tameer-e-Insaniyat, Urdu Bazar, Lahore, Vol.1 Pages 458-459).

On being asked when Hajj becomes obligatory, the Prophet is reported to have said when the provisions of journey and the mode of transport are available. (Tirmizi 813).

It is related that people from Yaman used to come for pilgrimage without any provisions with them, saying that they were people trusting in God and when they came to Makkah, they resorted to begging: The holy Qur'an thus addressed this issue in Verse 197 Surah 2. Al-Baqarah (Bukhari, 1523).

197. The Hajj (pilgrimage) is (in) the well-known (lunar year) months (i.e. the 10th month, the 11th month and the first ten days of the 12th month of the Islamic calendar, i.e. two months and ten days). So whosoever intends to perform Hajj therein (by assuming Ihram), then he should not have sexual relations (with his wife), nor commit sin, nor dispute unjustly during the Hajj. And whatever good you do, (be sure) Allah knows it. And take a provision (with you) for the journey, but the best provision is At-Taqwa (piety, righteousness). So fear Me, O men of understanding!

Hajj is obligatory when one has control over expenses of traveling and mode of transport whether as owner or on hire. Borrowing or using the means owned by someone else is impermissible. If someone offers gift for going for Hajj one is within rights to accepts or reject the offer. The expenses of traveling and mode of transport means that one should have, besides a house for residence, clothes, household articles, sufficient money for traveling to Makkah and for coming back; if there are any loans, to repay them and to leave behind sufficient money for expenses on those dependent upon him. (Fatawa-e-alamgiri edited and corrected by Abdul Latif Hasan Abdul Rehman Darul Kutubul Ilmiya Beirut, Lebanon 2000 Vol.1 page 240).

See also: the Religion of Islam by Maulana Mohammad Ali S.Chand and Company pages 525-526.

See also: Kitab-ul-Fiqh by Abdul Rehman Al Jazeeri translatedby Mr. Manzoor Ahsan Abbassi, published by Mehqama Auqaf Punjab, Lahore, 1977 Pages 1034-1035.

See also: Qamusool Fiqh by Khalid Saifulla Rehmani, Kutubkhana Naiyeemya Deoband 206, Vol.3 Pages 195-196.

40. We, therefore, direct the Central Government to progressively reduce the amount of subsidy so as to completely eliminate it within a period of 10 years from today.

41. The subsidy money may be more profitably used for upliftment of the community in education and other indices of social development.

42. Before leaving the issue of Hajj subsidy, we would like to point out that as the subsidy is progressively reduced and is finally eliminated, it is likely that more and more pilgrims would like to go for Hajj through PTOs. In that eventuality the need may arise for a substantial increase in the quota for the PTOs and the concerned authorities would then also be required to make a more nuanced policy for registration of PTOs and allocation of quotas of pilgrims to them. For formulating the PTO policy for the coming years, the concerned authorities in the Government of India should bear this in mind. They will also be well advised to invite and take into account suggestions from private operators/ travel agents for preparing the PTO policy for the future.

THE GOODWILL HAJJ DELEGATION

43. The issue of the Goodwill Hajj Delegation raises two questions; one in regard to the reasonableness and justification for sending an official delegation on the occasion of Hajj and the other about its composition and the manner in which people are nominated as members of the official delegation. In the affidavit of the Union of India, it is stated that the Goodwill Delegation was first sent to Saudi Arabia in the year 1967 and since then the delegation is being sent every year. The primary purpose of the delegation, according to the affidavit, is "to convey goodwill on the auspicious occasion of Hajj to the Government of Saudi Arabia as well as to the Indian Pilgrims". It is further stated that the delegation interacts with the Hajj pilgrims from India, understands their issues and takes up the same with the Saudi Arabian authorities. The delegation

addresses these issues in their meeting with the Minister of Hajj, Saudi Arabia and the Governor of Makkah. The delegation also has regular meetings with the Indian Hajj mission and the Hajj authorities of Saudi Arabia. A report is submitted to the Government about the conduct of Hajj and recommendations for a better Hajj in the ensuing year.

44. In the affidavit, it is further stated that a similar but much smaller delegation comprising no more than five to eight members is sent by Bangladesh. The Bangladesh delegation usually consists of Minister of Hajj, Secretary (Hajj), people working in the Islamic Organizations and one or two standing members of Parliamentary Committee relating to Hajj/Religious Affairs. The number of Hajj pilgrims from Bangladesh in the year 2011 was one lakh fifty thousands. Pakistan does not send any official Hajj Delegation.

45. As to the size of the delegation and the manner of nomination of its members, from the affidavit it appears that in 1967 the Goodwill Delegation consisted of three members. Till 1973, there was no material increase in its size and till 1987 the number of its members remained under ten. Thereafter, the delegation started steadily increasing in size and in 1997 the Goodwill Delegation was of 31 members. In the year 2005, there were 36 members in the delegation and in the year 2010 the number of its members was 30. In the year 2011, the number was marginally reduced to 27.

46. In pursuance of our direction, the affidavit also gives a list of the members of the Goodwill Hajj Delegation for the years 2002 to 2011. The affidavit does not disclose any criteria or guidelines on the basis of which persons are selected for being included in the Goodwill Delegation. From the list of the members of the Goodwill Delegation for a period of 10 years no rational basis is discernible for selecting members for the delegation. The list shows a disparate group of persons randomly put together from various professions and walks of life. What is more surprising is that there are some people who

were able to go as member of the Goodwill Delegation more than once, some even three or four times. In the absence of a reasonable basis the nomination to the Goodwill Delegation evidently works on patronage and granting of favours. On the basis of the materials brought to our notice we have no doubt that the way people are nominated as members of the Goodwill Delegation is in complete violation of Article 14 of the Constitution.

47. Now coming back to the reasonableness and justification for sending an official Goodwill Delegation for Hajj, it is noted above that the first such delegation was sent in the year 1967. The sending of the Goodwill Hajj Delegation from India for the first time in the year 1967 was not by accident or chance and those whose memory goes back to that year would recall the circumstances in which the official Goodwill Delegation on the occasion of Hajj was first sent to the Kingdom of Saudi Arabia. It is no secret that after the 1965 war Pakistan tried to use even the Hajj pilgrimage for anti-India propaganda and the purpose of sending the Goodwill Delegation was to meet the anti-India propaganda.

48. The reason for which the delegation was first sent has long ceased to exist and Pakistan is no longer sending any official Goodwill Hajj Delegation to Saudi Arabia. It may, however, be contended that with the passage of time the purpose of the delegation has changed in the changed circumstances the delegation serves other objects and purpose. As a matter of fact in the affidavit filed by the Union of India the sending of the Goodwill Hajj Delegation is justified on two other counts (1) to convey goodwill to the Government of Saudi Arabia as well as to the Indian pilgrims and (2) to oversee and facilitate reason the arrangements made for pilgrims that go for Hajj through the Haj Committees. Dealing first with the second reason, we are constrained to say that it appears quite unconvincing. In the earlier paragraph of the affidavit of the Union of India, it is stated that Hajj is one of the most complex

organizational tasks undertaken by Government of India outside its borders. It is further stated that all arrangements for the Hajj of pilgrims are coordinated by the Consulate General of India, Jeddah and the Embassy of India, Riyadh. Haj Committee of India, established under the Haj Committee Act, 2002 is responsible for making the arrangements for pilgrims performing Hajj through them. It is, thus, to be noted that the making of arrangements for the pilgrims is the duty and responsibility of Haj Committee of India, a statutory body constituted under an Act of the Parliament. The arrangements are further over seen by the Consulate General of India, Jeddah and the Embassy of India, Riyadh. The arrangements are, thus, looked after by competent professional people and any intervention by a disparate group of persons themselves going to Saudi Arabia for the first time is bound to create more confusion than being of any help in making any proper arrangements for the ordinary pilgrims numbering over 125,000. We are unable to accept the second reason given as justification for sending the Goodwill Hajj Delegation.

49. Coming now to the first reason, that is, to convey goodwill to the Government of Saudi Arabia as well as to the Indian pilgrims, we fully appreciate the idea of the people of India extending their goodwill to the Kingdom of Saudi Arabia on the auspicious occasion of Hajj but we completely fail to see how even that purpose can be served by sending such a large, unwieldy, amorphous and randomly selected delegation.

50. On a careful consideration of the issue we are quite clear that the present practice of sending Goodwill Hajj Delegation must come to stop. If the Government of India wishes to send a message of goodwill to the Kingdom of Saudi Arabia on the occasion of Hajj it may send a leader and a deputy leader and if there be any need to present any group from India for any formal event in the course of Hajj the leader may, in consultation with the Indian Ambassador and Consul General, constitute a group of ten Indians from among the very

large number of Indian pilgrims who are there at their own expense. It is to be kept in mind that over a lakh and fifty thousand pilgrims go for Hajj paying for their own expenses. The Indian Ambassador in Saudi Arabia and perhaps more than him, the Consul General at Jeddah would know about the arrival of many distinguished, learned and important Muslims among them and with the assistance of the Ambassador and the Consul General, the leader of the two member official team would be able to form a far more appropriate and representative Indian team from amongst them than a motley delegation whose members are selected on irrelevant considerations.

51. In this interim order we have primarily dealt with the issues of PTOs, Hajj Subsidy and the Goodwill Hajj Delegation. There are other issues which we propose to deal with in due course.

52. In the affidavit filed on behalf of the Union of India, it is stated that from the overall number of 1,70,000 pilgrims fixed under the bilateral agreement, the Government of India sets apart a quota of 11,000 seats to be reserved for the following categories:-

"(i) Khadim-ul-Hujjaj (to assist Pilgrims in Saudi Arabia) selected by the State Haj Committees (300)

(ii) Mehram (women who get selected in the Qurrah but must have an accompanying male member as per Saudi Law) (400)

(iii) The community of Bohras (2,500)

(iv) States/ Union Territories on special consideration e.g., Jammu and Kashmir (1,500) and Lakshadweep (239)

(v) States/Union Territories with Hajj applications in excess of Quota (2,500),

(vi) Haj Committee of India (500) and

(vii) Government of India (3,061)"

We would like to know in greater detail how the special quotas under the heads (i) to (vii) are allocated. It may be noted that in paragraph 8 of the affidavit it is stated that the quota of Government of India (3061 for this year) is allocated to unselected/waitlisted applicants before the Haj Committees on recommendation by dignitaries and eminent persons. We have some initial reservations on allocation of seats on recommendation by dignitaries and eminent persons.

53. We direct the Union of India to file further affidavit stating in greater detail the way the quota of 11,000 seats is being allocated for 2012 Hajj.

54. We would also like to know in greater detail the procedure followed by the Haj Committee of India and the state Haj committees in making selection for sending pilgrims for Hajj. We would specially like to examine the functioning of the Haj Committees of the States where the number of applicants exceed the quota allotted for the state.

55. We direct the Haj Committee of India to file a detailed affidavit giving full details of the process of selection of pilgrims from the applications made to the State Haj Committees. The affidavit should also give details of the charges realized from the pilgrims and the facilities made available to them.

55. Haj Committees of the States of Maharashtra, Kerala and Karnataka are directed to be impleaded as respondents. Let notice go to them with a direction to file affidavits giving details of the selection process and stating stage wise how selections are being made for sending pilgrims for the 2012 Hajj, what amounts are charged from each pilgrim and what facilities are provided to them.

56. The affidavits, as directed above, must be filed within

two months from today.

57. Put up on July 23, 2012.

SLP(C) Nos. 33190-33217 of 2011

58. In view of the order passed in SLP(C) No.28609/2011, these special leave petitions have become infructuous and are disposed of as such.

IAs by private operators.

59. In view of the order passed in SLP(C) No.28609/2011, all interlocutory applications filed by private operators/travel agents raising objections to the Government of India 2012 Haj Policy stand disposed of.

TP(C) Nos.191/2012, 192/2012, 196/2012, 197/2012, 198/2012, 199/2012.

60. In view of the order passed in SLP(C) No.28609/2011, the transfer petitions are rendered infructuous and stand disposed of accordingly.

D.G. Special Leave Petition (C) No. 28609 of 2011 is pending and other matters disposed of.

BIPROMASZ BIPRON TRADING SA
v.
BHARAT ELECTRONICS LIMITED (BEL)
(Arbitration Petition No. 19 of 2011)

MAY 8, 2012

[SURINDER SINGH NIJJAR, J.]

Arbitration and Conciliation Act, 1996: s.11(6) - Appointment of arbitrator - Dispute between parties - Petitioner filing petition seeking appointment of independent and impartial arbitrator - Respondent seeking appointment in terms of arbitration agreement which stated that in case of dispute the matter would be arbitrated by the Chairman and Managing Director (CMD) of the respondent or nominee appointed by him - Held: The Supreme Court has power to appoint a person other than the named arbitrator if the relevant facts indicate that the named arbitrator is not likely to be impartial - In this case, the petitioner had clearly pleaded that the named arbitrator is a direct subordinate of the CMD and employee of the respondent - CMD is the controlling authority of all the employees, who have been dealing with the subject matter in the said dispute and also controlling authority of the named arbitrator - Therefore, it would not be unreasonable for the petitioner to entertain the plea that the arbitrator appointed by the respondent would not be impartial - The CMD itself would not be able to act independently and impartially being amenable to the directions issued by the Ministry of Defence - In exercise of powers u/ss.11(4) and 11(6) read with Para 2 of the Appointment of Arbitrators by the Chief Justice of India Scheme, 1996, Retired Chief Justice of the Madras High Court appointed as the sole arbitrator, to adjudicate the disputes that have arisen between the parties, on such terms and conditions as the sole arbitrator deems fit and proper - The sole arbitrator shall decide all the disputes

arising between the parties without being influenced by any prima facie opinion expressed in this order, with regard to the respective claims of the parties.

BSNL & Ors. v. Subash Chandra Kanchan & Anr. **(2006) 8 SCC 279: 2006 (6) Suppl. SCR 93;** *State of Punjab v. Amar Singh Harika* **AIR 1966 SC 1313 - relied on.**

Administrative law: Administrative order - Communication of an order - Held: An order passed by an authority cannot be said to take effect unless the same is communicated to the party affected - The order passed by competent authority or by an appropriate authority and kept with itself, could be changed, modified, canceled and thus denuding such an order of the characteristics of a final order - Such an uncommunicated order can neither create any rights in favour of a party nor take away the rights of any affected party till it is communicated.

Laxminarayan R. Bhattad & Ors. v. State of Maharashtra & Anr. **(2003) 5 SCC 413: 2003 (3) SCR 409;** *Greater Mohali Area Development Authority & Ors. v. Manju Jain & Ors.* **(2010) 9 SCC 157: 2010 (10) SCR 134;** *Indian Oil Corporation Limited and Ors. v. Raja Transport Private Limited* **(2009) 8 SCC 520: 2009 (13) SCR 510;** *Denel (Proprietary) Limited v. Bharat Electronics Limited and Anr.* **(2010) 6 SCC 394: 2010 (6) SCR 784 - relied on.**

Collector of Central Excise, Madras v. M/s M.M. Rubber & Co., Tamil Nadu **1992 Supp.(1) SCC 471: 1991 (3) SCR 862;** *Bachhittar Singh v. State of Punjab & Anr.* **AIR 1963 SC 395 - held inapplicable.**

You One Engineering & Construction Co. Ltd. & Anr. v. National Highways Authority of India (NHAI) **(2006) 4 SCC 372 - Distinguished.**

Denel (Proprietary) Limited v. Ministry of Defence **(2012) 2 SCC 759;** *Union of India & Anr. v. M.P.Gupta* **(2004) 10 SCC 504;** *National Highways Authority of India & Anr. v. Bumihiway DDB Ltd.(JV) & Ors.* **(2006) 10 SCC 763: 2006 (6) Suppl. SCR 586;** *Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Limited* **(2008) 10 SCC 240: 2008 (12) SCR 216;** *RITE Approach Group Ltd. v. Rosoboronexport* **(2006) 1 SCC 206: 2005 (5) Suppl. SCR 266 - referred to.**

Case Law Reference:

2009 (13) SCR 510	**referred to**	**Para 14**
2010 (6) SCR 784	**referred to**	**Para 14**
(2012) 2 SCC 759	**referred to**	**Para 14, 20, 41**
AIR 1963 SC 395	**referred to**	**Para 17, 25, 30**
2006 (6) Suppl. SCR 93	**referred to**	**Para 17, 26**
AIR 1966 SC 1313	**referred to**	**Para 17, 27**
(2004) 10 SCC 504	**referred to**	**Para 18, 34**
(2006) 4 SCC 372	**referred to**	**Para 18, 34**
2006 (6) Suppl. SCR 586	**referred to**	**Para 18, 36**
2008 (12) SCR 216	**referred to**	**Para 18**
2009 (13) SCR 510	**referred to**	**Para 18**
1991 (3) SCR 862	**referred to**	**Para 20,29, 32**
2007 (8) SCR 570	**referred to**	**Para 20, 32**
2003 (3) SCR 409	**referred to**	**Para 28**
2010 (10) SCR 134	**referred to**	**Para 28**
2005 (5) Suppl. SCR 266	**referred to**	**Para 37**

CIVIL ORIGINAL JURISDICTION : Arbitration Petition No. 19 of 2011.

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

K.V. Vishwanathan, M.R. Shamshad, Vivek Vishnoi, Abhishek Kaushik, Zaki Ahmad Khan, Adeeba Mujahid for the Petitioner.

S.N. Bhat, Ravi Panwar, Poornima for the Respondent.

The order of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. In this petition, under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Arbitration Act") read with paragraphs 2 and 3 of the appointment of the Arbitrators by the Chief Justice of India Scheme, 1996, the petitioner seeks reference of the disputes to an independent and impartial sole Arbitrator. In terms of the arbitration agreement, the petitioner has issued the necessary notice and the respondent has not agreed for such appointment of an independent arbitrator.

2. It appears that the respondent is not opposing the petition on the ground that the disputes cannot be referred to arbitration. The only objection raised by the respondent is that the disputes have to be referred to the Chairman and Managing Director of the respondent or his nominee, in terms of the arbitration clause 10 of General Terms and Conditions of Purchase Order (Foreign). The aforesaid arbitration clause reads as under:-

> "Arbitration - All disputes regarding this order shall be referred to B E L Chairman & Managing Director or his nominee for arbitration who shall have all the powers conferred by the Indian Arbitration & Conciliation Bill 1996 or any statutory modification thereof in force."

3. In view of the above, reference need only be made to the skeletal facts necessary for adjudicating the issues raised by the parties.

4. On 6th October, 2008, the respondent issued a Purchase Order (PO) to the petitioner through which it sought to purchase the materials/goods, namely, Hydraulic Motor, Actuating Cylinder, EL Motor EDM, Converter and GYRO Unit.

5. The purchase order was issued along with a printed Annexure IV of "General Terms and Conditions of Purchase Order (Foreign)". As noticed above, the relevant arbitration clause is contained in the aforesaid general terms and conditions. The petitioner claims that fifth item, as stated above, was GYRO Unit EK.2.369.113.CE in 174 Nos. The entire agreed terms of sale by the petitioner was against 100% payment through Letter of Credit through the State Bank of India, Trade Finance CPC, 16, Whannels Road, Egmore, Chennai, India, to the petitioner and the said Letter of Credit was to be opened immediately after getting confirmation regarding readiness of the stock with the petitioner. The GYRO Unit (174 in Nos.) were to be provided by the petitioner to the respondent as per the aforesaid agreement and the petitioner took immediate steps to supply the said units to the respondent. The petitioner made huge investments in that regard and procured required materials. The specifications of GYRO Units, as per the specifications, did not stipulate, expressly or impliedly, the type of damping. While the entire process was going on, the respondent issued a letter dated 5th June, 2009 to the petitioner stating that as per the respondent's directives, all pending supplies as on that date, from the petitioner were to be "put on hold" and directed the petitioner not to dispatch any pending items including those for which Letter of Credit had been established until further communication from the respondent. After the aforesaid communication, the respondent did not issue any communication to the petitioner for supply of the said goods till 3rd December, 2009. In response to the

aforesaid communication, the petitioner sent 10 units of GYRO Stabilizers along with the Certificate which was issued by the Russian Company (manufacturer) for a lot of 24 units. It appears that the respondent, on the basis of the inspection report dated 17th November, 2009, rejected two GYRO Units (out of total 10) on the ground that the same were defective. The defects pointed out were that "Turret not moving in 'Auto' mode" and "vibration in elevation observed in Turret". The other 8 Units were accepted. The petitioner, therefore, called for payment of 8 accepted GYRO Units and assured the rectification of two rejected units. Through the communication dated 28th December, 2009, the respondent claimed that the goods supplied by the petitioner were not of Russian Origin and, therefore, all the 10 GYRO Units supplied by the petitioner were rejected. The orders were to be cancelled and no more supply of GYRO Units were to be permitted with electrical damping. The petitioner claims that the action of the respondent firstly stopping all the supplies of the petitioner and secondly rejecting the 10 GYRO Units, subsequently supplied, is arbitrary, extra contractual, illegal and without any basis whatsoever.

6. The petitioner claims that 10 GYRO Units were rejected on the baseless ground that certain corruption cases had come to light against certain other companies. The respondent, therefore, stopped receiving supply from various companies including the petitioner and directly contacted the Russian manufacturer company and obtained the said units from them through another Russian Exporter company to frustrate the purchase order of the petitioner. It is claimed that the objection taken by the respondent are frivolous and without any basis.

7. The petitioner also claims that the order dated 5th June, 2009 putting on hold the supplies that were to be made by the petitioner was issued by the Ministry of Defence, under which the respondent is a Public Sector Undertaking. The aforesaid order was, however, set aside by the Delhi High Court in Writ Petition (Civil) No.821 of 2010 by an order dated 11th February, 2010. Thereafter, inspite of the efforts made by the petitioner,

the respondent did not accept the plea that the purchase order did not contain any specific, express or implied condition for air damping. The petitioner also offered to supply 50 GYRO Units with Air damping to maintain good relations. The respondent, however, issued a letter dated 18th August, 2010 showing interest to accept 50 GYRO Units with Air Damping with condition that the payment will be made after the acceptance of the units by the respondent. According to the petitioner, this was contrary to the terms contained in the original purchase order. The petitioner, though not obliged as per the contract, started process of procuring GYRO with air damping but due to the short validity of the Letter of Credit, only 14 such units were supplied and the petitioner had to stop the procurement of the said unit due to the expiry of the Letter of Credit. Thereafter, the petitioner has sent a number of communications to the respondent to which there has been no response, hence, the petitioner claims that number of disputes which are mentioned in paragraph 14 (a) to (g) have arisen between the parties.

8. Vide notice dated 20th May, 2011, the petitioner requested the respondent to agree on a name of an independent and impartial sole arbitrator preferably a former Judge of this Court by mutual consent between the petitioner and the respondent.

9. The petitioner claims on the basis of the postal acknowledgement that the respondent received the aforesaid notice on or about 23rd May, 2011. The receipt of the notice has been acknowledged by the respondent by a letter dated 8th June, 2011. On 29th June, 2011, the authorised representative of the petitioner has sworn the necessary affidavit in Poland for filing of the present petition after the expiry of 30 days of the statutory period and the same were dispatched to the counsel at New Delhi.

10. In the meantime, the respondent replied by a communication dated 29th June, 2011 to the notice dated 20th

May, 2011, stating that the Chairman-cum-Managing Director is a competent person as the petitioner has subscribed the contract which states the nominated arbitrator, and hence the correspondence between the parties has been placed before the Chairman-cum-Managing Director for appropriate action. The petitioner claims that the aforesaid reply was received on 1st July, 2011.

11. The respondent, in the detailed counter affidavit, accepts that certain disputes have arisen with regard to the supply of GYRO Units. It, however, claims that the reference of the disputes has to be made to the Chairman-cum-Managing Director of the respondent or his nominee for arbitration. Therefore, the prayer made in the petition for appointment of a sole arbitrator to adjudicate the dispute is contrary to the express clause in the contract and thus not maintainable. It is also the case of the respondent that prior to the filing of the petition before this Court, the Chairman-cum-Managing Director, as sole arbitrator, has duly acted and exercised the power in appointing Mr. R. Chandra Kumar, General Manager (Kot), Bharat Electronics Ltd., District Pauri Garhwal, Kotdwara-246149, as the arbitrator and communicated by fax on 19th July, 2011 itself. It is denied that merely because the Chairman-cum-Managing Director is in control and supervision of the respondent Public Sector Undertaking would render him ineligible to be appointed as the arbitrator. The respondent having accepted the arbitration clause with open eyes cannot be permitted to avoid the same on the ground of perceived partiality. The petitioner in the rejoinder has emphasised that both the issues raised by the respondent are without any basis. The petitioner relies on the facts enumerated in paragraph 4 of the rejoinder. It is claimed that the arbitrator had not been appointed on 9th July, 2011 as claimed by the petitioner. The following facts have been highlighted as under:

"20.05.2011 - Notice, through counsel was sent to the respondent seeking appointment of Arbitrator.

29.06.2011 - Petitioner sworn affidavit in Poland for filing of the petition for appointment of Arbitrator.

29.06.2011 - Respondent's sent reply to the advocate at New Delhi received on 1.7.2011 stating that the correspondence is being placed before the Chairman and Managing Director.

Note: Due to the new communication received, the fresh affidavit was needed and hence petition was with held to await fresh affidavit from Poland.

08.07.2011 - Petitioner sent further Notice to the respondent stating that the action shall not be proper.

21.07.2011 - The present petition seeking the appointment of Arbitrator was filed.

26.07.2011 - Respondent sent email to the counsel of the petitioner at new attaching the letter of the counsel dated 26.7.2011 along with the letter of respondent dated 19.7.2011 stating the arbitrator had been appointed. The hard copy of the said letter was received by the counsel for the petitioner at New Delhi on 28.7.2011."

12. The petitioner further claims that no fax was ever sent by the respondent on 19th July, 2011, as no e-mail or postal communication was received by the petitioner in Poland in the whole month of July, 2011. It is further pointed out that neither the said fax nor email was sent to the counsel for the petitioner before 26th July, 2011. The petitioner further pointed out that a perusal of the copy of the letter dated 19th July, 2011 sent to the counsel for the petitioner at New Delhi itself indicates that the letter was faxed on 25th July, 2011 by MD's Office of the

respondent to the concerned person of the respondent to communicate further. The petitioner further claims that mere passing of the order will not have any relevance as the same was not communicated to the petitioner till after the filing of the petition.

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

14. Mr. Viswanathan, learned senior counsel appearing for the petitioner submits that the disputes cannot be referred to CMD or his nominee as neither of them would be able to act impartially. In any event, the petitioner would always be under a reasonable apprehension that CMD or his nominee would be favorably inclined towards the respondent. He points out that CMD has been in control and supervision of the works of the respondent and, therefore, cannot be expected to be impartial in any dispute between the petitioner and the respondent. Similarly, any employee of the respondent would suffer from the same disability. In support of the submission, the learned counsel has relied on *Indian Oil Corporation Limited & Ors. Vs. Raja Transport Private Limited*[1]*, Denel (Proprietary) Limited Vs. Bharat Electronics Limited & Anr.*[2]*,* and *Denel (Proprietary) Limited Vs. Ministry of Defence*[3]*.*

15. Mr. Viswanathan then submitted that the plea taken by the respondent that one Mr. R. Chandra Kumar, the General Manager, Bharat Electronics Limited was appointed as the sole arbitrator on 19th July, 2011 and communicated by fax on that date itself is without any basis. He submits that factually the aforesaid averment has not been proved. The affidavit filed by the respondent is not supported by any document including purported appointment letter dated 19th July, 2011. The said affidavit is completely silent as to whom the said communication was faxed, where it was faxed and what is the proof of same

1. (2009) 8 SCC 520.
2. (2010) 6 SCC 394.
3. (2012) 2 SCC 759.

having been faxed. He further submits that, in fact, the said communication was sent to the advocate for the petitioner on e-mail on 26th July, 2011, attaching the letter of counsel which was also dated 26th July, 2011. Prior to that, no communication had been received by the petitioner or his counsel either by fax or otherwise stating that the arbitrator had been appointed. He emphasised that even the aforesaid appointment letter purportedly signed on 19th July, 2011 shows that it was faxed from Bangalore Office only on 25th July, 2011 to their Solicitor who in turn further communicated to the counsel for the petitioner on 26th July, 2011. Therefore, according to Mr. Viswanathan, it is unbelievable that the communication released from Bangalore office (Head quarter where the Chairman sits) could have been conveyed to the petitioner on 19th July, 2011, though the communication states "CC" to the petitioner but it was never sent to the petitioner. The aforesaid communication was sent by the Solicitor of the respondent to the petitioner's counsel on e-mail on 26th July, 2011 and thereafter by way of postal communication. He, therefore, submits that even if it is assumed that the aforesaid letter was signed on 19th July, 2011, but it was certainly not communicated till after the filing of the present petition, therefore, the same would have no legal sanctity.

16. In support of the submission, the petitioner relies on Section 3(2) of the Arbitration Act, 1996 which provides that "The communication is deemed to have been received on the day it is so delivered". He submits that without delivery of the communication dated 19th July, 2011, the same shall be of no effect.

17. Mr. Viswanathan further submits that apart from the Arbitration Act, as a general principle of law, it is settled that an order takes effect only when it is served on the person affected. In support of this submission, learned counsel relied on in the case of *Bachhittar Singh Vs. State of Punjab & Anr.*[4]

4. AIR 1963 SC 395.

and *BSNL & Ors. Vs. Subash Chandra Kanchan & Anr.*[5] and *State of Punjab Vs. Amar Singh Harika*[6]. On the basis of the above, he submits that the petition deserves to be allowed and the matter be referred to an independent and impartial arbitrator.

18. On the other hand, Mr. Bhat, learned counsel appearing for the respondent has submitted that the petitioner having agreed to the provisions of arbitration contained in Clause 10 of the general conditions cannot now be permitted to turn around and contend that someone else has to be appointed as an arbitrator, thus giving a go-by to the arbitration agreement. He submits that it is well settled that once the parties have agreed upon a named arbitrator, the parties cannot resile therefrom. In support of the submission, he relied on the judgment of this Court in the cases of *Union of India & Anr. Vs. M.P.Gupta*[7], *You One Engineering & Construction Co. Ltd. & Anr. Vs. National Highways Authority of India (NHAI)*[8], *National Highways Authority of India & Anr. Vs. Bumihiway DDB Ltd.(JV) & Ors*[9], *Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Limited*[10] and *Indian Oil Corporation Limited & Ors. Vs. Raja Transport Private Limited*[11].

19. He further submits that the present petition is not maintainable as even prior to the filing of the petition, the Chairman-cum-Managing Director had duly acted and exercised his powers and had appointed Mr. R. Chandra Kumar, General Manager (Kot) as the arbitrator. It is his claim that the appointment was made on 19th July, 2011 and the

5. (2006) 8 SCC 279.
6. AIR 1966 SC 1313.
7. (2004) 10 SCC 504.
8. (2006) 4 SCC 372.
9. (2006) 10 SCC 763.
10. (2008) 10 SCC 240.
11. (2009) 8 SCC 520.

same was duly communicated by fax on 19th July, 2011 itself to the petitioner.

20. Mr. Bhat further submits that the order of the Managing Director came into force from the moment it was signed on 19th July, 2011. In support of this submission, he relies on the judgment of this Court in the case of *Collector of Central Excise, Madras Vs. M/s M.M. Rubber & Co., Tamil Nadu*[12]. According to the learned counsel, the aforesaid principle has been reiterated by this Court in *Municipal Corporation of Delhi Vs. Qimat Rai Gupta & Ors.*[13] On the issue of perceived partiality of the CMD or his nominee, Mr. Bhat submits that the petitioner cannot rely on the judgment of this Court in *Denel (Proprietary) Limited* (supra). The facts in the aforesaid case were different from the facts in the present case inasmuch as in *Denel* case (supra) this Court has directed the appointment of an independent arbitrator only on the ground that there was certain directions issued by the Ministry of Defence, Government of India and as such the Managing Director of BEL may not be in a position to independently decide the dispute between the parties. He further submits that in the event this Court accepts the submission of the petitioner then Chairman and Managing Director of any other Public Sector Undertaking, for example, Hindustan Aeronautics Limited or Bharat Earth Movers Ltd. may be appointed to arbitrate the dispute.

21. I have considered the submissions made by the learned counsel for the parties.

22. The first issue which needs to be addressed is as to whether the present petition is maintainable in view of the claim made by the respondent that Mr. R. Chandra Kumar had been appointed as the Sole Arbitrator on 19th July, 2011.

23. I am of the considered opinion that the aforesaid

12. 1992 Supp.(1) SCC 471.

13. (2007) 7 SCC 309.

submission of Mr. Bhat can not be accepted in view of the provision contained in Section 3(2) of the Arbitration Act. Section 3 of the Act provides for different modes in which any written communication is deemed to have been received. Section 3(2) specifically provides as under:-

> "The communication is deemed to have been received on the day it is so delivered."

24. In view of the aforesaid provision even if the order appointing the Sole Arbitrator, Mr. R. Chandra Kumar, was made on 19th July, 2011, it would be deemed to be received only on the day it is delivered.

25. Apart from the aforesaid statutory provision, it is also settled that an official order takes effect only when it is served on the person affected. In the case of *Bachhittar Singh Vs. State of Punjab & Anr.* (supra), this Court has clearly enunciated the Principle of Law in the following words:-

> "Thus it is of the essence that the order has to be communicated to the person who would be affected by that order before the State and that person can be bound by that order. For, until the order is communicated to the person affected by it, it would be open to the Council of Ministers to consider the matter over and over again and, therefore, till its communication the order cannot be regarded as anything more than provisional in character."

26. Similarly, in this case until the order was communicated to the petitioner, the Chairman-cum-Managing Director would have been at liberty to reconsider the matter and thus rendering the order only provisional in character. Similar question arose before this Court in the case of *BSNL & Ors. Vs. Subash Chandra Kanchan & Anr.* (supra) wherein it has been clearly observed as under:-

> "12. Evidently, the Managing Director of the appellant was served with a notice on 7-1-2002. The letter appointing the

arbitrator was communicated to the respondent on 7-2-2002. By that time, 30 days' period contemplated under the Act lapsed. The Managing Director of the appellant was required to communicate his decision in terms of clause 25 of the contract."

27. In reaching the aforesaid conclusion, this Court relied on earlier judgment rendered in the case of *State of Punjab Vs. Amar Singh Harika* (supra), wherein this Court has held as follows:-

"The first question which has been raised before us by Mr. Bishan Narain is that though the respondent came to know about the order of his dismissal for the first time on the 28th May 1951, the said order must be deemed to have taken effect as from the 3rd June 1949 when it was actually passed. The High Court has rejected this contention; but Mr. Bishan Narain contends that the view taken by the High Court is erroneous in law. We are not impressed by Mr. Bishan Narain's argument. *It is plain that the mere passing of an order of dismissal would not be effective unless it is published and communicated to the officer concerned.* If the appointing authority passed an order of dismissal, but does not communicate it to the officer concerned, theoretically it is possible that unlike in the case of a judicial order pronounced in Court, the authority may change its mind and decide to modify its order."

28. The aforesaid observations make it clear that an order passed by an authority can not be said to take effect unless the same is communicated to the party affected. The order passed by a competent authority or by an appropriate authority and kept with itself, could be changed, modified, cancelled and thus denuding such an order of the characteristics of a final order. Such an uncommunicated order can neither create any rights in favour of a party, nor take away the rights of any affected party, till it is communicated. The aforesaid proposition has been reiterated in the case of *Laxminarayan R. Bhattad*

& Ors. Vs. State of Maharashtra & Anr.[14], wherein it has been held that "it is now well known that a right created under an order of a statutory authority must be communicated so as to confer an enforceable right." Similar view has been reiterated in *Greater Mohali Area Development Authority & Ors. Vs. Manju Jain & Ors.*[15], wherein it is observed as follows:-

"24. Thus, in view of the above, it can be held that if an order is passed but not communicated to the party concerned, it does not create any legal right which can be enforced through the court of law, as it does not become effective till it is communicated."

29. Mr. Bhat on the contrary relied on the judgment of this Court in the case of *Collector of Central Excise, Madras Vs. M/s M.M. Rubber & Co., Tamil Nadu* (supra) and submitted that the order of the Managing Director came into force from the moment it was signed on 19th July, 2011. In Paragraph 12 of the aforesaid judgment, it is observed as follows:-

"12. It may be seen therefore, that, if an authority is authorised to exercise a power or do an act affecting the rights of parties, he shall exercise that power within the period of limitation prescribed therefor. The order or decision of such authority comes into force or becomes operative or becomes an effective order or decision on and from the date when it is signed by him. The date of such order or decision is the date on which the order or decision was passed or made : that is to say when he ceases to have any authority to tear it off and draft a different order and when he ceases to have any locus paetentiae. Normally that happens when the order or decision is made public or notified in some form or when it can be said to have left his hand. The date of communication of the order to the party whose rights are

14. (2003) 5 SCC 413.

15. (2010) 9 SCC 157.

affected is not the relevant date for purposes of determining whether the power has been exercised within the prescribed time."

30. In my opinion, the aforesaid observations do not deviate from the observations made by this Court in *Bachhittar Singh's* case (supra) and reiterated consistently thereafter by this Court. The observations herein were made with regard to the exercise of power by the competent authority with regard to determination of the date from which the period of limitation was to be calculated to make an appeal. In that case, an order in favour of the respondent was passed by the Collector of Central Excise, as an adjudicating authority on 28th November, 1984. Its copy was supplied to the respondent on 21st December, 1984. The Central Board of Excise and Customs, however, in exercise of its powers under Section 35-e(1) directed the Collector on 11th December, 1985 to make an appeal to the Customs, Excise Board (Control) Appellate Tribunal against this order. The point at issue was whether limitation under Section 35-e(3) of the Central Excise and Salt Act, 1944 for the order of the Board under Section 35-e(1) commenced from 28th November, 1984 or 21st December, 1984. The Appellate Tribunal rejected the Collector's application on the ground that it was beyond limitation period of one year commencing from 28th November, 1984. The aforesaid decision of the Appellate Tribunal was upheld by this Court with the observations made in Paragraph 12 above (supra). However, the aforesaid observation can not be read divorced from the observations made in Paragraph 13 and 18, which are as under:-

"13. So far as the party who is affected by the order or decision for seeking his remedies against the same, he should be made aware of passing of such order. Therefore courts have uniformly laid down as a rule of law that for seeking the remedy the limitation starts from the date on which the order was communicated to him or the date on

which it was pronounced or published under such circumstances that the parties affected by it have a reasonable opportunity of knowing of passing of the order and what it contains. The knowledge of the party affected by such a decision, either actual or constructive is thus an essential element which must be satisfied before the decision can be said to have been concluded and binding on him. Otherwise the party affected by it will have no means of obeying the order or acting in conformity with it or of appealing against it or otherwise having it set aside. This is based upon, as observed by Rajmannar, C.J. in Muthia Chettiar v. CIT "a salutary and just principle". The application of this rule so far as the aggrieved party is concerned is not dependent on the provisions of the particular statute, but it is so under the general law.

18. Thus if the intention or design of the statutory provision was to protect the interest of the person adversely affected, by providing a remedy against the order or decision any period of limitation prescribed with reference to invoking such remedy shall be read as commencing from the date of communication of the order. But if it is a limitation for a competent authority to make an order the date of exercise of that power and in the case of exercise of suo moto power over the subordinate authorities' orders, the date on which such power was exercised by making an order are the relevant dates for determining the limitation. The ratio of this distinction may also be founded on the principle that the government is bound by the proceedings of its officers but persons affected are not concluded by the decision."

31. From the above, it becomes evident that the order dated 19th July, 2011 would be binding on the Chairman-cum-Managing Director for the purposes of working out the limitation, but so far as the petitioner is concerned, the relevant date would be the date when the order is communicated to the petitioner. The order made by a Statutory Authority or an Officer

exercising the powers of that Authority comes into force so far as the Authority Officer is concerned, from the date it is made by the concerned Authority Officer. But, so far as the affected party is concerned, the order made by the Appropriate Authority would be the date on which it is communicated. In my opinion, Section 3(2) of the Arbitration and Conciliation Act, 1996, is a mere reiteration of the aforesaid general principle of law.

32. In view of the above, I am of the considered opinion that the reliance placed on the aforesaid judgment by Mr. Bhat is misplaced. In my opinion, the reliance placed by Mr. Bhat on the judgment in *Municipal Corporation of Delhi* (supra) is also misplaced as therein the Court has reiterated the principle laid down in *Collector of Central Excise, Madras* (supra); by observing as follows:-

> "26. A distinction, thus, exists in the construction of the word "made" depending upon the question as to whether the power was required to be exercised within the period of limitation prescribed therefor or in order to provide the person aggrieved to avail remedies if he is aggrieved thereby or dissatisfied therewith. Ordinarily, the words "given" and "made" carry the same meaning.

27. An order passed by a competent authority dismissing a government servant from services requires communication thereof as has been held in *State of Punjab v. Amar Singh Harika*[11] but an order placing a government servant on suspension does not require communication of that order. (See *State of Punjab v. Khemi Ram*[12].) What is, therefore, necessary to be borne in mind is the knowledge leading to the making of the order. An order ordinarily would be presumed to have been made when it is signed. Once it is signed and an entry in that regard is made in the requisite register kept and maintained in terms of the provisions of a statute, the same cannot be changed or altered. It, subject to the other provisions contained in the Act, attains finality. Where, however, communication of an order is a necessary ingredient for

bringing an end result to a status or to provide a person an opportunity to take recourse to law if he is aggrieved thereby, the order is required to be communicated."

These observations, in my opinion, do not support the submissions made by Mr. Bhat.

33. Keeping in view the aforesaid principle of law, the fact situation with regard to the making and the communication of the order dated 19th July, 2011 can now be examined. Even though the respondent claims that the order was sent by fax on 19th July, 2011, there is clear denial of the same by the petitioner. Prima facie, it would appear that even though the order may have been made on 19th July, 2011, it was served for the first time on the counsel of the petitioner by e-mail on 26th July, 2011. Therefore, prima facie, it would not be possible to accept the submission of Mr. Bhat that the petition would not be maintainable on the ground that the arbitrator had already been appointed at the time when the present petition was filed. The issue needs to be decided on the basis of the evidence produced by the parties, at the appropriate time.

34. I am also not much impressed by the submission made by Mr. Bhat that this Court is bound to appoint the Chairman-cum-Managing Director or its nominee as the arbitrator in view of the arbitration clause. However, it is necessary to consider the judgments relied upon by Mr. Bhat. In the case of *Union of India & Anr. Vs. M.P.Gupta* (supra), this Court observed that in view of the express provision contained in the arbitration clause that two Gazetted Railway Officers shall be appointed as arbitrators; a Former Judge of the Delhi High Court can not be appointed as the Sole Arbitrator. It must be noticed here that in the aforesaid case, no facts have been pleaded in justification of the plea for the appointment of an independent arbitrator in spite of the arbitration clause. In *You One Engineering & Construction Co. Ltd. & Anr. Vs. National Highways Authority of India (NHAI)* (supra), Justice B.N.

Srikrishna, sitting as a Chamber Judge in a petition under Section 11(6) has observed as follows:-

> "10. In my view, the contention has no merit. The arbitration agreement clearly envisages the appointment of the presiding arbitrator by IRC. There is no qualification that the arbitrator has to be a different person depending on the nature of the dispute. If the parties have entered into such an agreement with open eyes, it is not open to ignore it and invoke exercise of powers in Section 11(6)."

35. In this matter also, there was no plea that the Arbitral Tribunal constituted under the arbitration clause was likely to be favorably inclined towards the respondent. This Court has merely reiterated the legal position that in normal circumstances, arbitrator has to be appointed in terms of the agreement of the parties contained in the arbitration clause.

36. In the case of *National Highways Authority of India & Anr. Vs. Bumihiway DDB Ltd.(JV) & Ors.* (supra), the question which was before this Court was again as to whether a presiding arbitrator could be appointed beyond the scope of the arbitration clause, by the High Court in a petition under Section 11(6). It was submitted on behalf of the appellant that when the arbitration agreement clearly envisages the appointment of the presiding officer by the IRC and there is no specification that the arbitrator has to be different person depending on the nature of the dispute, it is not open to ignore it and invoke the exercise of power under Section 11(6) of the Act. It was also submitted that the High Court was not justified in referring to the principle of hierarchy and ignoring the express contractual provision for appointment of the presiding arbitrator. Upon consideration of the rival submissions, this Court considered the questions of law which had arisen. The relevant question for the purposes of this case is "Whether an arbitration clause, which is a sacrosanct clause, can be rewritten by appointment of a judicial arbitrator when no qualification therefor is provided in the agreement?"

37. The answer to the aforesaid question was in the negative. It was held that the appointment made by the High Court was beyond the arbitration agreement which clearly envisages the appointment of the presiding arbitrator by IRC, there is no qualification that the arbitrator has to be a different person depending on the nature of the dispute. It was emphasised that "if the parties have entered into such an agreement with open eyes, it is not open to ignore it and invoke exercise of the powers in Section 11(6)." The observations made by this Court in *RITE Approach Group Ltd. Vs. Rosoboronexport*[16], were reiterated, wherein this Court has clearly held that :-

> "In view of the specific provision contained in the `agreement specifying the jurisdiction of the court to decide the matter, this Court cannot assume the jurisdiction, and hence, whenever there is a specific clause conferring jurisdiction on a particular court to decide the matter, then it automatically ousts the jurisdiction of the other court."

38. In *Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Limited* (supra), a three Judge bench of this Court reiterated the general principle as noticed in the judgments relied upon by Mr. Bhat. At the same time, it is emphasised that in exercise of its powers under Section 11(6) of the Act, the Court has to take into consideration the provision contained in Section 11(8) of the Act. The aforesaid provision requires that the Chief Justice or the person or an institution designated by him in appointing an arbitrator shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and other considerations as are likely to secure the appointment of an independent and impartial arbitrator. It is also observed that a bare reading of the Scheme of Section 11 shows that the emphasis is on the term of the agreement being adhere to and /or give effect to as closely as possible. But it is not mandatory

16. (2006) 1 SCC 206.

for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators. But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations.

39. In *Indian Oil Corporation Limited & Ors. Vs. Raja Transport Private Limited* (supra), this Court whilst emphasizing that normally the Court shall make the appointment in terms of the agreed procedure, has observed that the Chief Justice or his designate may deviate from the same after recording reasons for the same. In Paragraph 45 of the aforesaid judgment, it is observed as follows:-

> "45. If the arbitration agreement provides for arbitration by a named arbitrator, the courts should normally give effect to the provisions of the arbitration agreement. But as clarified by Northern Railway Admn., where there is material to create a reasonable apprehension that the person mentioned in the arbitration agreement as the arbitrator is not likely to act independently or impartially, or if the named person is not available, then the Chief Justice or his designate may, after recording reasons for not following the agreed procedure of referring the dispute to the named arbitrator, appoint an independent arbitrator in accordance with Section 11(8) of the Act. In other words, referring the disputes to the named arbitrator shall be the rule. The Chief Justice or his designate will have to merely reiterate the arbitration agreement by referring the parties to the named arbitrator or named Arbitral Tribunal. Ignoring the named arbitrator/Arbitral Tribunal and nominating an independent arbitrator shall be the exception to the rule, to be resorted for valid reasons."

40. In view of the aforesaid observations, it would not be possible to reject the petition merely on the ground that this Court would have no power to make an appointment of an arbitrator other than the Chairman-cum-Managing Director or his designate. This Court would have the power to appoint a

person other than the named arbitrator, upon examination of the relevant facts, which would tend to indicate that the named arbitrator is not likely to be impartial. In this case, the petitioner had clearly pleaded that the named arbitrator is a direct subordinate of the CMD and employee of the respondent. CMD is the controlling authority of all the employees, who have been dealing with the subject matter in the present dispute and also controlling authority of the named arbitrator. Apprehending that the CMD, who had been dealing with the entire contract would not act impartially as an arbitrator, the petitioner had issued a notice on 20th May, 2011. In this notice, it was pointed out that while the entire process of the performance of the contract was going on, the CMD had issued a letter on 5th June, 2009 to the petitioner stating that as per the company's directives, all pending supplies as on that date were "put on hold". After the aforesaid communication, no communication was issued to the petitioner for supply of the goods as per the Purchase Order dated 3rd December, 2009. Even subsequently, there were difficulties when a further lot of 24 units were supplied. The detailed submissions made by the petitioner have been noticed in the earlier part of the judgment.

41. Keeping in view the aforesaid facts, I am of the opinion that it would not be unreasonable for the petitioner to entertain the plea that the arbitrator appointed by the respondent would not be impartial. The CMD itself would not be able to act independently and impartially being amenable to the directions issued by the Ministry of Defence. In similar circumstances, this Court in the case of *Denel (Proprietary) Limited Vs. Bharat Electronics Limited & Anr.* (supra), this Court observed as follows:-

> "21. However, considering the peculiar conditions in the present case, whereby the arbitrator sought to be appointed under the arbitration clause, is the Managing Director of the Company against whom the dispute is raised (the respondents). In addition to that, the said

Managing Director of Bharat Electronics Ltd. which is a "government company", is also bound by the direction/ instruction issued by his superior authorities. It is also the case of the respondent in the reply to the notice issued by the respondent, though it is liable to pay the amount due under the purchase orders, it is not in a position to settle the dues only because of the directions issued by the Ministry of Defence, Government of India. It only shows that the Managing Director may not be in a position to independently decide the dispute between the parties."

42. In my opinion, the facts in the present case are similar and, therefore, a similar course needs to be adopted.

43. In exercise of my powers under Sections 11(4) and 11(6) of the Arbitration and Conciliation Act, 1996 read with Para 2 of the Appointment of Arbitrators by the Chief Justice of India Scheme, 1996, I hereby appoint Hon'ble Mr. Justice Ashok C. Agarwal, Retired Chief Justice of the Madras High Court, r/o No. 20, Usha Kiran, 2nd Pasta Lane, Colaba, Mumbai 400 005, as the sole arbitrator, to adjudicate the disputes that have arisen between t.he parties, on such terms and conditions as the learned sole arbitrator deems fit and proper. Undoubtedly, the learned sole arbitrator shall decide all the disputes arising between the parties without being influenced by any prima facie opinion expressed in this order, with regard to the respective claims of the parties.

44. The Registry is directed to communicate this order to the sole arbitrator forthwith to enable him to enter upon the reference and decide the matter as expeditiously as possible.

45. The Arbitration Petition is accordingly disposed of.

D.G. Arbitration petition disposed of.

PRIYA GUPTA

v.

STATE OF CHHATISHGARH & ORS.

(Civil Appeal No. 4318 of 2012)

MAY 08, 2012

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

EDUCATION/EDUCATIONAL INSTITUTIONS:

Medical and Dental College - Admission to MBBS course - Tampering with the schedule specified under the Regulations and judgments of the Supreme Court with clear intent to grant admission to less meritorious candidates over and above candidates of higher merit - Held: Adherence to the principle of merit, compliance with the prescribed schedule, refraining from mid stream admission and adoption of admission process that is transparent, non-exploitative and fair are mandatory requirements of the entire scheme - From time to time, Supreme Court has given directions in relation to the manner of announcement of details, results and counseling for admission and its publication in newspaper - Schedules prescribed have the force of law in as much as they form part of the judgments of Supreme Court - No authority whether Medical Council of India, Government of India, State Government, University or selection bodies constituted at the college level for allotment of seat by way of counseling are vested with the power of relaxing, varying or disturbing the time schedule or the procedure of admission - There have been irregularities in maintaining the prescribed Schedule and that the last few days of the declared schedule are primarily being utilized in an exploitative manner on account of charging higher fees for securing admission and thereby defeating the principle of admission on merit - Adverse consequences of non-adherence to the time schedule stated and directions issued - In the instant appeal, two vacant seats

were available on 30th September, 2006 - Appellants were given admission on 30th September without effecting due publicity - State Government cancelled their admission on the ground that it was arbitrary and based on favouritism - High Court rightly dismissed the writ petition by appellants - There was nothing on record to show that all the candidates were informed of counseling on the last day - Appellants were stated to have been present in college and were given admission - Appellant no.2 was daughter of Director of medical education - From 23rd April 2006 to 29th September 2006, no record to show efforts to fill up vacant seats - Out of favouritism and arbitrariness, the appellants were given admission by completing the entire admission process within few hours on 30th September, 2006 - The entire exercise smacked of arbitrariness, unfairness and is discriminatory - On peculiar facts and circumstances, though there is no legal infirmity in judgment under appeal, but since by virtue of interim orders, the appellants had completed four years of studies during the High Court decision, in order to do complete justice within the ambit of Article 142 of the Constitution, the appellants permitted to complete their professional courses subject to the condition that each one of them pay a sum of Rs.5 lakhs to college, which amount shall be utilized for developing the infrastructure in the college - Initiation of proceedings directed under the Contempt of Courts Act against various authorities - Report of the Committee constituted to look into irregularity in admission to the effect that the admission to appellants was on State PMT merit was a mere eye-wash rather than a proper report upon examining the entire matter in its proper perspective - Committee acted in undue haste, in violation of the prescribed procedure of admission and certainly contrary to the judgments of Supreme Court - Constitution of India, 1950 - Articles 141, 142 - Costs.

Recognition granted to medical or dental college prior/ after 15th July of each year - Effect of.

The appellants had appeared in the Pre-Medical Test conducted by the State of Chhattisgarh for the academic year 2006. The results were declared in July 2006. Appellant No.1 secured general rank 1614 while appellant No.2 secured general rank 3893 and SC rank 396. The first counseling was held on 21-22nd July, 2006 but at that time, the Jagdalpur College was not given permission to commence admission to the MBBS course. The counseling was conducted for medical colleges at Raipur and Bilaspur and also for the Raipur Dental College. 18 per cent of seats were to be reserved for allotment under the All India Quota and the Central Pool quota. The State Government by its letter dated 14th August, 2006, granted permission for the starting of admission procedure for the academic year 2006-07 at the Jagdalpur College. Its annual admission capacity was 50 seats which were to be filled up by the candidates who had qualified PMT 2006 in the order of their merit. The State Government by letter dated 21st August, 2006 was stated to have informed the Jagdalpur College that two seats out of the total seats were reserved for allotment under the Central Pool Quota and no seats were reserved under All India Quota. Upon receipt of recognition, only 48 seats were offered for admission to the students on 22nd - 23rd August, 2006. The Central Pool Quota seats were not filled up and were allegedly not made available to the candidates who appeared for that counseling. The Dean of Jagdalpur College informed the Director, Medical Education on 30th September, 2006 that on that date, 48 candidates had taken admission and two seats were lying vacant. This information was sent in response to inquiry by the Director, Medical Education in this regard and directions were sought by the Jagdalpur College for filling up of vacant seats. On the same day, the Director, Medical Education, directed that the seats should be filled from the merit list and the candidates could be contacted on telephone and if contact was not possible,

admission could be given to the candidates who were available in the Jagdalpur College. On 30th September, 2006 itself, the two vacant seats were given to the appellants. The Dean of the Jagdalpur College informed the Director, Medical Education about the admission of the appellants.

On a complaint regarding irregularity in admission given to the appellants, a Committee was constituted which gave report to the effect that no admission was granted to any students in All India quota and the appellants got admission in Medical College Jagdalpur in 2006 by the State PMT merit on the last date of the admission i.e. 30th September 2006. The inquiry report was submitted by the Dean of Jagdalpur College to the Directorate (DGHS). However, on 22nd July, 2010, the Secretary, Department of Health and Family Welfare, Government of Chhattisgarh was informed by the Assistant Director General (Medical Education), Government of India that the admission of the appellants was on the basis of fake letters purported to be issued from the DGHS and that their admissions may be cancelled with immediate effect and action taken report be submitted to the DGHS. In furtherance to this letter, the Deputy Secretary, Medical and Family Welfare Department, Government of Chhattisgarh, issued order dated 10th September, 2010 stating that the admission of these two appellants was not in accordance with the provisions of the Rules and other guidelines/provisions with regard to allotment of seats under the All India Quota and the admission was cancelled with immediate effect. The appellants filed writ petitions before the High Court. The High Court held that admission to the appellants was given ignoring more meritorious and suitable candidates which amounted to violation of natural justice to such other candidates and declined to interfere with the order

of cancellation of admission. The instant appeals were filed challenging the order of the High Court.

Disposing of the appeals, the Court

HELD: 1. Admission to professional colleges is governed by the judgment of this Court in the case of *TMA Pai Foundation & Ors. v. State of Karnataka & Ors.* **[(2002) 8 SCC 481]. The framework of admissions to colleges was discussed in some detail by this Court. However, even in the case of** *Dr. Pradeep Jain & Ors. v. Union of India & Ors.* **[(1984) 3 SCC 654], the concept of an All India quota came to be introduced while determining the validity of a domicile requirement in such admissions. Earlier, 30 per cent of seats in the under-graduate courses were reserved for this purpose, which came to be modified to 15 per cent seats for All India quota in the case of** *Dr. Dinesh Kumar & Ors. v. Moti Lal Nehru College, Allahabad & Ors.* **[(1985) 3 SCC 22]. In the case of** *Dr. Dinesh Kumar & Ors. v. Moti Lal Nehru College, Allahabad & Ors.* **[(1987) 4 SCC 459], this Court also passed directions in relation to the manner of notification/ announcement of details, results and counseling for admission, in that case, for post graduate admissions, which were to be published in two successive issues of newspapers, including one national paper in English and at least two local papers in the language of the State. Declaration of results would be made four weeks after the examination and academic courses were to mandatorily begin on the 2nd of May every year. Again, in the case of** *Dr. Dinesh Kumar & Ors. v. Moti Lal Nehru College, Allahabad & Ors.* **[(1990) 4 SCC 627], as some of the States were not adhering to the prescribed schedule, this Court took punitive action against the State of Uttar Pradesh and even contemplated action under the Contempt of Courts Act, 1971. Right from Dr. Pradeep Jain's case, this Court has always directed that merit alone must be the**

criteria for admission to MBBS courses. To make such admissions more subject-specific, transparent and systematic, certain further directions were issued by this Court in *Shrawan Kumar & etc. etc. v. Director General of Health Services & Anr. & etc.* **[(1993) 3 SCC 332]. This Court clarified that candidates who have been allotted a seat in the second round of counseling will have to join the college within 15 days from the date of their personal appearance and the whole allotment and admission process to 15 per cent seats of All India quota will be over before the 30th September of each year, the remaining seats having been surrendered back to the college/State. Various judgments of this Court have sought to carry forward, with greater clarity, the fundamental requirement as stated in TMA Pai that the admission process should be fair, transparent and non-exploitative. Every subsequent judgment of this Court has attempted to elucidate one or other aspect of this principle. Having noticed that there have been irregularities in maintaining the prescribed schedule and that the last few days of the declared schedule are primarily being utilized in an exploitative manner, on account of charging higher fees for securing admission and thereby defeating the principle of admission on merit, a three Judge Bench of this Court in the case of** *Mridul Dhar (Minor) & Anr. v. Union of India & Ors.* **[(2005) 2 SCC 65] applied the schedule notified by the Medical Council of India (MCI) in Appendix 'E' of the Graduate Medical Education (Amendment) Regulations, 2004 and directed its strict adherence. The Court noticed that the holding of 10+2 examination and declaration of results is also of importance for the entire admission process and, therefore, directed strict adherence to the Schedule in all respects and by all concerned. The date of 30th September was stated not to be the date of normal admission but is to give opportunity to grant admission against stray vacancies. The Court clarified that adherence to the time schedule**

by everyone was a paramount concern. In that case, the Court issued a specific direction to all the State functionaries, particularly the Chief Secretaries and heads of the concerned Ministries/Departments participating in the States/Union Territories, adopting the time schedule and holding the State examination, to ensure declaration of results on or before 15th June, 2005. They were also required to ensure the appropriate utilization of All India quota, to fullest extent, by timely reporting to the DGHS by the Deans of various colleges or any other State authority, informing the DGHS of the acceptance or rejection of seats by the students after the first counseling of All India/State Quota. Further, this Court even took pains to declare the need for adherence to the schedule for receipt of applications for establishment of new medical colleges or seats and the process of the review and recommendation by the Central Government and the Medical Council of India. Lastly, in the case of *Priyadarshini Dental College & Hospital v. Union of India & Ors.* **[(2011) 4 SCC 623], this Court cautioned all concerned that the schedule specified in Mridul Dhar should be maintained and regulations should be strictly followed. The Court suggested that the process of inspection of colleges, grant of permission or renewal of permission should also be done well in advance to allow time for setting right the deficiencies pointed out. [Paras 20, 21, 23] [805-D-H; 806-A-H; 808-C-H; 810-C-D]**

TMA Pai Foundation & Ors. v. State of Karnataka & Ors. **(2002) 8 SCC 481: 2002 (3) Suppl. SCR 587;** *Dr. Pradeep Jain & Ors. v. Union of India & Ors.* **(1984) 3 SCC 654: 1984 (3) SCR 942;** *Dr. Dinesh Kumar & Ors. v. Moti Lal Nehru College, Allahabad & Ors.* **(1985) 3 SCC 22: 1985 (1) Suppl. SCR 41;** *Dr. Dinesh Kumar & Ors. v. Moti Lal Nehru College, Allahabad & Ors.* **(1987) 4 SCC 459: 1988 (1) SCR 351;** *Dr. Dinesh Kumar & Ors. v. Moti Lal Nehru College, Allahabad & Ors.* **(1990) 4 SCC 627: 1990 (1) Suppl. SCR 135;** *Shrawan*

Kumar & etc. etc. v. Director General of Health Services & Anr. & etc. **(1993) 3 SCC 332;** *Mridul Dhar (Minor) & Anr. v. Union of India & Ors.* **(2005) 2 SCC 65: 2005 (1) SCR 380;** *Priyadarshini Dental College & Hospital v. Union of India & Ors.* **(2011) 4 SCC 623: 2011 (2) SCR 945 - relied on.**

2. In the case of *State of Bihar & Ors. v. Dr. Sanjay Kumar Sinha & Ors.* **[(1990) 4 SCC 624], a Bench of this Court took exception to the non-adherence to the time schedules and reiterated that the admissions to medical colleges and post-graduate courses were governed by the orders of this Court and the regulations issued by the Medical Council of India, which must be strictly followed. This Court issued a warning, that if there was any violation in future, the same shall be treated as default and viewed very seriously. Further, in the case of** *Medical Council of India v. Madhu Singh & Ors.* **[(2002) 7 SCC 258], this Court declared two very important principles. Firstly, it declared that mid-stream admissions should not be permitted and secondly, noticing the practice of compassion in review of such admissions, this Court also held that late or mid-stream admission, even just four months after beginning of the classes, cannot be permitted. [Para 24] [810-E-H]**

State of Bihar & Ors. v. Dr. Sanjay Kumar Sinha & Ors. **(1990) 4 SCC 624: 1989 (2) Suppl. SCR 168** *Medical Council of India v. Madhu Singh & Ors.* **(2002) 7 SCC 258: 2002 (2) Suppl. SCR 228 - relied on.**

3. Admissions based on favouritism necessarily breach the rule of merit on the one hand, while on the other, they create frustration in the minds of the students who have attained higher rank in the competitive entrance examinations, but have not been admitted. Adherence to the principle of merit, compliance with the prescribed schedule, refraining from mid-stream admissions and adoption of an admission process that is transparent,

non-exploitative and fair are mandatory requirements of the entire scheme. The schedules prescribed have the force of law, in as much as they form part of the judgments of this Court, which are the declared law of the land in terms of Article 141 of the Constitution of India and form part of the regulations of the Medical Council of India, which also have the force of law and are binding on all concerned. It is difficult to comprehend that any authority can have the discretion to alter these schedules to suit a given situation, whether such authority is the Medical Council of India, the Government of India, State Government, University or the selection bodies constituted at the college level for allotment of seats by way of counseling. None of these authorities are vested with the power of relaxing, varying or disturbing the time schedule, or the procedures of admission, as provided in the judgments of this Court and the Medical Council of India Regulations. Inter alia, the disadvantages are:-

(1) Delay and unauthorized extension of schedules defeat the principle of admission on merit, especially in relation to preferential choice of colleges and courses. Magnanimity in this respect, by condoning delayed admission, need not be shown by the Courts as it would clearly be at the cost of more meritorious students. The principle of merit cannot be so blatantly compromised. This was also affirmed by this Court in the case of *Muskan Dogra & Ors. v. State of Punjab & Ors.* **[(2005) 9 SCC 186].**

(2) Mid-stream admissions are being permitted under the garb of extended counseling or by extension of periods for admission which, again, is impermissible.

(3) The delay in adherence to the schedule, delay

in the commencement of courses etc., encourage lowering of the standards of education in the Medical/Dental Colleges by shortening the duration of the academic courses and promoting the chances of arbitrary and less meritorious admissions.

(4) Inequities are created which are prejudicial to the interests of the students and the colleges and more importantly, affect the maintenance of prescribed standard of education. These inequities arise because the candidates secure admission, with or without active connivance, by the manipulation and arbitrary handling of the prescribed schedules, at the cost of more meritorious candidates. When admissions are challenged, these students would run the risk of losing their seats though they may have completed their course while litigation was pending in the court of competent jurisdiction.

(5) The highly competitive standards for admission to such colleges stand frustrated because of non-adherence to the prescribed time schedules. The admissions are stretched to the last date and then admissions are arbitrarily given by adopting impermissible practices.

(6) Timely non-inclusion of the recognised/ approved colleges and seats deprives the students of their right of fair choice of college/ course, on the strength of their merit.

(7) Preference should be to fill up all vacant seats, but under the garb that seats should not go waste, it would be impermissible to give admissions in an arbitrary manner and without

recourse to the prescribed rule of merit. [Para 26- 27] [811-E-H; 812-A-H; 813-A-G]

Muskan Dogra & Ors. v. State of Punjab & Ors. **(2005) 9 SCC 186 - relied on.**

4. The Medical and Dental Councils of India, the Governments and the Universities are expected to act in tandem with each other and ensure that the recognition for starting of the medical courses and grant of admission are strictly within the time frame declared by this Court and the regulations. However, despite warnings having been issued by this Court and despite the observations made by this Court, that default and non-adherence to the time schedules shall be viewed very seriously, matters have not improved. Persistent defaults by different authorities and colleges and granting of admission arbitrarily and with favouritism have often invited criticism from this Court. The consistent effort of this Court to direct corrective measures and adherence to law is not only being thwarted by motivated action on the part of the concerned authorities, but there has also been a manifold increase in arbitrary admissions. Repeated defaults have resulted in generating more and more litigation with the passage of time. [Para 28] [813-G-H; 814-A-F]

Arvind Kumar Kankane v. State of U.P. & Ors. **(2001) 8 SCC 355: 2001 (1) Suppl. SCR 262;** *Chhavi Mehrotra (Miss) v. DGHS* **(1994) 2 SCC 370 - relied on.**

5. The maxim *Boni judicis est causas litium dirimere* **places an obligation upon the Court to ensure that it resolves the causes of litigation in the country. Thus, the need of the hour is that binding dicta be prescribed and statutory regulations be enforced, so that all concerned are mandatorily required to implement the time schedule in its true spirit and substance. It is difficult and not even advisable to keep some windows open to meet a**

particular situation of exception, as it may pose impediments to the smooth implementation of laws and defeat the very object of the scheme. These schedules have been prescribed upon serious consideration by all concerned. They are to be applied *stricto sensu* and cannot be moulded to suit the convenience of some economic or other interest of any institution, especially, in a manner that is bound to result in compromise of the stated principles. Thus, the following directions *in rem* are issued for their strict compliance, without demur and default, by all concerned,.

(i) The commencement of new courses or increase in seats of existing courses of MBBS/ BDS are to be approved/recognised by the Government of India by 15th July of each calendar year for the relevant academic sessions of that year.

(ii) The Medical Council of India shall, immediately thereafter, issue appropriate directions and ensure the implementation and commencement of admission process within one week thereafter.

(iii) After 15th July of each year, neither the Union of India nor the Medical or Dental Council of India shall issue any recognition or approval for the current academic year. If any such approval is granted after 15th July of any year, it shall only be operative for the next academic year and not in the current academic year. Once the sanction/approval is granted on or before 15th July of the relevant year, the name of that college and all seats shall be included in both the first and the second counseling, in accordance with the Rules.

(iv) Any medical or dental college, or seats thereof, to which the recognition/approval is issued subsequent to 15th July of the respective year shall not be included in the counseling to be conducted by the concerned authority and that college would have no right to make admissions in the current academic year against such seats.

(v) The admission to the medical or dental colleges shall be granted only through the respective entrance tests conducted by the competitive authority in the State or the body of the private colleges. These are the methods of selection and grant of admission to these courses. However, where there is a single Board conducting the State examination and there is a single medical college, then in terms of clause 5.1 of the Medical Council of India Eligibility Certificate Regulations, 2002 the admission can be given on the basis of 10+2 exam marks, strictly in order of merit.

(vi) All admissions through any of the stated selection processes have to be effected only after due publicity and in consonance with the directions issued by this Court. The practice of giving admissions on 30th September of the academic year is strongly deprecated. In fact, that is the date by which, in exceptional circumstances, a candidate duly selected as per the prescribed selection process is to join the academic course of MBBS/BDS. Under the directions of this Court, second counseling should be the final counseling, as this Court has already held in the case of *Ms. Neelu Arora & Anr. v. UOI & Ors.* [(2003) 3 SCC 366] and third

counseling is not contemplated or permitted under the entire process of selection/grant of admission to these professional courses.

(vii) If any seats remain vacant or are surrendered from All India Quota, they should positively be allotted and admission granted strictly as per the merit by 15th September of the relevant year and not by holding an extended counseling. The remaining time will be limited to the filling up of the vacant seats resulting from exceptional circumstances or surrender of seats. All candidates should join the academic courses by 30th September of the academic year.

(viii) No college may grant admissions without duly advertising the vacancies available and by publicizing the same through the internet, newspaper, on the notice board of the respective feeder schools and colleges, etc. Every effort has to be made by all concerned to ensure that the admissions are given on merit and after due publicity and not in a manner which is ex-facie arbitrary and casts the shadow of favouritism.

(ix) The admissions to all government colleges have to be on merit obtained in the entrance examination conducted by the nominated authority, while in the case of private colleges, the colleges should choose their option by 30th April of the relevant year, as to whether they wish to grant admission on the basis of the merit obtained in the test conducted by the nominated State authority or they wish to follow the merit list/rank obtained by the candidates in the competitive examination collectively held by the nominated agency for the private colleges. The option exercised by 30th April shall not be subject to change. This choice should also be given by the colleges which are anticipating grant of recognition, in compliance with the date specified in these directions. [Paras 29- 30] [814-G-H; 815-A-H; 816-A-H; 817-A-H]

Ms. Neelu Arora & Anr. v. UOI & Ors. **(2003) 3 SCC 366: 2003 (1) SCR 562 - relied on.**

6. All these directions shall be complied with by all concerned, including Union of India, Medical Council of India, Dental Council of India, State Governments, Universities and medical and dental colleges and the management of the respective universities or dental and medical colleges. Any default in compliance with these conditions or attempt to overreach these directions shall, without fail, invite the following consequences and penal actions:-

a) Every body, officer or authority who disobeys or avoids or fails to strictly comply with these directions stricto sensu shall be liable for action under the provisions of the Contempt of Courts Act. Liberty is granted to any interested party to take out the contempt proceedings before the High Court having jurisdiction over such Institution/State, etc.

b) The person, member or authority found responsible for any violation shall be departmentally proceeded against and punished in accordance with the Rules. Violation of these directions or overreaching them by any process shall tantamount to indiscipline, insubordination, misconduct and being unworthy of becoming a public servant.

c) Such defaulting authority, member or body shall also be liable for action by and personal liability to third parties who might have suffered losses as a result of such default.

d) There shall be due channelization of selection and admission process with full cooperation and coordination between the Government of India, State Government, Universities, Medical Council of India or Dental Council of India and the colleges concerned. They shall act in tandem and strictly as per the prescribed schedule. In other words, there should be complete harmonisation with a view to form a uniform pattern for concerted action, according to the framed scheme, schedule for admission and regulations framed in this behalf.

e) The college which grants admission for the current academic year, where its recognition/ approval is granted subsequent to 15th July of the current academic year, shall be liable for withdrawal of recognition/approval on this ground, in addition to being liable to indemnify such students who are denied admission or who are wrongfully given admission in the college.

f) Upon the expiry of one week after holding of the second counseling, the unfilled seats from all quotas shall be deemed to have been surrendered in favour of the respective States and shall be filled thereafter strictly on the basis of merit obtained in the competitive entrance test.

g) It shall be mandatory on the part of each college and University to inform the State and the Central Government/competent authority of the seats which are lying vacant after each counseling and they shall furnish the complete details, list of seats filled and vacant in the respective states, immediately after each counseling.

h) No college shall fill up its seats in any other manner. [Para 31] [818-A-H; 819-A-F]

7. The instant case is a glaring example of calculated tampering with the schedule specified under the regulations and the judgments of this Court, with a clear intent to grant admission to less meritorious candidates over and above the candidates of higher merit. The High Court had cancelled the admission of the appellants by a detailed and well-reasoned judgment. However, as a result of interim orders granted by the Court, both the appellants had already completed four years of the studies at the time of the High Court decision. They are stated to have completed their final exam now. Despite having lost their case before the High Court, the appellants continued to pursue their professional courses because of the interim orders of the Court and, therefore, the plea of inequities was raised. On 30th September, 2006, the Director, Medical Education, Chhattisgarh, wrote a letter to the Dean of the College, requiring that the Jagdalpur College provide the up-to-date list of the students admitted to it and if there were any seats remaining vacant, guidance was to be taken from the Directorate of the State Government. Another letter written by the Director, Medical Education, to the Dean of the Jagdalpur College and referring to their letter of the same date, which stated that two seats were vacant, in turn, ordered that those seats be filled up and the candidates be contacted over telephone. If contact

could not be established with any candidate, then the Jagdalpur College was directed to fill up the seats with the candidates physically present and available at the Jagdalpur College, according to merit. The Dean of the Jagdalpur College, on that very day, constituted a Committee to examine the certificates etc. of the available candidates and recommend the names on the basis of merit. Again, on that very day, the Committee recommended the names of the two appellants, declaring them to be eligible for getting admissions. More strangely, the Committee also noted that the fees from the candidates had been deposited and they could be given admission. Then, by another letter dated 30th September, 2006, the Dean of the College informed the Director, Medical Education that the two appellants were given admission and the admission process for 50 seats had been completed. There was nothing placed on the records of the Court as to what steps were taken by the Jagdalpur College to inform all the other candidates of counseling on the last date. Also strange was the direction of the Directorate that the candidates should be informed on telephone. Even if this direction was of some content and meaning, there is still no material to show how many candidates were actually informed on the telephone that there would be counseling for two seats. Thus, the questions remained open, as to the reason for total abandonment of the procedure of informing all eligible candidates, by appropriate means, that two seats were available for admissions, who all had actually appeared for the counseling, how only two candidates who even according to the State Government were not contacted on telephone, were alone present before the Committee and immediately found to be eligible for admission. This entire exercise smacked of arbitrariness, unfairness and was discriminatory ex facie. Respondent No.3, the Director of the Medical Education in Chhattisgarh, is the father of appellant no.2 and that

speaks volumes of how the admission had been granted to the appellants. [Paras 33, 36-37] [820-A-D; 821-D-H; 822-A-F]

8. The methodology adopted and the manner in which admissions were given to the appellants would show that this process was neither fair nor transparent. In fact, within a few hours, the entire process of admission was completed, indicating that the whole exercise was undertaken only with the object of granting admission to the appellants, that too, as if no other candidates of merit were available for these two seats. This view was entirely substantiated by the records produced before us. The prescribed procedure for grant of admission was given a go by and the rule of admission on merit stood frustrated as a consequence of such admission process. One fails to understand why no preventive steps or efforts to fill the vacant seats were taken by any of the competent authorities involved in the entire process of selection and admission to MBBS courses. The students who had undertaken the PMT examination had been allocated seats in the college on 23rd August, 2006. Not even a single document was placed on record of this Court from 23rd August, 2006 to 29th September, 2006 showing efforts to fill up vacant seats. Everybody waited for the last date which, in fact, was the date for joining the courses and not admission, whereafter the entire machinery in the Centre, State Government and the college acted so swiftly that within hours, the entire admission process was concluded to grant the admission to the appellants. It is a travesty of fairness and transparency that for 50 seats in the Jagdalpur College, the Directorate as well as the Committee constituted for counseling/selection could find only the candidates at Merit Nos. 3893 and 1614 suitable, completely ignoring all the candidates being higher in merit than these two appellants, who must also be waiting for admission to the MBBS course. Strangely,

the merit ranks of these two appellants, as given in the letter of the DGHS dated 8th August, 2006 were 2196 and 2203 respectively. From every angle only one conclusion is possible that the allocation of seats was totally arbitrary and contrary to the procedure laid down. The three members of the Selection Committee found only these two candidates eligible and fit to be granted admission to the MBBS courses on the last day for admissions. To say the least, this Committee acted in undue haste, in violation of the prescribed procedure of admission and certainly contrary to the judgments of this Court. The Dean of the Jagdalpur College is directed to convey the displeasure of this Court to the members of the Selection Committee and the same be placed on their respective service records. [Para 38] [822-G-H; 823-A-H; 824-A]

9. The Inquiry Committee returned a finding that the admission to the two appellants was not given in furtherance to the letter dated 8th August, 2006, but validly granted on 30th September, 2006 instead. Their report did not even mention if they had verified the fact that notices had been issued to all the concerned persons on 30th September, 2006 and if other students had been contacted for intimation of counseling or if any effort was even made on 30th September, 2006 or even prior thereto to put these two vacant seats on the internet or notice board of the colleges so as to enable the students of higher merit to seek admission to the MBBS course in the Jagdalpur College. This aspect attained a greater significance in view of the fact that the seats were not allotted in the second counseling itself on 22nd - 23rd August, 2006. The Jagdalpur College, the Directorate of the State Government as well as the Union of India made no effort and did not act in coordination, to allot these two seats to the candidates in accordance with merit in the PMT. The finding recorded by the Committee appears to be a mere eye-wash rather than a proper report upon

examining the entire matter in its proper perspective. It was not only expected of the Committee to examine the documents which were made available to it, as is recorded in the report, but also to call for all such necessary documents which were relevant and could have bearing on the reference made to it. The Committee did not even care to know why everything was completed on 30th September, 2006 and how nobody else except these two appellants were available for admission from amongst candidates in the entire State. [Para 39] [824-B-H; 825-A-C]

10. Another aspect of this inquiry was that, even as on 30th September, 2006, nobody was clear as to which quota these two vacant seats belonged to. According to the State of Chhattisgarh, these two seats were part of the 15 per cent All India quota which stood surrendered after 23rd August, 2006. According to the appellants, they were Central Pool quota seats which stood surrendered to the State on 30th September, 2006 only. According to the Union of India, they had not made any allotment to the appellants or anyone in the Jagdalpur College from the All India Quota, and even the code number given on the 8th August, 2006 letter is wrong. If the Directorate, the Union of India and the Jagdalpur College itself were not ad idem as to which quota the seats belonged to and who was the competent authority to allot the seats, none of them had any business to allot these two seats in such an arbitrary manner. Even now, there is no clarity as to how and under what quota the Jagdalpur College has granted admission to these two appellants. The inquiry report, in fact, did not help to resolve the issue and cannot, thus, form the basis of returning any finding in favour of or against any person. Ex facie, the findings returned by the Inquiry Committee would appear to be inconclusive, uncertain and vague. Be that as it may, there is no escape from returning the finding that

admission of both the appellants was made in a most improper and arbitrary manner. The whole exercise was undertaken on 30th September, 2006 with only one aim in mind, i.e., that these two appellants have to be given admission in the Jagdalpur College. [para 40] [825-C-H; 826-A]

11. The cancellation of the admission of the appellants was challenged by the appellants before the High Court, which allowed continuation of study under interim orders, though finally it dismissed the writ petitions filed by these appellants. At that time, they had already completed more than four years of the MBBS course to which they were admitted. Today, they have already appeared for their final examination. The Jagdalpur College ought to have declared these two seats as being available for admission when the counseling was held on 22nd - 23rd August, 2006 and that there was violation of the basic principles of equality of opportunity and of equal consideration for allotment of seats. Candidates of higher merit stand excluded. Another challenge which was raised on behalf of the appellants was that the order of cancellation dated 10th September, 2010 was passed without affording any opportunity of hearing to these two appellants and, therefore, the order was liable to be set aside, being violative of principles of natural justice. It is, in fact, not in dispute that no specific notice was given to the appellants before the impugned order was passed. It is not necessary for this Court to examine this submission in any greater detail because the appellants have now had two occasions to put forward their claim before the Court. The High Court considered various aspects of the case and gave a complete hearing to the appellants. No prejudice was caused to them, inasmuch as they have pursued their studies despite cancellation of admission and have now been duly heard by the High Court, as well

as this Court. Hence, this ground of challenge did not, in any case, survive, particularly since it is held the admission to these appellants was given in a completely arbitrary and unfair manner. [Paras 42-43] [826-C-H; 827-A-C]

12. In the instant case, the fault is attributed to all the stakeholders involved in the process of admission, i.e., the concerned Ministry of the Union of India, Directorate of Medical Education in the State of Chhattisgarh, the Dean of the Jagdalpur College and all the three Members of the Committee which granted admission to both the appellants on 30th September, 2006. But the students were also not innocent. They certainly took advantage of being persons of influence. The father of appellant No. 2 was the Director of Medical Education, State of Chhattisgarh at the relevant time, the entire process of admission was handled through the Directorate. The students well knew that the admissions could only be given on the basis of merit in the entrance test and they had not ranked so high that they were entitled to the admission on that basis alone. In fact, they were also aware of the fact that no other candidate had been informed and that no one was present due to non-intimation. Out of favouritism and arbitrariness, they had been given admission by completing the entire admission process within a few hours on 30th September, 2006. Balancing of equities by the Court itself is inequitable. Some party or the other would suffer a set back or adverse consequence from the order of the Court. On the one hand, if admissions are cancelled, the students who have practically completed their MBBS course would lose their professional education as well as nearly five years of their life spent in such education. If their admissions are protected, then the standard of education, the merit of the candidates and the desirability of the persons of higher merit becoming doctors is negated. The best solution to such problems is strict adherence

to the time schedule, procedure for selection/admission and strict observance of the Medical Council of India Regulations, by all concerned. Once these factors are adhered to, not only would such situation not arise, but also it will prevent avoidable litigation before the Courts. The persons who violate the time schedule to grant admissions in an arbitrary manner and by colourable exercise of power, who are not adhering to Medical Council of India Regulations and the judgments of this Court, should be dealt with strictly by punishment in accordance with law, to prevent such mischief from repeating. In the instant case, the appellants had already sat for their final examination and are about to complete their courses. Even if their admissions are protected on the ground of equity, they cannot be granted such relief except on appropriate terms. By their admissions, firstly, other candidates of higher merit have been denied admission in the MBBS course. Secondly, they have taken advantage of a very low professional college fee, as in private or colleges other than the government colleges, the fee payable would be Rs.1,95,000/- per year for general admission and for management quota, the fee payable would be Rs.4,00,000/- per year, but in government colleges, it is Rs.4,000/- per year. So, they have taken a double advantage. As per their merit, they obviously would not have got admission into the Jagdalpur College and would have been given admission in private colleges. The ranks that they obtained in the competitive examination clearly depict this possibility, because there were only 50 seats in the Jagdalpur College and there were hundreds of candidates above the appellants in the order of merit. They have also, arbitrarily and unfairly, benefitted from lower fees charged in the Jagdalpur College. On the peculiar facts and circumstances of the case, though there is no legal or other infirmity in the judgment under appeal, but to do complete justice between the parties

within the ambit of Article 142 of the Constitution of India, the appellants are permitted to complete their professional courses, subject to the condition that each one of them pay a sum of Rs.5 lakhs to the Jagdalpur College, which amount shall be utilized for developing the infrastructure in the Jagdalpur College. Heavy cost is imposed upon these appellants to ensure that such admissions are neither accepted nor granted leave to complete their medical courses in future. [Paras 48-51] [828-G-H; 829-A-H; 830-A-H]

13. Accordingly, it is ordered that though, there is no merit in the appeal preferred by the appellants and the judgment of the High Court does not suffer from any infirmity, still, in the peculiar facts and circumstances of the case, the appellants are permitted to complete their MBBS course as general candidates in the Government Medical College, Jagdalpur, subject to their paying a sum of Rs. 5 lakhs each, within one week from today. In the event of default of payment or failure to file proof of payment in the Registry of this Court, not only will the present appeal stand dismissed on merits, but the exam results of the defaulting appellant will not be declared, they will not be conferred with the degree of MBBS by the Jagdalpur College and the Medical Council of India shall not register their names on the rolls maintained by it or the State Council, as the case may be. For these reasons, if their admissions are cancelled, there being no claimants for these seats, the seats will go waste and the entire expenditure incurred by the State would also be wasted. After so many years, it would be an exercise in futility to cancel their admissions, which, but for the interim orders, could be avoided. An undue advantage from the interim orders has accrued in favour of the appellants. The High Courts are requested to ensure strict adherence to the prescribed time schedule, process of selection and to the rule of merit. Except in very exceptional cases, the High Court may consider it

appropriate to decline interim orders and hear the main petitions finally, subject to convenience of the Court. All the relevant stakeholders have failed to perform their duty/obligation in accordance with law. Where the time schedules have not been complied with, and rule of merit has been defeated, there nepotism and manipulation have prevailed. The stands of various authorities are at variance with each other and none admits to fault. Thus, it is imperative for this Court to ensure proper implementation of judgments of this Court and the regulations of the Medical Council of India as well as not to overlook the arbitrary and colourable exercise of power by the concerned authorities/colleges. Therefore, initiation of proceedings is directed under the provisions of the Contempt of Courts Act, 1971 against the Additional Secretary, Ministry of Health & Family Welfare, Union of India, Dr. S.L. Adile, Director, Medical Education, Dean of the Jagdalpur College, Dr. M.S. Banjan, Member of the Selection Committee, Dr. P.D. Agarwal, Member of the Selection Committee, Shri Padmakar Sasane, Member of the Selection Committee, Director General, Directorate of Health Services, Union of India. All concerned authorities are hereby directed to carry out the directions and orders contained in this judgment, particularly paragraphs 30 and 31 of the judgment forthwith. The directions shall be applicable for the academic year 2012-2013 itself. [Para 53] [831-C-H; 832-A-H; 833-A-C]

State of M.P. & Ors. v. Gopal D. Tirthani & Ors. **(2003) 7 SCC 83: 2003 (1) Suppl. SCR 797;** *Bharati Vidyapeeth (Deemed University) & Ors. v. State of Maharashtra & Anr.* **(2004) 11 SCC 755: 2004 (2) SCR 775;** *Chowdhury Navin Hemabhai & Ors. v. State of Gujarat & Ors.* **(2011) 3 SCC 617: 2011 (2) SCR 1071** *Harish Verma & Ors. v. Ajay Srivastava & Ors.* **(2003) 8 SCC 69: 2003 (3) Suppl. SCR 833;** *A. Sudha v. University of Mysore & Anr.* **(1987) 4 SCC 537: 1988 (1) SCR 368;** *Amandeep Jaswal v. State of Punjab* **(2006) 9 SCC 597;** *R. Vishwanatha Pillai v. State of Kerala & Ors.* **(2004) 2 SCC 105; 2004 (1) SCR 360;** *Chowdhary Navin Hemabhai & Ors. v. The State of Gujarat & Ors.* **(2011) 3 SCC 617; 2011 (2) SCR 1071;** *Medical Council of India v. Rajiv Gandhi University of Health Sciences* **(2004) 6 SCC 76: 2004 (3) SCR 1119 - referred to.**

Case Law Reference:

2002 (3) Suppl. SCR 587	relied on	Para 20
1984 (3) SCR 942	relied on	Para 20
1985 (1) Suppl. SCR 41	relied on	Para 20
1988 (1) SCR 351	relied on	Para 20
1990 (1) Suppl. SCR 135	relied on	Para 20
(1993) 3 SCC 332	relied on	Para 20
2005 (1) SCR 380	relied on	Para 20
2011 (2) SCR 945	relied on	Para 23
1989 (2) Suppl. SCR 168	relied on	Para 24
2002 (2) Suppl. SCR 228	relied on	Para 24
2003 (1) Suppl. SCR 797	referred to	Para 25
2004 (2) SCR 775	referred to	Para 205
2011 (2) SCR 1071	referred to	Para 25
2003 (3) Suppl. SCR 833	referred to	Para 25
(2005) 9 SCC 186	relied on	Para 27
2001 (1) Suppl. SCR 262	relied on	Para 29
(1994) 2 SCC 370	relied on	Para 29
2003 (1) SCR 562	referred to	Para 30
1988 (1) SCR 368	referred to	Para 46, 47

(2006) 9 SCC 597	**referred to**	**Para 46**
2004 (1) SCR 360	**referred to**	**Para 46,**
2011 (2) SCR 1071	**referred to**	**Para 46, 47**
2004 (3) SCR 1119	**referred to**	**Para 4**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4318 of 2012.

From the Judgment & Order dated 09.08.2011 of the High Court of Chattisgarh at Bilaspur (C.G.) in Writ Petition (C) No. 5488 of 2010.

WITH

C.A. No. 4319 of 2012.

Dr. Rajiv Dhawan, Mukul Rohtagi, Sushil Kumar Jain, Puneet Jain, Pratibha Jain, Sanjeeb Panigrahi, Subas Acharya, L. Nidhiram Sharma, Siddhartha Chowdhury for the Appellants.

Ashok Bhan, S.S. Rawat, D.S. Mahra, Atul Jha, Sandeep Jha, Dharmendra Kumar Sinha for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Leave granted.

2. The Department of Medical and Family Welfare, Government of Chhattisgarh, vide its letter dated 10th September, 2010 cancelled the admission granted to Akansha Adile and Priya Gupta in the MBBS course for the academic year 2006-07 in the Government NMDC Medical College, Jagdalpur (for short, the Jagdalpur College) with immediate effect.

3. Aggrieved by this order of the Government, both the students challenged the legality and correctness of this action in separate writ petitions under Article 226 of the Constitution

of India. The High Court, vide its judgment dated 9th August, 2011, held that admission to these petitioners had been given ignoring more meritorious and suitable candidates, which amounted to violation of natural justice to such other candidates and declined to interfere in the impugned order dated 10th September 2010, hence giving rise to the present appeals. The appellants had appeared in the Pre-Medical Test conducted by the State of Chhattisgarh for the academic year 2006. The results were declared in July 2006 and Appellant No.1, Priya Gupta, secured general rank 1614 while Appellant No.2, Akansha Adile, secured general rank 3893. As the latter belonged to the Scheduled Caste category, her rank in that category was 396. This entrance exam was conducted by the State as per the notification of the State Government dated 8th March, 2006 under the 'Chhattishgarh Medical and Dental Graduate Examination Rules, 2006' (Chhatisgarh Chikitsha Tatha Dant Chikitsha Snatak Pravesh Pariksha Niyam, 2006) (for short, 'the Rules'). These Rules provided for allocation of seats and reservation, the process for admission to the vacant seats, selection procedure as well as cancellation of admission and the matters incidental thereto.

4. The State Government, vide its letter dated 14th August, 2006, had granted permission for the starting of admission procedure for the academic year 2006-07 at the Jagdalpur College. The annual admission capacity was 50 seats which were to be filled up by the candidates who had qualified PMT 2006 in the order of their merit.

5. The first counseling was held on 21-22nd July, 2006 but obviously, at that time, the Jagdalpur College had not been given permission to commence admission to the MBBS course. The counseling was conducted for medical colleges at Raipur and Bilaspur and also for the Raipur Dental College. 18 per cent of seats were to be reserved for allotment under the All India Quota and the Central Pool quota. However, the State Government vide letter dated 21st August, 2006 is stated to

have informed the Jagdalpur College that two seats out of the total seats were reserved for allotment under the Central Pool Quota and no seats were reserved under All India Quota. Upon receipt of recognition, only 48 seats were offered for admission to the students on 22nd - 23rd August, 2006. The Central Pool Quota seats were not filled up and were allegedly not made available to the candidates who appeared for that counseling. The Dean of Jagdalpur College informed the Director, Medical Education, State of Chhattisgarh on 30th September, 2006 that on that date, 48 candidates had taken admission and two seats were lying vacant. This information was sent in response to inquiry by the Director, Medical Education in this regard and directions were sought by the Jagdalpur College for filling up of vacant seats. On the same day, the Director, Medical Education, directed that the seats should be filled from the merit list and the candidates could be contacted on telephone. If contact was not possible, admission could be given to the candidates who were available in the Jagdalpur College. On 30th September, 2006 itself, the two vacant seats were given to the available candidates, who are the appellants herein.

6. As already noticed, the Jagdalpur College was granted permission for starting the academic procedure for the session 2006-2007 by the Government of Chhattisgarh. This letter reads as under:-

> "Consequent to the letter No. U.12012/206/2005/M.E.(P.II) dated 15th July, 2006 of the Health and Family Welfare Department, Government of India, the State Government hereby grants permission for starting admission procedure for the academic session 2006-07 in the Government Medical College, Jagdalpur.
>
> 2. The annual admission capacity of the said Medical College would be 50 seats and the candidates qualified in P.M.T. 2006 would be given admission on the basis of merit. Necessary action be ensured as per the aforesaid."

7. 48 students under different categories were given admission as per the list published by the Jagdalpur College on 30th September, 2006. Vide letter dated 30th September, 2006, the Jagdalpur College and other medical colleges in the State had been informed by the Directorate of Medical Education, State of Chhatisgarh that 30th September, 2006 being the last date for admission as per the judgment of the Supreme Court, a list of the students who had been given admission may be sent to the Directorate and guidance sought from the Directorate, if any seats were lying vacant. The guidance was received by the Jagdalpur College by letter dated 30th September, 2006, which reads as under :-

> "On the above subject, information about 2 vacant seats has been given by you. In order to fill these up contact the candidates over telephone. If contact could not be established with any candidate then fill up the vacant seats from amongst the candidates available in the college according to merit."

8. On that very date, inter alia, an order was issued by the Dean of Jagdalpur College constituting a Committee to give admission to the available candidates in accordance with mer t of the PMT. This letter reads as under:-

> "As per the directions received from the Directorate of Medical Education, the vacant seats are to be filled from the available candidates according to the merit in P.M.T. For this purpose, Counseling Committee is constituted as follows:-
>
> 1. Dr. M.S. Banjari, Assistant Vice Principal
>
> 2. Dr. P.D. Agarwal, Assistant Vice Principal
>
> 3. Shri Padmakar Sasane, Demonstrator
>
> The aforesaid Committee after examining the certificates

etc. of the available candidates recommend for admission on the basis of merit."

9. The Dean of the Jagdalpur College was further informed by the Committee, on 30th September, 2006 itself, that only two candidates, i.e., the appellants were available and they were given admission to the vacant seats. This letter reads as under:-

"In compliance of your letter No. 233/GAMC/06 Jagdalpur, dated 20.9.2006 the certificates etc. of the candidates available on today's date have been examined. Only the following two candidates, who were present have been found to be eligible to be given admission -

1. Ku. Priya Gupta Merit No. UR 1614

2. Ku. Akanksha AdileMerit No. SC 396 /3893

Prescribed fees have been got deposited from the aforesaid candidates. They can be given admission against the vacant seats."

10. Having granted admission to these two appellants, the Dean of the Jagdalpur College informed the Director, Medical Education as follows:-

"With reference to the above, it is submitted that according to the directions given by you in the letter under reference the following two candidates, present on 30.9.2006, have been given admission in the 2 seats remained vacant in this college.

1. Ku. Priya Gupta Merit No. UR 1614

2. Ku. Akanksha AdileMerit No. SC 396/3893

It is further submitted that the admission procedure for all the 50 seats of this college has been completed."

11. As is evident from the above letters, all the events had

taken place on 30th September, 2006 itself. Appellant No.2, Akansha Adile is stated to be daughter of the Director, Medical Education Government of Chhattisgarh, one Dr. S.L. Adile, who is supposed to be the highest authority in the State directly responsible for admission to the medical colleges, including Jagdalpur College. The appellants were given admission and they joined the course of MBBS.

12. The State of Chhattisgarh, vide notification No. F-16-1/2001/75/55 dated 8th March, 2006 had framed the Rules. Under Sub-Rule (1) of Rule 4 of these Rules it had been specifically prescribed that in all Government Medical and Dental Colleges, there will be a reservation of 15 per cent of seats under All India quota and these seats will be filled on the basis of All India Entrance Examination. Further, under sub-rule (2), it was specified that in the said colleges, there shall be a prescribed quota of 3 per cent reserved for admissions from the Central Pool, which would be filled from the names nominated by the concerned/authorised officer.

13. It emerges from the record that a Right to Information application was filed before the Directorate General of Medical Services, Medical Examination Cell, New Delhi by one Dr. Anil Khakhariya. The Assistant Director General, ME, Government of India, had forwarded the complaint to the State Government and the Jagdalpur College, and vide letter dated 13th September, 2009 informed Dr. Anil Khakhariya that an inquiry committee consisting of three members had been constituted by the Director, Medical Education, State of Chhattisgarh to examine whether the admission of the two candidates, namely Akansha Adile and Priya Gupta, was valid or not. The Committee submitted its Report with the following findings:-

"A. No Admission was granted to any students in All India quota on the basis of letter of Director General of Health Services (ME), Ministry of Health & Family Welfare, Govt. Of India no. U-11011/1/2006-ME dated 08/08/2006.

B. Two students namely Miss. Akansha Adile & Miss Priya Gupta got admission in Medical College Jagdalpur in 2006 by the state PMT merit on the last date of the admission i.e. 30/09/2006."

14. The above inquiry report was submitted by the Dean of Jagdalpur College to the Directorate. However, on 22nd July, 2010, the Secretary, Department of Health and Family Welfare, Government of Chhattisgarh was informed by the Assistant Director General (Medical Education), Government of India that the admission of Akanksha and Priya had been on the basis of fake letters purported to be issued from the Directorate General of Health Services (DGHS) and that their admissions may be cancelled with immediate effect and action taken report be submitted to the DGHS. In furtherance to this letter, the Deputy Secretary, Medical and Family Welfare Department, Government of Chhattisgarh, issued an order dated 10th September, 2010 stating that the admission of these two appellants was not in accordance with the provisions of the Rules and other guidelines/provisions with regard to allotment of seats under the All India Quota and the admission was cancelled with immediate effect. As already noticed, this letter of cancellation of admission was challenged by the appellants before the High Court.

15. The Assistant Director General, (Medical Education), New Delhi, has filed an affidavit taking up the stand that the Central Board for Secondary Education, New Delhi had been entrusted with the responsibility to conduct All India Pre-Medical and Pre-Dental Examinations, but allotment of seats would be undertaken by the DGHS. The candidates equal to the number of seats available for allotment, together with the wait-listed candidates are called for counseling. The allotment of seats is made on merit and only two rounds of counseling are permitted. In the counseling, the candidates have to appear in person. In Chhattisgarh, the allotment of All India Quota seats in the Pt. JLN Medical College, Raipur was made vide letter dated 8th

August, 2006 on the basis of vacancy position furnished by that college. The allotment of Akansha Adile and Priya Gupta in the Jagdalpur College, was also allegedly made by the same letter under 15 per cent All India Quota of 2006. However, the DGHS denies making any allotment of seats to the appellants by such letter.

16. Therefore, according to the Union of India, it was a case of fake admission to the Jagdalpur College, taken up in furtherance to a purported letter issued by the answering respondents, which was now found fake. Vide letter dated 19th April, 2010, the Secretary, Department of Health and Family Welfare, State of Chhattisgarh had been requested to personally look into whether the allegations made by Dr. Anil Khakharia under the Right to Information Act, as mentioned above, were correct. Letters dated 6th August, 2010 and 24th August 2010 were also exchanged between the parties. In response to the letter of the DGHS dated 6th August, 2010, the Secretary, Department of Health and Family Welfare, Raipur, Chhattisgarh, vide letter dated 24th September, 2010, communicated the information that admissions given to Akansha Adile and Priya Gutpa in the MBBS course for the academic year 2006-07 were against the norms and the Rules and the admission was cancelled immediately by the Department vide order dated 10th September, 2010. Further, it is the clear stand of the Union of India that the order dated 10th September, 2010 was passed in accordance with law and the judgment of the High Court dismissing the writ petition does not call for any interference.

17. The petitioners have impugned the judgment of the High Court on the following grounds:

(1) The order dated 10th September, 2010 has been passed in violation of the principles of natural justice. Neither hearing nor copy of the inquiry report was given to them prior to cancellation of admission.

(2) The report submitted by the Inquiry Committee had specifically recorded a finding that the admission of both the appellants was not granted in furtherance to the letter of the DGHS dated 8th August, 2006 and that they had received admission in the Jagdalpur College through the State PMT on the basis of merit on the last date of admission, i.e. 30th September, 2006 and only upon recommendation of a duly constituted counseling Committee. In face of these positive findings, the order of cancellation of admission suffers from legal infirmity and as such, the judgment of the High Court sustaining this order is in error of law.

(3) The Jagdalpur College was granted permission to admit students by the Central Government vide its letter dated 15th July, 2006 and by the Government of the State of Chhattisgarh only on 14th August, 2006. Two seats had not been offered for admission in the counseling held on 22nd -23rd August, 2006 and 48 seats were offered for admission. The two remaining seats reverted from the Central Pool quota to the State Government only on 30th September, 2006 which were then given to the appellants in accordance with the Rules. Therefore, no fault is attributable to the appellants.

(4) The petitioners have already pursued the MBBS course for a considerable period and, in fact, have completed a major part of the course, having written their final examination and thus, to cancel their admission at this stage would be unjust and unfair. It will be inequitable to the petitioners to cancel their admission at this stage and would cause them irreparable loss and damage, besides wasting the seats and public money.

(5) The High Court judgment is also challenged on the ground that no candidate entitled to admission has been denied admission and also that no candidate has complained about or objected to the admission of the appellants.

18. It deserves to be noticed that the stands taken by the Union of India and the State of Chhattisgarh in the present petitions are not exactly the same. According to the DGHS, Respondent No.2 herein, the letter dated 8th August, 2006 is fake and no seats had been allotted to the Jagdalpur College. Seats were allotted only to Pt. JLN Medical College, Raipur. The letter dated 8th August, 2006 is alleged to have been sent by the Assistant Director General (ME), Ministry of Health and Welfare, Nirman Bhawan, New Delhi. Having found the letter to be fake, the DGHS directed cancellation of the admission granted to both the appellants. According to the State of Chhattisgarh, the State had to distribute only 41 seats of the Jagdalpur College as 15 per cent were reserved for All India quota and three per cent for Central Pool quota. It is their stand that Dr. S.L. Adile, Respondent No.3 is the father of Akanksha Adile and is the highest officer in the State for controlling pre-medical education and post graduate admission. Seats reserved, if any, would have reverted back on 23rd August, 2006 to Respondent No.3 and no action was taken to fill up these seats at that time. Suspiciously, the seats were filled only on 30th September, 2006, by giving the seats to the appellants. They support the case of the Union of India that the letter dated 8th August, 2006 is fake and claim that the two seats were deliberately not offered for the second round of counseling, which was held on 22nd-23rd August, 2006. All other candidates had been absent on 30th September, 2006 as they had not been contacted. The entire admission process of the appellants was vitiated by fraud.

19. The admission to MBBS and BDS courses, whether at State level or All India level has ever been a matter of

concern for the courts. Large number of writ petitions are filed challenging the admission process or admission of some particular candidates on varied grounds, like admission being contrary to Rules, the principle of merit being disturbed, admissions being arbitrary, etc. and there is still flagrant violation of the dicta of this Court, as issued in various judgments, as well as of the Rules and Regulations wherever framed by the State or Central Government or Medical or Dental Council of India. The present case is one example of violation of procedure and admissions being arbitrary. Before we examine the intricacies of procedural irregularities in the present case and the arbitrary admission of the appellants, we must examine the background in which admissions of the present kind are normally questioned before the courts of competent jurisdiction.

20. Admission to professional colleges are governed by the judgment of this Court in the case of *TMA Pai Foundation & Ors. v. State of Karnataka & Ors.* [(2002) 8 SCC 481]. The framework of admissions to colleges was discussed in some detail by this Court. However, even in the case of *Dr. Pradeep Jain & Ors. v. Union of India & Ors.* [(1984) 3 SCC 654], the concept of an All India quota came to be introduced while determining the validity of a domicile requirement in such admissions. Earlier, 30 per cent of seats in the under-graduate courses were reserved for this purpose, which came to be modified to 15 per cent seats for All India quota in the case of *Dr. Dinesh Kumar & Ors. v. Moti Lal Nehru College, Allahabad & Ors.* [(1985) 3 SCC 22]. In the case of *Dr. Dinesh Kumar & Ors. v. Moti Lal Nehru College, Allahabad & Ors.* [(1987) 4 SCC 459], this Court also passed directions in relation to the manner of notification/announcement of details, results and counseling for admission, in that case, for post graduate admissions, which were to be published in two successive issues of newspapers, including one national paper in English and at least two local papers in the language of the State. Declaration of results would be made four weeks after

the examination and academic courses were to mandatorily begin on the 2nd of May every year. Again, in the case of *Dr. Dinesh Kumar & Ors. v. Moti Lal Nehru College, Allahabad & Ors.* [(1990) 4 SCC 627], as some of the States were not adhering to the prescribed schedule, this Court took punitive action against the State of Uttar Pradesh and even contemplated action under the Contempt of Courts Act, 1971. Right from *Dr. Pradeep Jain's* case (supra), this Court has always directed that merit alone must be the criteria for admission to MBBS courses. To make such admissions more subject-specific, transparent and systematic, certain further directions were issued by this Court in *Shrawan Kumar & etc. etc. v. Director General of Health Services & Anr. & etc.* [(1993) 3 SCC 332]. This Court clarified that candidates who have been allotted a seat in the second round of counseling will have to join the college within 15 days from the date of their personal appearance and the whole allotment and admission process to 15 per cent seats of All India quota will be over before the 30th September of each year, the remaining seats having been surrendered back to the college/State. Various judgments of this Court have sought to carry forward, with greater clarity, the fundamental requirement as stated in *TMA Pai* (supra) that the admission process should be fair, transparent and non-exploitative. Every subsequent judgment of this Court has attempted to elucidate one or other aspect of this principle. Having noticed that there have been irregularities in maintaining the prescribed schedule and that the last few days of the declared schedule are primarily being utilized in an exploitative manner, on account of charging higher fees for securing admission and thereby defeating the principle of admission on merit, a three Judge Bench of this Court in the case of *Mridul Dhar (Minor) & Anr. v. Union of India & Ors.* [(2005) 2 SCC 65] applied the schedule notified by the Medical Council of India (MCI) in Appendix 'E' of the Graduate Medical Education (Amendment) Regulations, 2004 and directed its strict adherence. The said Schedule reads as under :

"APPENDIX E

TIME SCHEDULE FOR COMPLETION OF THE ADMISSION PROCESS FOR FIRST MBBS COURSE

Schedule for admission	*Seats filled up by the Central Government through All-India Entrance Examination*	*Seats filled up by the State Governments/ institutions*
Conduct of entrance examination	Month of May	Month of May
Declaration of result of qualifying exam/ entrance exam	By 5th June	By 15th June
First round of counseling/ admission	To be over by 30th June	To be over by 25th July
Last date for joining the allotted college and course	Within 15 days from the date of allotment of seats	31st July
Second round of counseling for allotment of seats from waiting list	To be over by 8th August	Up to 28th August
Last date for joining for candidates allotted seats in second round of counseling from the waiting list	Within 15 days from the date of allotment of seat (seats vacant after 22nd August will be surrendered back to the States/ colleges)	31st August
Commencement of academic session		1st of August
Last date up to which students can be admitted against vacancies arising due to any reason		30th September"

21. The Court noticed that the holding of 10+2 examination and declaration of results is also of importance for the entire admission process and, therefore, directed strict adherence to the Schedule in all respects and by all concerned. The date of 30th September was stated not to be the date of normal admission but is to give opportunity to grant admission against stray vacancies. The Court clarified that adherence to the time schedule by everyone was a paramount concern. In that case, the Court issued a specific direction to all the State functionaries, particularly the Chief Secretaries and heads of the concerned Ministries/Departments participating in the States/Union Territories, adopting the time schedule and holding the State examination, to ensure declaration of results on or before 15th June, 2005. They were also required to ensure the appropriate utilization of All India quota, to fullest extent, by timely reporting to the DGHS by the Deans of various colleges or any other State authority, informing the DGHS of the acceptance or rejection of seats by the students after the first counseling of All India/State Quota.

22. Further, this Court even took pains to declare the need for adherence to the schedule for receipt of applications for establishment of new medical colleges or seats and the process of the review and recommendation by the Central Government and the Medical Council of India. In para 28 of the judgment, the Schedule under the 1999 Regulations are referred to, that reads as under :

"SCHEDULE FOR RECEIPT OF APPLICATIONS FOR ESTABLISHMENT OF NEW MEDICAL COLLEGES AND PROCESSING OF THE APPLICATIONS BY THE CENTRAL GOVERNMENT AND THE MEDICAL COUNCIL OF INDIA

	Stage of processing	*Last date*
1.	Receipt of applications by the Central Government	From 1st August to 31st August (both days inclusive) of any year
2.	Receipt of applications by MCI from the Central Government	30th September
3.	Recommendations of the Medical Council of India to the Central Government for issue of letter of intent	31st December
4.	Issue of letter of intent by the Central Government	31st January
5.	Receipt of reply from the applicant by the Central Government requesting for letter of permission	28th February
6.	Receipt of letter from the Central Government by the Medical Council of India for consideration for issue of letter of permission	15th March
7.	Recommendations of the Medical Council of India to the Central Government for issue of letter of permission	15th June
8.	Issue of letter of permission by the Central Government	15th July

Note: (1) The information given by the applicant in Part I of the application for setting up a medical college that is information regarding organisation, basic infrastructural facilities, managerial and financial capabilities of the applicant shall be scrutinised by the Medical Council of India through an inspection and thereafter the Council may recommend issue of letter of intent by the Central Government.

(2) Renewal of permission shall not be granted to a medical college if the above schedule for opening a medical college is not adhered to and admissions shall not be made without prior approval of the Central Government."

23. Lastly, in the case of *Priyadarshini Dental College & Hospital v. Union of India & Ors.* [(2011) 4 SCC 623], this Court cautioned all concerned that the schedule specified in *Mridul Dhar* (supra) should be maintained and regulations should be strictly followed. The Court suggested that the process of inspection of colleges, grant of permission or renewal of permission should also be done well in advance to allow time for setting right the deficiencies pointed out.

24. In the case of *State of Bihar & Ors. v. Dr. Sanjay Kumar Sinha & Ors.* [(1990) 4 SCC 624], a Bench of this Court took exception to the non-adherence to the time schedules and reiterated that the admissions to medical colleges and post-graduate courses were governed by the orders of this Court and the regulations issued by the Medical Council of India, which must be strictly followed. This Court issued a warning, that if there was any violation in future, the same shall be treated as default and viewed very seriously. Further, in the case of *Medical Council of India v. Madhu Singh & Ors.* [(2002) 7 SCC 258], this Court declared two very important principles. Firstly, it declared that mid-stream admissions should not be permitted and secondly, noticing the practice of compassion in review of such admissions, this Court also held that late or mid-stream admission, even just four months after beginning of the classes, cannot be permitted.

25. A consistent and clear view held by this Court is that the regulations framed by the MCI are binding and these standards cannot be deviated from. Reference can be made to *State of M.P. & Ors. v. Gopal D. Tirthani & Ors.* [(2003) 7 SCC 83 - paras 24 and 26]; *Bharati Vidyapeeth (Deemed University) & Ors. v. State of Maharashtra & Anr.* [(2004) 11 SCC 755 - para 20]; *Chowdhury Navin Hemabhai & Ors. v. State of Gujarat & Ors.* [(2011) 3 SCC 617 - paras 7, 11, 12, 14 and 18] and *Harish Verma & Ors. v. Ajay Srivastava & Ors.* [(2003) 8 SCC 69 - paras 14 to 21].

26. What is of greater significance is that this Court has not so far considered or stated as a principle, what consequences should follow where the Central Government, or the State Government or Medical Council of India or the College itself, with impunity, violate the time schedule, regulations and order of merit to give admission to students in an arbitrary and nepotistic manner. Also, we must consider what preventive steps can be taken to avoid such repetitive and intentional defaults, as well as undue exploitation of the class of students. Admissions based on favouritism necessarily breach the rule of merit on the one hand, while on the other, they create frustration in the minds of the students who have attained higher rank in the competitive entrance examinations, but have not been admitted. We propose to specifically address this concern in this judgment. From the above discussion and reference to various judgments of this Court, it is clear that adherence to the principle of merit, compliance with the prescribed schedule, refraining from mid-stream admissions and adoption of an admission process that is transparent, non-exploitative and fair are mandatory requirements of the entire scheme.

27. Now, let us examine the adverse consequences of non-adherence to the prescribed schedules. The schedules prescribed have the force of law, in as much as they form part of the judgments of this Court, which are the declared law of

the land in terms of Article 141 of the Constitution of India and form part of the regulations of the Medical Council of India, which also have the force of law and are binding on all concerned. It is difficult to comprehend that any authority can have the discretion to alter these schedules to suit a given situation, whether such authority is the Medical Council of India, the Government of India, State Government, University or the selection bodies constituted at the college level for allotment of seats by way of counseling. We have no hesitation in clearly declaring that none of these authorities are vested with the power of relaxing, varying or disturbing the time schedule, or the procedures of admission, as provided in the judgments of this Court and the Medical Council of India Regulations. Inter alia, the disadvantages are:-

(1) Delay and unauthorized extension of schedules defeat the principle of admission on merit, especially in relation to preferential choice of colleges and courses. Magnanimity in this respect, by condoning delayed admission, need not be shown by the Courts as it would clearly be at the cost of more meritorious students. The principle of merit cannot be so blatantly compromised. This was also affirmed by this Court in the case of *Muskan Dogra & Ors. v. State of Punjab & Ors.* [(2005) 9 SCC 186].

(2) Mid-stream admissions are being permitted under the garb of extended counseling or by extension of periods for admission which, again, is impermissible.

(3) The delay in adherence to the schedule, delay in the commencement of courses etc., encourage lowering of the standards of education in the Medical/Dental Colleges by shortening the duration of the academic courses and promoting the chances of arbitrary and less meritorious

admissions.

(4) Inequities are created which are prejudicial to the interests of the students and the colleges and more importantly, affect the maintenance of prescribed standard of education. These inequities arise because the candidates secure admission, with or without active connivance, by the manipulation and arbitrary handling of the prescribed schedules, at the cost of more meritorious candidates. When admissions are challenged, these students would run the risk of losing their seats though they may have completed their course while litigation was pending in the court of competent jurisdiction.

(5) The highly competitive standards for admission to such colleges stand frustrated because of non-adherence to the prescribed time schedules. The admissions are stretched to the last date and then admissions are arbitrarily given by adopting impermissible practices.

(6) Timely non-inclusion of the recognised/approved colleges and seats deprives the students of their right of fair choice of college/course, on the strength of their merit.

(7) Preference should be to fill up all vacant seats, but under the garb that seats should not go waste, it would be impermissible to give admissions in an arbitrary manner and without recourse to the prescribed rule of merit.

28. The Medical and Dental Councils of India, the Governments and the Universities are expected to act in tandem with each other and ensure that the recognition for starting of the medical courses and grant of admission are strictly within the time frame declared by this Court and the

regulations. It has come to the notice of this Court that despite warnings having been issued by this Court and despite the observations made by this Court, that default and non-adherence to the time schedules shall be viewed very seriously, matters have not improved. Persistent defaults by different authorities and colleges and granting of admission arbitrarily and with favouritism have often invited criticism from this Court. In the case of *Arvind Kumar Kankane v. State of U.P. & Ors.* (2001) 8 SCC 355], the Court observed that the process of counseling cannot go on continuously for a long period and the resultant chain reaction should be checked. Some seats may have to be left vacant per compulsion, but, the process of admission should stand the test of rationality. There should be exceptional and fortuitous circumstances to justify late admission. In the case of *Chhavi Mehrotra (Miss) v. DGHS* [(1994) 2 SCC 370], the Court was even compelled to issue notice of contempt to the Director General of Health Services as to why proceedings under the Contempt of Courts Act, 1971 be not taken for non-compliance with the scheme framed by the Court for consideration of applications for transfer of students between colleges and they be not punished accordingly. The consistent effort of this Court to direct corrective measures and adherence to law is not only being thwarted by motivated action on the part of the concerned authorities, but there has also been a manifold increase in arbitrary admissions. Repeated defaults have resulted in generating more and more litigation with the passage of time. This Court, thus, now views this matter with greater emphasis on directions that should be made to curb incidents of disobedience.

29. The maxim Boni judicis est causas litium dirimere places an obligation upon the Court to ensure that it resolves the causes of litigation in the country.

30. Thus, the need of the hour is that binding dicta be prescribed and statutory regulations be enforced, so that all concerned are mandatorily required to implement the time

schedule in its true spirit and substance. It is difficult and not even advisable to keep some windows open to meet a particular situation of exception, as it may pose impediments to the smooth implementation of laws and defeat the very object of the scheme. These schedules have been prescribed upon serious consideration by all concerned. They are to be applied stricto sensu and cannot be moulded to suit the convenience of some economic or other interest of any institution, especially, in a manner that is bound to result in compromise of the above-stated principles. Keeping in view the contemptuous conduct of the relevant stakeholders, their cannonade on the rule of merit compels us to state, with precision and esemplastically, the action that is necessary to ameliorate the process of selection. Thus, we issue the following directions in rem for their strict compliance, without demur and default, by all concerned,.

(i) The commencement of new courses or increases in seats of existing courses of MBBS/BDS are to be approved/recognised by the Government of India by 15th July of each calendar year for the relevant academic sessions of that year.

(ii) The Medical Council of India shall, immediately thereafter, issue appropriate directions and ensure the implementation and commencement of admission process within one week thereafter.

(iii) After 15th July of each year, neither the Union of India nor the Medical or Dental Council of India shall issue any recognition or approval for the current academic year. If any such approval is granted after 15th July of any year, it shall only be operative for the next academic year and not in the current academic year. Once the sanction/approval is granted on or before 15th July of the relevant year, the name of that college and all seats shall be included in both the first and the second counseling, in accordance with the Rules.

(iv) Any medical or dental college, or seats thereof, to which the recognition/approval is issued subsequent to 15th July of the respective year shall not be included in the counseling to be conducted by the concerned authority and that college would have no right to make admissions in the current academic year against such seats.

(v) The admission to the medical or dental colleges shall be granted only through the respective entrance tests conducted by the competitive authority in the State or the body of the private colleges. These two are the methods of selection and grant of admission to these courses. However, where there is a single Board conducting the state examination and there is a single medical college, then in terms of clause 5.1 of the Medical Council of India Eligibility Certificate Regulations, 2002 the admission can be given on the basis of 10+2 exam marks, strictly in order of merit.

(vi) All admissions through any of the stated selection processes have to be effected only after due publicity and in consonance with the directions issued by this Court. We vehemently deprecate the practice of giving admissions on 30th September of the academic year. In fact, that is the date by which, in exceptional circumstances, a candidate duly selected as per the prescribed selection process is to join the academic course of MBBS/ BDS. Under the directions of this Court, second counseling should be the final counseling, as this Court has already held in the case of *Ms. Neelu Arora & Anr. v. UOI & Ors.* [(2003) 3 SCC 366] and third counseling is not contemplated or permitted under the entire process of selection/grant of admission to these professional courses.

(vii) If any seats remain vacant or are surrendered from All India Quota, they should positively be allotted and admission granted strictly as per the merit by 15th September of the relevant year and not by holding an extended counseling. The remaining time will be limited to the filling up of the vacant seats resulting from exceptional circumstances or surrender of seats. All candidates should join the academic courses by 30th September of the academic year.

(viii) No college may grant admissions without duly advertising the vacancies available and by publicizing the same through the internet, newspaper, on the notice board of the respective feeder schools and colleges, etc. Every effort has to be made by all concerned to ensure that the admissions are given on merit and after due publicity and not in a manner which is ex-facie arbitrary and casts the shadow of favouritism.

(ix) The admissions to all government colleges have to be on merit obtained in the entrance examination conducted by the nominated authority, while in the case of private colleges, the colleges should choose their option by 30th April of the relevant year, as to whether they wish to grant admission on the basis of the merit obtained in the test conducted by the nominated State authority or they wish to follow the merit list/rank obtained by the candidates in the competitive examination collectively held by the nominated agency for the private colleges. The option exercised by 30th April shall not be subject to change. This choice should also be given by the colleges which are anticipating grant of recognition, in compliance with the date specified in these directions.

31. All these directions shall be complied with by all concerned, including Union of India, Medical Council of India, Dental Council of India, State Governments, Universities and medical and dental colleges and the management of the respective universities or dental and medical colleges. Any default in compliance with these conditions or attempt to overreach these directions shall, without fail, invite the following consequences and penal actions:-

(a) Every body, officer or authority who disobeys or avoids or fails to strictly comply with these directions stricto sensu shall be liable for action under the provisions of the Contempt of Courts Act. Liberty is granted to any interested party to take out the contempt proceedings before the High Court having jurisdiction over such Institution/State, etc.

(b) The person, member or authority found responsible for any violation shall be departmentally proceeded against and punished in accordance with the Rules. We make it clear that violation of these directions or overreaching them by any process shall tantamount to indiscipline, insubordination, misconduct and being unworthy of becoming a public servant.

(c) Such defaulting authority, member or body shall also be liable for action by and personal liability to third parties who might have suffered losses as a result of such default.

(d) There shall be due channelization of selection and admission process with full cooperation and coordination between the Government of India, State Government, Universities, Medical Council of India or Dental Council of India and the colleges concerned. They shall act in tandem and strictly as per the prescribed schedule. In other words, there

should be complete harmonisation with a view to form a uniform pattern for concerted action, according to the framed scheme, schedule for admission and regulations framed in this behalf.

(e) The college which grants admission for the current academic year, where its recognition/approval is granted subsequent to 15th July of the current academic year, shall be liable for withdrawal of recognition/approval on this ground, in addition to being liable to indemnify such students who are denied admission or who are wrongfully given admission in the college.

(f) Upon the expiry of one week after holding of the second counseling, the unfilled seats from all quotas shall be deemed to have been surrendered in favour of the respective States and shall be filled thereafter strictly on the basis of merit obtained in the competitive entrance test.

(g) It shall be mandatory on the part of each college and University to inform the State and the Central Government/competent authority of the seats which are lying vacant after each counseling and they shall furnish the complete details, list of seats filled and vacant in the respective states, immediately after each counseling.

(h) No college shall fill up its seats in any other manner.

32. Having dealt with, in general, the directions that this Court would issue to prevent the evils of arbitrariness and discrimination from creeping into these selection/admission processes, which are required to be transparent, fair and non-exploitatory, we shall now proceed to deal with the facts of the present case.

33. The present case is a glaring example of calculated tampering with the schedule specified under the regulations and the judgments of this Court, with a clear intent to grant admission to less meritorious candidates over and above the candidates of higher merit. To put it simply, it is a case of favouritism and arbitrariness. This also chronicles how, either way, the careers of the students are jeopardised. The High Court had cancelled the admission of the appellants by a detailed and well-reasoned judgment. However, as a result of interim orders granted by the Court, both the appellants had already completed four years of the studies at the time of the High Court decision. They are stated to have completed their final exam now. Despite having lost their case before the High Court, the appellants continued to pursue their professional courses because of the interim orders of the Court. Now, the plea of inequities is being raised.

34. From the facts narrated above, it is clear that the admission relates to the academic year 2006. The Central Government vide its letter dated 15th July, 2006 had granted approval and leave to admit the students to the Jagdalpur College. Thereafter, permission to commence admission was granted by the Governor of the State of Chhattisgarh on 14th August, 2006. The name of Jagdalpur College was not in the brochure published for admission. The first counseling was, in fact, conducted by 25th - 26th July, 2006 in which the College did not participate and the second counseling was done on 22nd-23rd August, 2006.

35. In paragraph 2 of State Government's approval letter, it was clearly stated that the capacity of the Jagdalpur College would be 50 seats and the candidates qualified in the PMT 2006 would be given admission on the basis of merit. After issuance of this letter, the college was included in the second counseling and as already noticed, it had allocated 48 out of the 50 seats.

36. On 8th August, 2006, a letter is stated to have been issued by the DGHS stating that 15 per cent of the total seats

reserved for All India Quota, 2006, if remaining vacant, on or after 23rd August, 2006, may be treated as surrendered to the State Quota. To this letter a statement of the same date was annexed, which allegedly gave two seats from the All India Quota to the present appellants. As per that statement, the seats were allocated on 8th August, 2006. From the record before us, it is clear that between 14th August, 2006 and 30th September, 2006, no correspondence was exchanged between the parties. This is despite the fact that the Government of India had required the college and the State Authorities to inform them of the details of the admissions given to the students as well as the details of the Quota seats, if the seats were vacant. All India Quota seats, which had not been filled till 22nd August, 2006 would be surrendered in favour of the State. Strangely, nothing has been placed on record to show that any of the concerned State authorities, including the college, adhered to the requirement of informing the DGHS or other authorities with regard to the status of admissions. On 30th September, 2006, the Director, Medical Education, Chhattisgarh, wrote a letter to the Dean of the College, requiring that the Jagdalpur College provide the up-to-date list of the students admitted to it and if there were any seats remaining vacant, guidance was to be taken from the Directorate of the State Government.

37. Another letter written by the Director, Medical Education, to the Dean of the Jagdalpur College and referring to their letter of the same date, which stated that two seats were vacant, in turn, ordered that those seats be filled up and the candidates be contacted over telephone. If contact could not be established with any candidate, then the Jagdalpur College was directed to fill up the seats with the candidates physically present and available at the Jagdalpur College, according to merit. The Dean of the Jagdalpur College, on that very day, constituted a Committee of Asst. Vice-Principals and Demonstrator of the Jagdalpur College to examine the certificates etc. of the available candidates and recommend the names on the basis of merit. Again, on that very day, the

Committee recommended the names of the two appellants, declaring them to be eligible for getting admissions. More strangely, the Committee also notes that the fees from the candidates had been deposited and they could be given admission. Then, vide another letter dated 30th September, 2006, the Dean of the College informed the Director, Medical Education that the two appellants have been given admission and the admission process for 50 seats had been completed. We must notice that there is nothing placed on the records of the Court as to what steps were taken by the Jagdalpur College to inform all the other candidates of counseling on the last date. Also strange was the direction of the Directorate that the candidates should be informed on telephone. Even if this direction was of some content and meaning, there is still no material to show how many candidates were actually informed on the telephone that there would be counseling for two seats. Thus, the questions remain open, as to the reason for total abandonment of the procedure of informing all eligible candidates, by appropriate means, that two seats were available for admissions, who all had actually appeared for the counseling, how only two candidates who even according to the State Government were not contacted on telephone, were alone present before the Committee and immediately found to be eligible for admission. This entire exercise smacks of arbitrariness, unfairness and is discriminatory ex facie. It is brought to our notice and is clear from the record that the Respondent No.3, the Director of the Medical Education in Chhattisgarh, is the father of Akansha Adile, Appellant no.2 and that speaks volumes of how the admission had been granted to the two appellants.

38. The methodology adopted and the manner in which admissions were given to the present appellants leaves no doubt in the mind of the Court that this process was neither fair nor transparent. In fact, within a few hours, the entire process of admission was completed, indicating that the whole exercise was undertaken only with the object of granting admission to

the appellants, that too, as if no other candidates of merit were available for these two seats. This view is entirely substantiated by the records produced before us. The prescribed procedure for grant of admission was given a go by and the rule of admission on merit stood frustrated as a consequence of such admission process. One fails to understand why no preventive steps or efforts to fill the vacant seats were taken by any of the competent authorities involved in the entire process of selection and admission to MBBS courses. The students who had undertaken the PMT examination had been allocated seats in the college on 23rd August, 2006. Not even a single document has been placed on record of this Court from 23rd August, 2006 to 29th September, 2006 showing efforts to fill up vacant seats. Everybody waits for the last date which, in fact, is the date for joining the courses and not admission, whereafter the entire machinery in the Centre, State Government and the college acts so swiftly that within hours, the entire admission process is concluded to grant the admission to the appellants. It is a travesty of fairness and transparency that for 50 seats in the Jagdalpur College, the Directorate as well as the Committee constituted for counseling/selection could find only the candidates at Merit Nos. 3893 and 1614 suitable, completely ignoring all the candidates being higher in merit than these two appellants, who must also be waiting for admission to the MBBS course. Strangely, the merit ranks of these two appellants, as given in the letter of the DGHS dated 8th August, 2006 were 2196 and 2203 respectively. From whatever angle this case is examined, only one conclusion is possible and that is, that the allocation of seats was totally arbitrary and contrary to the procedure laid down. We also would like to make a clear mention of the displeasure of this Court to the three members of the Selection Committee who found only these two candidates eligible and fit to be granted admission to the MBBS courses on the last day for admissions. To say the least, this Committee acted in undue haste, in violation of the prescribed procedure of admission and certainly contrary to the judgments

of this Court. We direct the Dean of the Jagdalpur College to convey the displeasure of this Court to the members of the Selection Committee and the same be placed on their respective service records.

39. Now, we may come to the inquiry that was conducted by a three member committee and which recorded the finding that we have already noticed in paragraph 13 of the judgment. This inquiry was initiated in furtherance to an application made under the Right to Information Act, regarding the letter dated 8th August, 2006 according to which the admission in the Jagdalpur College, particularly to these two appellants, was made in an arbitrary and unfair manner. The stand of the Union of India before this Court is that the letter dated 8th August, 2006 was never issued by the DGHS and is a fabricated document. In face of that stand, we are unable to appreciate as to how the Inquiry Committee returned a finding that the admission to the two appellants was not given in furtherance to the letter dated 8th August, 2006, but validly granted on 30th September, 2006 instead. They were expected to examine this matter in greater depth and record proper findings. We also cannot understand as to how they have recorded that both the appellants got admission in the Jagdalpur College by State PMT merit. Their report does not even mention if they had verified the fact that notices had been issued to all the concerned persons on 30th September, 2006 and if other students had been contacted for intimation of counseling or if any effort was even made on 30th September, 2006 or even prior thereto to put these two vacant seats on the internet or notice board of the colleges so as to enable the students of higher merit to seek admission to the MBBS course in the Jagdalpur College. This aspect attains a greater significance in view of the fact that the seats were not allotted in the second counseling itself on 22nd - 23rd August, 2006. The Jagdalpur College, the Directorate of the State Government as well as the Union of India made no effort and did not act in coordination, to allot these two seats to the candidates in accordance with

merit in the PMT. The finding recorded by the Committee appears to be a mere eye-wash rather than a proper report upon examining the entire matter in its proper perspective. It was not only expected of the Committee to examine the documents which were made available to it, as is recorded in the report, but also to call for all such necessary documents which were relevant and could have bearing on the reference made to it. The Committee has not even cared to know why everything was completed on 30th September, 2006 and how nobody else except these two appellants were available for admission from amongst candidates in the entire State.

40. Another aspect of this inquiry is that, even as on 30th September, 2006, nobody was clear as to which quota these two vacant seats belonged to. According to the State of Chhattisgarh, these two seats were part of the 15 per cent All India quota which stood surrendered after 23rd August, 2006. According to the appellants, they were Central Pool quota seats which stood surrendered to the State on 30th September, 2006 only. According to the Union of India, they had not made any allotment to the appellants or anyone in the Jagdalpur College from the All India Quota, and even the code number given on the 8th August, 2006 letter is wrong. If the Directorate, the Union of India and the Jagdalpur College itself were not ad idem as to which quota the seats belonged to and who was the competent authority to allot the seats, none of them had any business to allot these two seats in such an arbitrary manner. Even now, there is no clarity as to how and under what quota the Jagdalpur College has granted admission to these two appellants. The inquiry report, in fact, does not help to resolve the issue and cannot, thus, form the basis of returning any finding in favour of or against any person. Ex facie, the findings returned by the Inquiry Committee appear to be inconclusive, uncertain and vague. Be that as it may, there is no escape from returning the finding that admission of both the appellants was made in a most improper and arbitrary manner. The whole exercise was undertaken on 30th September, 2006 with only

one aim in mind, i.e., that these two appellants have to be given admission in the Jagdalpur College.

41. The Government of India, taking the view that these were All India Quota seats which had been wrongly allocated to these two appellants in a manner contrary to the relevant Rules, vide its letter dated 22nd March, 2010, directed cancellation of the admissions of both the appellants. In furtherance to the letter issued by the Central Government, the State Government vide its letter dated 10th September, 2010, actually cancelled the admissions of both the appellants.

42. This cancellation was challenged by the appellants before the High Court, which allowed continuation of study under interim orders, though finally it dismissed the writ petitions filed by these appellants. At that time, they had already completed more than four years of the MBBS course to which they were admitted. Today, they have already appeared for their final examination.

43. We are also in agreement with the findings recorded by the High Court that the Jagdalpur College ought to have declared these two seats as being available for admission when the counseling was held on 22nd - 23rd August, 2006 and that there was violation of the basic principles of equality of opportunity and of equal consideration for allotment of seats. Candidates of higher merit stand excluded. Another challenge which has been raised on behalf of the appellants before us is that the order of cancellation dated 10th September, 2010 was passed without affording any opportunity of hearing to these two appellants and, therefore, the order is liable to be set aside, being violative of principles of natural justice. It is, in fact, not in dispute before us that no specific notice had been given to the appellants before the impugned order was passed. We are of the considered view that it is not necessary for this Court to examine this submission in any greater detail because the appellants have now had two occasions to put forward their claim before the Court. The High Court has considered various

aspects of the case and has given a complete hearing to the appellants. We have also heard the appellants at great length and have examined their challenge to the order dated 10th September, 2010. No prejudice has been caused to them, inasmuch as they have pursued their studies despite cancellation of admission and have now been duly heard by the High Court, as well as this Court. Hence, this ground of challenge does not, in any case, survive, particularly in view of the fact that we have also held that the admission to these appellants was given in a completely arbitrary and unfair manner.

44. The admission of the appellants was cancelled by the State Government which, even under the Rules, is the final competent authority for such purposes. In the present case, the mischief played by the concerned persons came to the notice of the Central Government which directed cancellation of the seats and required the State Government to act in accordance with law.

45. The learned counsel appearing for the appellants, by way of last resort, advanced an argument that even if the admissions are found to be irregular by the Court, still, to balance the equities, the Court can direct surrender or creation of equal number of seats in the next academic year by the Jagdalpur College. Further, it is also contended that since the appellants have already completed substantial part of their professional course, it will cause serious prejudice and irreparable loss to them if their admissions are cancelled, particularly when the students are not at fault and it is the Jagdalpur College or the Directorate of the State Government which were instrumental in allotting two seats to these students. To further substantiate this plea, another argument advanced is that in the Government Colleges, the admission fee is very low and the Government spends a considerable sum in imparting the medical education to the students of those

colleges. Thus, even that expenditure of the State would be wasted if admissions were now cancelled.

46. It was also argued with some emphasis that the appellants are not at fault. They had taken the entrance examination and were given seats by the concerned authorities. Even if the authorities have committed some irregularity, the appellants should not be made to suffer at the very end of their professional course. To substantiate this premise, they relied upon the judgments of this Court in the cases of *A. Sudha v. University of Mysore & Anr.* (1987) 4 SCC 537, *Amandeep Jaswal v. State of Punjab* (2006) 9 SCC 597, *R. Vishwanatha Pillai v. State of Kerala & Ors.* (2004) 2 SCC 105 and *Chowdhary Navin Hemabhai & Ors. v. The State of Gujarat & Ors.* (2011) 3 SCC 617.

47. We have perused the judgments of this Court relied upon by the petitioners. Firstly, they were delivered on their own facts and the Court has not stated any absolute principle of law, which would operate as a valid and binding precedent. Secondly, in all these cases, the Court had returned the finding that other authorities or rule-making bodies concerned were at fault and not the students. In the case of Chowdhary Navin Hemabhai (supra), the Court had noticed that the fault was of the rule making authority in not formulating the State Rules, 2008 in conformity with the Medical Council of India Regulations, while in the case of *A. Sudha* (supra), the Court found that the Principal of the institute was at fault and he had made incorrect statements in writing, which were acted upon by the students bona fide.

48. In the present case, we have no doubt in our mind that the fault is attributed to all the stakeholders involved in the process of admission, i.e., the concerned Ministry of the Union of India, Directorate of Medical Education in the State of Chhattisgarh, the Dean of the Jagdalpur College and all the three Members of the Committee which granted admission to

both the appellants on 30th September, 2006. But the students are also not innocent. They have certainly taken advantage of being persons of influence. The father of the Appellant No. 2, Akansha Adile was the Director of Medical Education, State of Chhattisgarh at the relevant time and as noticed above, the entire process of admission was handled through the Directorate. The students well knew that the admissions can only be given on the basis of merit in the entrance test and they had not ranked so high that they were entitled to the admission on that basis alone. In fact, they were also aware of the fact that no other candidate had been informed and that no one was present due to non-intimation. Out of favouritism and arbitrariness, they had been given admission by completing the entire admission process within a few hours on 30th September, 2006.

49. Balancing of equities by the Court itself is inequitable. Some party or the other would suffer a set back or adverse consequence from the order of the Court. On the one hand, if admissions are cancelled, the students who have practically completed their MBBS course would lose their professional education as well as nearly five years of their life spent in such education. If their admissions are protected, then the standard of education, the merit of the candidates and the desirability of the persons of higher merit becoming doctors is negated. The best solution to such problems is strict adherence to the time schedule, procedure for selection/admission and strict observance of the Medical Council of India Regulations, by all concerned. Once these factors are adhered to, not only would such situation not arise, but also it will prevent avoidable litigation before the Courts. The persons who violate the time schedule to grant admissions in an arbitrary manner and by colourable exercise of power, who are not adhering to Medical Council of India Regulations and the judgments of this Court, should be dealt with strictly by punishment in accordance with law, to prevent such mischief from repeating. In the present case, we are informed that the students have already sat for

their final examination and are about to complete their courses. Even if we have to protect their admissions on the ground of equity, they cannot be granted such relief except on appropriate terms. By their admissions, firstly, other candidates of higher merit have been denied admission in the MBBS course. Secondly, they have taken advantage of a very low professional college fee, as in private or colleges other than the government colleges, the fee payable would be Rs.1,95,000/- per year for general admission and for management quota, the fee payable would be Rs.4,00,000/- per year, but in government colleges, it is Rs.4,000/- per year. So, they have taken a double advantage. As per their merit, they obviously would not have got admission into the Jagdalpur College and would have been given admission in private colleges. The ranks that they obtained in the competitive examination clearly depict this possibility, because there were only 50 seats in the Jagdalpur College and there are hundreds of candidates above the appellants in the order of merit. They have also, arbitrarily and unfairly, benefitted from lower fees charged in the Jagdalpur College.

50. On the peculiar facts and circumstances of the case, though we find no legal or other infirmity in the judgment under appeal, but to do complete justice between the parties within the ambit of Article 142 of the Constitution of India, we would permit the appellants to complete their professional courses, subject to the condition that each one of them pay a sum of Rs.5 lakhs to the Jagdalpur College, which amount shall be utilized for developing the infrastructure in the Jagdalpur College.

51. We have not and should not be even understood to have stated any precedent for the cases like grant of admission and leave to complete the course like the appellants in the present case.

52. We are imposing heavy costs upon these appellants to ensure that such admissions are neither accepted nor granted leave to complete their medical courses in future.

53. We would, thus, hereby issue directions on the one hand and order initiation of contempt proceedings against all the defaulting parties under the provisions of Contempt of Courts Act, 1971 read with Article 129 of the Constitution of India.

ORDER :

Accordingly, we order as follows: -

1. Though, we find no merit in the appeal preferred by the appellants and the judgment of the High Court does not suffer from any infirmity, still, in the peculiar facts and circumstances of the case, we permit the appellants to complete their MBBS course as general candidates in the Government Medical College, Jagdalpur, subject to their paying a sum of Rs. 5 lakhs each, within one week from today.

2. In the event of default of payment or failure to file proof of payment in the Registry of this Court, not only will the present appeal stand dismissed on merits, but we also direct that the exam results of the defaulting appellant will not be declared, they will not be conferred with the degree of MBBS by the Jagdalpur College and the Medical Council of India shall not register their names on the rolls maintained by it or the State Council, as the case may be.

3. For the reasons afore-stated, if their admissions are cancelled, there being no claimants for these seats, the seats will go waste and the entire expenditure incurred by the State would also be wasted. After so many years, it would be an exercise in futility to cancel their admissions, which, but for the interim orders, could be avoided. An undue advantage from the interim orders has accrued in favour of the appellants.

With all the humility at our command, we request the High Courts to ensure strict adherence to the prescribed time schedule, process of selection and to the rule of merit.

We reiterate what has been stated by this Court earlier, that except in very exceptional cases, the High Court may consider it appropriate to decline interim orders and hear the main petitions finally, subject to convenience of the Court. We may refer the dictum of this Court in the case of *Medical Council of India v. Rajiv Gandhi University of Health Sciences* [(2004) 6 SCC 76, para 14] in this regard.

4. We have categorically returned a finding that all the relevant stakeholders have failed to perform their duty/obligation in accordance with law. Where the time schedules have not been complied with, and rule of merit has been defeated, there nepotism and manipulation have prevailed. The stands of various authorities are at variance with each other and none admits to fault. Thus, it is imperative for this Court to ensure proper implementation of judgments of this Court and the regulations of the Medical Council of India as well as not to overlook the arbitrary and colourable exercise of power by the concerned authorities/colleges.

5. Therefore, we hereby direct initiation of proceedings against the following under the provisions of the Contempt of Courts Act, 1971. Let notice be issued to the following, to show cause why they be not punished in accordance with law.

a. Additional Secretary, Ministry of Health & Family Welfare, Union of India.

b. Dr. S.L. Adile, Director, Medical Education.

c. Dean of the Jagdalpur College.

d. Dr. M.S. Banjan, Member of the Selection Committee.

e. Dr. P.D. Agarwal, Member of the Selection Committee.

f. Shri Padmakar Sasane, Member of the Selection Committee.

g. Director General, Directorate of Health Services, Union of India.

5. Notice be issued returnable in two weeks, on which day the matter shall be listed before this Court. Registry shall maintain separate file for that purpose.

6. All concerned authorities are hereby directed to carry out the directions and orders contained in this judgment, particularly paragraphs 30 and 31 of the judgment forthwith. The directions shall be applicable for the academic year 2012-2013 itself.

54. A copy of this judgment shall be sent to all concerned authorities, forthwith, for strict compliance and adherence, without demur and default.

55. Both the appeals are disposed of with the above directions.

D.G. Appeals disposed of.

M/S BEST SELLERS RETAIL (INDIA) PVT. LTD.
v.
M/S ADITYA BIRLA NUVO LTD. & ORS.
(Civil Appeal Nos.4313-14 of 2012)

MAY 08, 2012

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

Code of Civil Procedure, 1908 - Order 39 Rules 1 and 2 r/w s.151 -Temporary injunction - Respondent no.1 filed suit for specific performance of agreement in respect of property and in the alternative for damages for expenses and losses if specific performance of the agreement was refused by the Court - Along with the suit, respondent no.1 also filed application for temporary injunction restraining the defendants from leasing, sub-leasing, alienating or encumbering the property in any manner pending disposal of the suit - Trial court allowed the application for temporary injunction - Order upheld by High Court - Held: While passing an interim order of injunction under Order 39 Rules 1 and 2 CPC, the Court is required to consider (i) whether there is a prima facie case in favour of the plaintiff; (ii) whether the balance of convenience is in favour of passing the order of injunction; and (iii) whether the plaintiff will suffer irreparable injury if an order of injunction would not be passed as prayed for - In the instant case, the trial court and the High Court were right in coming to the conclusion that there was a prima facie case in favour of respondent no.1 - However, even where prima facie case is in favour of the plaintiff, Courts ought to refuse temporary injunction if injury suffered by plaintiff on account of refusal of temporary injunction was not irreparable - In the present case, respondent no.1 itself had claimed alternative relief of damages if relief for specific performance was to be refused by the Court - If temporary injunction restraining the defendants from allowing, leasing, sub-leasing or

encumbering the suit property was not granted, and respondent no.1 ultimately succeeded in the suit, it would be entitled to damages claimed and proved before the court - Respondent no.1 will not suffer irreparable injury - Order of temporary injunction accordingly set aside - Specific Relief Act, 1963 - s.37.

In the year 2005, respondent no.1 had entered into an agreement with Liberty Agencies whereunder Liberty Agencies agreed to sell the products of respondent no.1 in the property in question and also agreed to retain the possession of the property until the expiry of the term of agreement and Liberty Agencies was not to sell any other articles or goods other than that supplied by respondent no.1. Under the agreement, Liberty Agencies was entitled to a fixed commission per month. Thereafter, respondent no.1 notified to Liberty Agencies various breaches of the terms and conditions of the agreement but Liberty Agencies did not set right the breaches. As a result, respondent no.1 suffered huge financial losses. Respondent no.1 issued a legal notice calling upon Liberty Agencies to comply with the terms of the agreement. Liberty Agencies, however, sent a letter dated 26-2-2010 claiming that the constitution of the partnership firm has changed and that its partner A.C. Thirumalaraj had retired and that A.C. Thirumalaraj as the owner of the property had terminated the tenancy of the property in favour of Liberty Agencies.

Respondent no.1 filed suit for specific performance of the agreement and in the alternative for damages for expenses and losses if the specific performance of the agreement was refused by the Court. Along with the suit, respondent no.1 also filed an application under Order 39 Rules 1 and 2 read with Section 151 of CPC praying for a temporary injunction restraining the defendants from leasing, sub-leasing, alienating or encumbering the

property in any manner pending disposal of the suit. The trial court allowed the application for temporary injunction and restrained Liberty Agencies and its partners including A.C. Thirumalaraj from leasing, sub-leasing, alienating or encumbering the property in any manner pending disposal of the suit.

Aggrieved, A.C. Thirumalaraj filed a Miscellaneous Appeal under Order 43 Rule 1 of the CPC against the order of temporary injunction before the High Court. While the Miscellaneous Appeal was pending, it was brought to the notice of the High Court in an I.A. that in spite of the temporary injunction granted in favour of respondent no.1, A.C. Thirumalaraj and Best Sellers Retail (I) Pvt. Ltd., were opening a shop in the suit schedule property in the name of 'Jack & Jones' and by an interim order the High Court restrained Best Sellers (I) Pvt. Ltd. from carrying on business in the suit schedule property until further orders of the High Court. Best Sellers Retail (I) Pvt. Ltd. then filed an application for vacating the interim order. By the impugned judgment, the High Court dismissed the Miscellaneous Appeal and rejected the application for vacating the interim order but directed respondent no.1 to give an undertaking to the trial court that in case respondent no.1 fails in the suit, it will compensate the loss to A.C. Thirumalaraj and Best Sellers Retail (I) Pvt. Ltd. for not using the suit schedule property.

Aggrieved, A.C. Thirumalaraj and Best Sellers (I) Pvt. Ltd. filed the instant appeals contending that the Courts below ought not to have granted temporary injunction in favour of plaintiff-respondent no.1.

Allowing the appeals, the Court

HELD:1.1. Section 37 of the Specific Relief Act, 1963 makes it clear that temporary injunctions are to be

regulated by the CPC and not by the provisions of the Specific Relief Act, 1963. In fact, the application for temporary injunction of respondent no.1 before the trial court is under the provisions of Order 39 Rules 1 and 2 read with Section 151 of the CPC. It is well established that while passing an interim order of injunction under Order 39 Rules 1 and 2 CPC, the Court is required to consider (i) whether there is a prima facie case in favour of the plaintiff; (ii) whether the balance of convenience is in favour of passing the order of injunction; and (iii) whether the plaintiff will suffer irreparable injury if an order of injunction would not be passed as prayed for. [Para 12] [846-C-F]

1.2. In the instant case, on a reading of clause B-2 of the agreement, it is found that Liberty Agencies had given a warranty that the suit schedule property was owned by it and that it will retain the possession of the suit schedule property until the expiry of the agreement. Clause D of the agreement clearly stipulated that the duration of the agreement shall be for a period of twelve years from the date of the agreement unless terminated in accordance with the provisions of the agreement. Clause E-2 further provides that respondent no.1 and not Liberty Agencies could terminate the agreement by giving a notice of not less than three months after the end of six years from the date of the agreement and respondent no.1 had not terminated the agreement under this clause. Before the expiry of six years from the date of the agreement, Liberty Agencies sent the letter dated 26.02.2010 to respondent No.1 committing a breach of clause B-2 of the agreement which provided that Liberty Agencies will retain possession of the suit schedule property until the expiry of the agreement. This was the breach of the agreement which was sought to be prevented by the trial court by an order of temporary injunction. The trial court and the High Court were thus right in coming to the conclusion that respondent no.1 had a prima facie case. [Para 13] [846-G-H; 847-A-D]

Kishoresinh Ratansinh Jadeja v. Maruti Corporation & Ors. **(2009) 11 SCC 229: 2009 (5) SCR 527 - relied on.**

Indian Oil Corporation Ltd. v. Amritsar Gas Service & Ors. **(1991) 1 SCC 533: 1990 (3) Suppl. SCR 196;** *Percept D'Mark (India) (P) Ltd. v. Zaheer Khan & Anr.* **(2006) 4 SCC 227: 2006 (3) SCR 146 - cited.**

Page One Records Ltd. v. Britton **(1968) 1 WLR 157: (1967) 3 All ER 822 - cited.**

2.1. Yet, the settled principle of law is that even where prima facie case is in favour of the plaintiff, the Court will refuse temporary injunction if the injury suffered by the plaintiff on account of refusal of temporary injunction was not irreparable. [Para 14] [847-D-E]

2.2. In the present case, respondent no.1 itself had claimed in the plaint the alternative relief of damages to the tune of Rs.20,12,44,398/- if the relief for specific performance was to be refused by the Court. The statement of damages claimed by respondent no.1 in the plaint show that respondent no.1 itself calculated a projected loss of profit for the balance seven year term of the agreement as Rs.10,31,00,000/- and has also assessed loss of goodwill at Rs.2,00,00,000/- besides the loss of Rs.6,00,00,000/- in relocating the store to another place in Brigade Road, Bangalore. [Paras 15, 16] [847-H; 848-A; F-H]

2.3. Despite this claim towards damages made by respondent no.1 in the plaint, the trial court has held that if the temporary injunction as sought for is not granted, Liberty Agencies may lease or sub-lease the suit schedule property or create third party interest over the same and in such an event, there will be multiplicity of

proceedings and thereby respondent no.1 will be put to hardship and mental agony, which cannot be compensated in terms of money. Respondent no.1 is a limited company carrying on the business of readymade garments and one fails to appreciate what mental agony and hardship it will suffer except financial losses. The High Court has similarly held in the impugned judgment that if the premises is let out, respondent no.1 will be put to hardship and the relief claimed would be frustrated and, therefore, it is proper to grant injunction and the trial court has rightly granted injunction restraining the partners of Liberty Agencies from alienating, leasing, sub-leasing or encumbering the property till the disposal of the suit. The High Court lost sight of the fact that if the temporary injunction restraining Liberty Agencies and its partners from allowing, leasing, sub-leasing or encumbering the suit schedule property was not granted, and respondent no.1 ultimately succeeded in the suit, it would be entitled to damages claimed and proved before the court. In other words, respondent no.1 will not suffer irreparable injury. [Para 17] [849-A-F]

Dalpat Kumar & Anr. v. Prahlad Singh & Ors. **(1992) 1 SCC 719: 1991 (3) Suppl. SCR 472 - relied on.**

The Attorney-General vs. Hallett **153 ER 1316: (1857) 16 M. & W.569 - referred to.**

3. The order of temporary injunction passed by the trial court as well as the impugned judgment of the High Court are set aside. [Para 18] [849-G-H]

Case Law Reference:

2009 (5) SCR 527	**relied on**	**Para 6**
1990 (3) Suppl. SCR 196	**cited**	**Para 8**
2006 (3) SCR 146	**cited**	**Para 8**

(1967) 3 All ER 822	**cited**	**Para 8**
1991 (3) Suppl. SCR 472	**relied on**	**Para 14**
(1857) 16 M. & W.569	**referred to**	**Para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4313-14 of 2012 etc.

From the Judgment & Order dated 25.08.2010 of the High Court of Karnataka in M.F.A. No. 4060 of 2010.

WITH

C.A. No. 4315 of 2012.

Altaf Ahmed, A.K. Ganguly, Vikram Gurunath, Balaji Srinivasan, Jaikriti S. Jadeja, G. Vikram, S. Srinivasan for the Appellant.

K.K. Venugopal, Harish V. Shankar, Gopal Shankaranarayanan, Rajesh D.M., Jyothi V.K. Ansar Ahmad Chaudhary, Madhusmita Bora for the Respondents.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. Leave granted.

2. These are appeals by way of special leave under Article 136 of the Constitution of India against the judgment and order dated 25.08.2010 of the High Court of Karnataka in MFA No.4060 of 2010 and in M.C. No12036 of 2010 and in M.C. No.12036 of 2010.

3. The relevant facts briefly are that Aditya Birla Nuvo Ltd., respondent no.1 in both the appeals, filed a suit O.S. No.1533 of 2010 against Liberty Agencies, a partnership firm and its partners, in the Court of the City Civil Judge at Bangalore. The case of the respondent no.1 in the plaint was as follows: The respondent no.1 was engaged in the business of readymade garments and accessories under various reputed brand names

and in the year 1995 had appointed Liberty Agencies as an agent to conduct its business of readymade garments and accessories with the reputed brand name 'Louis Philippe'. Thereafter, on 02.03.2005 respondent no.1 entered into a fresh agreement with Liberty Agencies under which Liberty Agencies agreed to sell the products of the respondent no.1 in the suit schedule property and also agreed to retain the possession of the suit schedule property until the expiry of the term of agreement and Liberty Agencies was not to sell any other articles or goods other than that supplied by the respondent no.1. Under the agreement dated 02.03.2005 (for short 'the agreement'), Liberty Agencies was entitled to a fixed commission of Rs.7,50,000/- per month and by an addendum dated 01.07.2008 the fixed commission payable to Liberty Agencies was increased to Rs.9,62,500/-. Thereafter, the respondent no.1 notified to Liberty Agencies various breaches of the terms and conditions of the agreement but Liberty Agencies did not set right the breaches. As a result, the respondent no.1 suffered huge financial losses. The respondent no.1 issued a legal notice on 06.02.2010 calling upon Liberty Agencies to comply with the terms of the agreement. Liberty Agencies, however, sent a letter dated 26.02.2010 claiming that the constitution of the partnership firm has changed and that its partner A.C. Thirumalaraj had retired and that A.C. Thirumalaraj as the owner of the suit schedule property had terminated the tenancy of the suit schedule property in favour of Liberty Agencies and initiated a collusive eviction proceeding with an intention to defeat the claim of the respondent no.1. The respondent no.1 thus prayed for specific performance of the agreement and in the alternative for damages for expenses and losses amounting to Rs.20,12,44,398/- if the specific performance of the agreement was refused by the Court.

4. Along with the suit, respondent no.1 also filed an application under Order 39 Rules 1 and 2 read with Section 151 of the Code of Civil Procedure (for short 'the CPC') praying for a temporary injunction restraining the defendants from

leasing, sub-leasing, alienating or encumbering the suit schedule property in any manner pending disposal of the suit. Liberty Agencies and A.C. Thirumalaraj filed their objections to the application for temporary injunction and stated, inter alia in their objections that the possession of the suit schedule property had been delivered to Best Sellers Retail (I) Pvt. Ltd. The Additional City Civil Judge heard the parties and by order dated 24.04.2010 allowed the application for temporary injunction and restrained Liberty Agencies and its partners including A.C. Thirumalaraj from leasing, sub-leasing, alienating or encumbering the suit schedule property in any manner pending disposal of the suit.

5. Aggrieved, A.C. Thirumalaraj filed a Miscellaneous Appeal under Order 43 Rule 1 of the CPC against the order of temporary injunction before the High Court. While the Miscellaneous Appeal was pending, it was brought to the notice of the High Court in I.A. No.1 of 2010 that in spite of the temporary injunction granted in favour of the respondent no.1, A.C. Thirumalaraj and Best Sellers Retail (I) Pvt. Ltd., were opening a shop in the suit schedule property in the name of 'Jack & Jones' and by an order dated 16.07.2010 the High Court restrained Best Sellers (I) Pvt. Ltd. from carrying on business in the suit schedule property until further orders of the High Court. Best Sellers Retail (I) Pvt. Ltd. then filed an application M.C. No.12036 of 2010 for vacating the interim order dated 16.07.2010. By the impugned judgment, however, the High Court dismissed the Miscellaneous Appeal and rejected the appeal for vacating the interim order but directed the respondent no.1 to give an undertaking to the trial court that in case respondent no.1 fails in the suit, it will compensate the loss to A.C. Thirumalaraj and Best Sellers Retail (I) Pvt. Ltd. for not using the suit schedule property. Aggrieved, A.C. Thirumalaraj and Best Sellers (I) Pvt. Ltd. have filed these Civil Appeals.

6. Mr. Altaf Ahmed and Mr. A.K. Ganguly, learned senior

counsel appearing for the two appellants, submitted relying on the decision of this Court in *Kishoresinh Ratansinh Jadeja v. Maruti Corporation & Ors.* [(2009) 11 SCC 229] that while passing an order of temporary injunction under Order 39 Rules 1 and 2 CPC, the Court is to consider (i) whether the plaintiff has a prima facie case; (ii) whether balance of convenience is in favour of the plaintiff; and (iii) whether the plaintiff will suffer irreparable loss and injury if an order of injunction was not passed. They submitted that the respondent no.1 itself has claimed damages of Rs.20,12,44,398/- as alternative relief in the event the suit for specific performance of the contract is not decreed. They argued that as the plaintiff itself had made a claim for damages for the alleged breach of the agreement by the defendants, the Court should not have granted the temporary injunction in favour of the plaintiff.

7. Learned counsel for the appellants further submitted that Section 14(1) of the Specific Relief Act, 1963 provides in clause (b) that a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms, such a contract cannot be specifically enforced. They submitted that similarly Section 14(1) in clause (d) provides that a contract, the performance which involves the performance of a continuous duty which the court cannot supervise, is a contract which cannot be specifically enforced. They submitted that the agreement between Liberty Agencies and respondent no.1 is a contract of agency and is covered under clauses (b) and (d) of Section 14(1) of the Specific Relief Act, 1963 and is one which cannot be specifically enforced. They submitted that Section 14(1) of the Specific Relief Act, 1963 in clause (c) further provides that a contract which is in its nature determinable cannot be specifically enforced. They argued that on completion of six years from the date of the agreement, Liberty Agencies could terminate the agreement and the six years period had expired

in the year 2011 and hence the Court cannot specifically enforce the contract. They submitted that Section 41 (e) of the Specific Relief Act, 1963 clearly provides that an injunction cannot be granted to prevent breach of a contract, the performance of which would not be enforced.

8. Learned counsel for the appellants cited the decision in *Indian Oil Corporation Ltd. v. Amritsar Gas Service & Ors.* [(1991) 1 SCC 533] in which this Court has held that a contract which is in its nature determinable cannot be enforced by the Court. They also cited the decision in *Percept D'Mark (India) (P) Ltd. v. Zaheer Khan & Anr.* [(2006) 4 SCC 227] in which this Court has held relying on the judgment of the Chancery Division in *Page One Records Ltd. v. Britton* [(1968) 1 WLR 157: (1967) 3 All ER 822], that where the totality of the obligations between the parties give rise to a fiduciary relationship injunction would not be granted because the performance of the duties imposed on the party in the fiduciary relationship could not be enforced at the instance of the other party.

9. Learned counsel for the appellants further submitted that the agreement between Liberty Agencies and the respondent no.1 was an agency agreement and it did not create any interest whatsoever in the suit schedule property and, therefore, the respondent no.1 was not entitled to any injunction restraining the owner of the suit schedule property from dealing with the property in any manner with a third party. They submitted that in any case since the defendants had clearly stated in their objections to the application for temporary injunction that possession of the suit schedule property had already been delivered to a third party, Best Sellers Retail (I) Pvt. Ltd., the trial court should not have granted any injunction without the third party being impleaded as a defendant. Learned counsel for the appellants submitted that the interest of the third party has been totally ignored by the trial court and the High Court and this is a fit case in which the order of temporary injunction should be set aside.

10. Mr. K. K. Venugopal, learned senior counsel appearing for the respondent no.1, on other hand, submitted that under clause B-2 of the agreement, Liberty Agencies had given a warranty that the suit schedule property is owned by it and that it will retain possession of the suit schedule property until the expiry of the agreement. He submitted that under clause D of the agreement the duration of the agreement was for a period of twelve years from the date of the agreement and this period was to expire in 2017 and, therefore, it is not correct, as has been contended by the learned counsel for the appellants, that the period of the agreement has expired. He argued that under clause E-2 of the agreement only the respondent no.1 company had the right to terminate the agreement by giving a written notice of not less than three months after the end of six years from the date of the agreement and hence Liberty Agencies had no right to terminate the agreement. He submitted that no contention can, therefore, be raised on behalf of Liberty Agencies that the contract was determinable in nature or that the contract had expired.

11. In reply to the contention that under Section 14(1)(b) and (d) of the Specific Relief Act, 1963 the agreement cannot be specifically enforced, Mr. Venugopal cited Bowstead and Reynolds on Agency for the proposition that in exceptional cases specific performance of a contract of agency can also be decreed by the Court. He argued that Section 42 of the Specific Relief Act, 1963 makes it abundantly clear that where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implead, not to do a certain act, the circumstances that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement. He also cited the decision of the Chancery Division in Donnell v. Bennett reported in 22 Ch.D. 835 where it has been held that where there is a negative clause in the agreement, the Court has to enforce it without regard to the question of whether specific performance could

be granted of the entire contract. He referred to clause B-5 of the agreement which provides that Liberty Agencies shall only sell the products supplied by the respondent no.1 company and shall not sell any other articles/products manufactured by any other person/Company/Firm in the premises during the period of the agreement unless approved by the respondent no.1 company. He submitted that this is not a case where the appellants are entitled to any relief from this Court under Article 136 of the Constitution of India.

12. It is not necessary for us to deal with the contentions of learned counsel for the parties based on the provisions of Sections 14, 41 and 42 of the Specific Relief Act, 1963 because Section 37 of the said Act makes it clear that temporary injunctions are to be regulated by the CPC and not by the provisions of the Specific Relief Act, 1963. In fact, the application for temporary injunction of respondent no.1 before the trial court is under the provisions of Order 39 Rules 1 and 2 read with Section 151 of the CPC. It has been held by this Court in *Kishoresinh Ratansinh Jadeja v. Maruti Corporation & Ors.* (supra) that it is well established that while passing an interim order of injunction under Order 39 Rules 1 and 2 CPC, the Court is required to consider (i) whether there is a prima facie case in favour of the plaintiff; (ii) whether the balance of convenience is in favour of passing the order of injunction; and (iii) whether the plaintiff will suffer irreparable injury if an order of injunction would not be passed as prayed for. Hence, we only have to consider whether these well-settled principles relating to grant of temporary injunction have been kept in mind by the trial court and the High Court.

13. On a reading of clause B-2 of the agreement, we find that Liberty Agencies had given a warranty that the suit schedule property was owned by it and that it will retain the possession of the suit schedule property until the expiry of the agreement. Clause D of the agreement clearly stipulated that the duration of the agreement shall be for a period of twelve

years from the date of the agreement unless terminated in accordance with the provisions of the agreement. Clause E-2 further provides that respondent no.1 and not Liberty Agencies could terminate the agreement by giving a notice of not less than three months after the end of six years from the date of the agreement and respondent no.1 had not terminated the agreement under this clause. Before the expiry of six years from the date of the agreement, Liberty Agencies sent the letter dated 26.02.2010 to the respondent No.1 committing a breach of clause B-2 of the agreement which provided that Liberty Agencies will retain possession of the suit schedule property until the expiry of the agreement. This was the breach of the agreement which was sought to be prevented by the trial court by an order of temporary injunction. The trial court and the High Court were thus right in coming to the conclusion that the respondent no.1 had a prima facie case.

14. Yet, the settled principle of law is that even where prima facie case is in favour of the plaintiff, the Court will refuse temporary injunction if the injury suffered by the plaintiff on account of refusal of temporary injunction was not irreparable. In *Dalpat Kumar & Anr. v. Prahlad Singh & Ors.* [(1992) 1 SCC 719] this Court held:

> "Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely, one that cannot be adequately compensated by way of damages."

15. In the present case, the respondent no.1 itself had claimed in the plaint the alternative relief of damages to the

tune of Rs.20,12,44,398/- if the relief for specific performance was to be refused by the Court and break-up of the damages of Rs.20,12,44,398/- claimed in the plaint was as follows:

> "I. Net Book stock amount on 28.02.2010 is Rs.1,15,97,638/-.
>
> II. Loan amount due as on 27.01.2010 is Rs.44,81,584/-.
>
> III. Amount due as per Statement of Accounts as on 28.02.2010 is Rs.20,65,176/-.
>
> IV. Projected Loss of profit on sales, for the balance 7 year term of the Agency Agreement amounts to a sum of Rs.10,31,00,000/-.
>
> V. Loss of Goodwill, Reputation including amount spent on advertisement Rs.2,00,00,000/-.
>
> VI. Loss of amount which Plaintiff would incur for relocating the store to other place in the Brigade Road, Bangalore and to continue its business for rest of the term 7 years would amount to Rs.6,00,00,000/- along with simple interest at the rate of 24% p.a. from the date of payment till realization as the same being a commercial transaction."

16. Mr. Venugopal, learned counsel appearing for the respondent no.1, however, submitted that future profits and loss of goodwill of the respondent no.1 cannot be calculated in terms of the money, but the aforesaid statement of damages claimed by the respondent no.1 in the plaint would show that the respondent no.1 has itself calculated a projected loss of profit for the balance seven year term of the agreement as Rs.10,31,00,000/- and has also assessed loss of goodwill at Rs.2,00,00,000/- besides the loss of Rs.6,00,00,000/- in relocating the store to another place in Brigade Road, Bangalore.

17. Despite this claim towards damages made by the respondent no.1 in the plaint, the trial court has held that if the temporary injunction as sought for is not granted, Liberty Agencies may lease or sub-lease the suit schedule property or create third party interest over the same and in such an event, there will be multiplicity of proceedings and thereby the respondent no.1 will be put to hardship and mental agony, which cannot be compensated in terms of money. Respondent no.1 is a limited company carrying on the business of readymade garments and we fail to appreciate what mental agony and hardship it will suffer except financial losses. The High Court has similarly held in the impugned judgment that if the premises is let out, the respondent no.1 will be put to hardship and the relief claimed would be frustrated and, therefore, it is proper to grant injunction and the trial court has rightly granted injunction restraining the partners of Liberty Agencies from alienating, leasing, sub-leasing or encumbering the property till the disposal of the suit. The High Court lost sight of the fact that if the temporary injunction restraining Liberty Agencies and its partners from allowing, leasing, sub-leasing or encumbering the suit schedule property was not granted, and the respondent no.1 ultimately succeeded in the suit, it would be entitled to damages claimed and proved before the court. In other words, the respondent no.1 will not suffer irreparable injury. To quote the words of Alderson, B. in *The Attorney-General vs. Hallett* [153 ER 1316: (1857) 16 M. & W.569]:

> "I take the meaning of irreparable injury to be that which, if not prevented by injunction, cannot be afterwards compensated by any decree which the Court can pronounce in the result of the cause."

18. For the aforesaid reasons, we set aside the order of temporary injunction passed by the trial court as well as the impugned judgment and the order dated 16.07.2010 of the High Court. The appeals are allowed with no order as to costs.

B.B.B. Appeals allowed.

KATHI BHARAT VAJSUR & ANR.

v.

STATE OF GUJARAT

(Criminal Appeal No. 1042 of 2002)

MAY 08, 2012

[H.L. DATTU AND ANIL R. DAVE, JJ.]

Penal Code, 1860 - s.302 r/w s.34 - Armed assault - Gunshots - Blow on head with axe - Death of one person and serious injury to PW6 - Acquittal of all three accused by trial court - Death of A1 during pendency of appeal - A2 and A3 convicted by High Court u/s.302 r/w s.34 and sentenced to life imprisonment - Justification - Held: From the evidence of PW5, PW6, PW7, PW8, PW12 and PW16, it is clear that A1, A2 and A3 were present at the place of the incident and were carrying tamanchas (country pistols) and axe; that there was altercation between the accused persons and PW5, PW6 and the deceased; that gun shots were fired and that deceased died because of gun shot injuries and blow on the head with axe by A3 - Trial Court took a hyper-technical view by primarily concentrating on minor contradictions to hold that the prosecution failed to prove the guilt of the accused beyond reasonable doubt - Though there were some discrepancies in the evidence given by PW5 and PW6, guilt of the accused not in doubt - Injuries on PW6 and the deceased were consistent with the testimony of the evidence tendered by the eyewitnesses, namely PW5 and PW6 - When medical evidence is in consonance with the principal part of the oral/ ocular evidence thereby supporting the prosecution story, no question of ruling out the ocular evidence merely on the ground that there are some inconsistencies or contradictions in the oral evidence - The fact that the eyewitnesses did not recognize the weapons used, made no difference to the prosecution case in view of the entire evidence on record -

Guilt of appellants (A2 and A3) proved beyond doubt - High Court correctly appreciated the evidence on record - Conviction and sentence of appellants, as imposed by High Court, accordingly upheld.

Evidence - Oral/Ocular evidence - Appreciation of - Contradictions and inconsistencies - Effect of - Held: While appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially affect the trial - Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety.

Witness - Unusual reaction of eye-witness - Effect of - Held: When an eyewitness behaves in a manner that perhaps would be unusual, it is not for the prosecution or the Court to go into the question as to why he reacted in such a manner - There is no fixed pattern of reaction of an eyewitness to a crime - When faced with what is termed as 'an unusual reaction' of an eyewitness, the Court must only examine whether the prosecution story is in anyway affected by such reaction - If the answer is in the negative, then such reaction is irrelevant.

The prosecution case was that there was an altercation between the three accused persons (A1, A2 and A3) and PW5, PW6 and 'M', whereupon A1 opened fire from his double bore tamancha (country pistol) causing injuries to PW6 and in the meanwhile, A2 also fired from tamancha on the person of 'M' due to which he fell down, and thereafter A3 caused injury on the head of 'M' with an axe. Due to the injuries caused, 'M' died on the spot. Charge-sheet was filed against the three accused persons for offences punishable under Sections 302, 307 read with Section 34 IPC. The trial court, however, acquitted the accused persons, on the ground that the

prosecution failed to prove its case beyond reasonable doubt. The State preferred appeal before the High Court. During pendency of the appeal, A1 expired, and the appeal stood abated as against him. The High Court reversed the order of acquittal passed by the trial court and convicted A2 and A3 under section 302 read with section 34 IPC, sentencing them to imprisonment for life. Hence the present appeal by A2 and A3.

Dismissing the appeal, the Court

HELD: 1. The circumstances in which an appellate court will interfere with the finding of the Trial Court are now well settled. The High Court is entitled to re-appreciate the evidence if it is found that the view taken by the acquitting Court was not a possible view or that it was a perverse or infirm or palpably erroneous view or the Trial Court has taken into consideration inconsequential circumstances or has acted with material irregularity or has rejected the evidence of eye-witnesses on wrong assumptions. [Paras 12, 13] [861-C-G-H]

Narinder Singh v. State of Punjab **2000 Crl.LJ 3462 SC - relied on.**

Dwarka Dass v. State of Hayana **(2003) 1 SCC 204: 2002 (4) Suppl. SCR 150;** *State of U.P, v, Krishna Gopal* **(1988) 4 SCC 302: 1988 (2) Suppl. SCR 391 and** *Gurbachan Singh v. Satpal Singh* **(1990) 1 SCC 445: 1989 (1) Suppl. SCR 292- referred to.**

2. In the instant case, it is not in dispute that one person 'M' was killed and the other person PW6 was seriously injured. From a perusal of the entire evidence on record, it is clear that Trial Court had erred in holding that the prosecution had not been able to prove the case beyond reasonable doubt. By relying on the evidence of

PW5, PW6, PW7, PW8, PW12 and PW16, there can be no doubt that A1, A2 and A3 were present at the place of the incident and were carrying tamanchas and axe, and that, there was an altercation between the accused persons and PW5, PW6 and 'M', and that gun shots were fired and 'M' died because of the gun shot injuries and the blow on the head with the axe by A3. Perhaps the Trial Court took a hyper-technical view by primarily concentrating on minor contradictions to hold that the prosecution has failed to prove the guilt of the accused beyond reasonable doubt. [Para 16] [864-B-F]

3. Though there were some discrepancies in the evidence given by PW5 and PW6, there is no doubt about the guilt of the accused. While appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. [Paras 17, 19] [864-G; 865-A; G-H]

Leela Ram v. State of Haryana **(1999) 9 SCC 525: 1999 (3) Suppl. SCR 435 and** *Sunil Kumar Sambhudayal Gupta (Dr.) v. State of Maharashtra* **(2010) 13 SCC 657: 2010 (15) SCR 452 - relied on.**

4. Moreover, the injuries on PW6 and 'M' are consistent with the testimony of the evidence tendered by the eyewitnesses, namely PW5 and PW6. When the medical evidence is in consonance with the principal part of the oral /ocular evidence thereby supporting the prosecution story, there is no question of ruling out the ocular evidence merely on the ground that there are some inconsistencies or contradictions in the oral evidence. [Paras 20, 21] [867-F-G; 868-C-D]

Rakesh v. State of M.P. **(2011) 9 SCC 698 - referred to.**

6. The unusual behaviour of the injured eyewitness, PW6, did not, in anyway, aid the appellants to punch a hole on to the prosecution story. The trial judge was not justified in disbelieving the evidence of PW6. When an eyewitness behaves in a manner that perhaps would be unusual, it is not for the prosecution or the Court to go into the question as to why he reacted in such a manner. There is no fixed pattern of reaction of an eyewitness to a crime. When faced with what is termed as 'an unusual reaction' of an eyewitness, the Court must only examine whether the prosecution story is in anyway affected by such reaction. If the answer is in the negative, then such reaction is irrelevant. [Paras 22, 23] [868-D-E; 869-F-H; 870-A]

Appabhai v. State of Gujarat **(1988) Supp. SCC 241 - relied on.**

7. When the entire evidence on record is considered, the fact that the eyewitnesses did not recognize the weapons used, makes no difference to the prosecution story. In the instant case, cumulative reading of the entire evidence makes the prosecution story believable, thereby proving the guilt of the accused-appellants beyond any doubt. The High Court in the impugned judgment has correctly appreciated the evidence on record, and there is no infirmity in the same, therefore the conviction of guilt and sentence imposed by the High Court is upheld. [Paras 25, 26] [870-F-G-H; 871-A]

Mahendra Pratap Singh v. State of U.P. **(2009) 11 SCC 334: 2009 (2) SCR 1033 - distinguished.**

8. The appellants had been enlarged on bail during the pendency of this appeal before this Court. Therefore, the Jurisdictional Jail Superintendent is directed that the

appellants be taken into custody forthwith to serve out the sentence of life imprisonment. [Para 27] [871-B-C]

Case Law Reference:

2002 (4) Suppl. SCR 150	**referred to**	**Para 12**
2000 Crl.LJ 3462 SC	**relied on**	**Para 13**
1988 (2) Suppl. SCR 391	**referred to**	**Para 14**
1989 (1) Suppl. SCR 292	**referred to**	**Para 15**
1999 (3) Suppl. SCR 435	**relied on**	**Para 18**
2010 (15) SCR 452	**relied on**	**Para 19**
(2011) 9 SCC 698	**referred to**	**Para 20**
(1988) Supp. SCC 241	**relied on**	**Para 22**
2009 (2) SCR 1033	**distinguished**	**Para 24**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1042 of 2002.

From the Judgment & Order dated 15.07.2002 of the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 744 of 1985

S.K. Dholakia, Pramit Saxena, Amit Kumar Sharma (for E.C. Agrawala) for the Appellants.

Madhvi Diwan, Jesal Wahi, Nandini Gupta (for Hemantika Wahi) for the Respondent.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. This appeal is directed against the judgment and order passed by the Division Bench of the High Court of Gujarat in Criminal Appeal No. 744/1985 dated 15.07.2002. By the impugned judgment and order, the High Court has reversed the order of acquittal passed by the

Additional Sessions Judge, Amreli in Sessions Case No. 22/84 and convicted the two appellants for the offence punishable under section 302 read with section 34 of the Indian Penal Code, 1860 ["the IPC" for short], sentencing them to imprisonment for life and a fine of Rs. 1000/- each, in default of which they are directed to further undergo rigorous imprisonment for six months.

2. At the outset, we note that initially there were three accused before the Trial Court, and they were all acquitted for the offences alleged against them. During the pendency of the appeal before the High Court, A1 (Kathi Fakira Vajsur) expired, and the appeal stood abated as against him. The other two accused, namely A2 (Kathi Bharat Vajsur) and A3 (Kathi Ramku Vajsur) are prosecuting this appeal. During the pendency of this appeal, this Court had enlarged the appellants on bail vide order dated 03.12.2002.

3. The factual scenario giving rise to the present appeal is as follows:

The case of the prosecution is that, a part of the adjoining land of the primary school in village Gigasan was leased out to A1, where he had constructed a storage tank for storage of kerosene. It was resolved by the Gigasan Panchayat to give the road between the school and the tank to the school for their use. Therefore, Panchayat had proposed to construct a wall on the land so granted. Prior to the date of the incident, when one Amra Pitha and other labourers had commenced the work on the said plot, A1 protested to it and did not permit them to carry out the proposed work, due to which Amra Pitha had to complain to the Sarpanch Jagu Dada and the Secretary of the Panchayat Shri. Kanubhai about the interference caused by A1. On the morning of the incident, i.e. 30th March 1984, when Jagu Dada (PW6), Mulu Dada (deceased) and Dhoha Vasta (Informant) informed the President of the Taluka Development Officer about the attitude of A1 towards Amra Pitha and other

labourers, he directed Mulu Dada to ignore the threat and complete the construction as resolved by the Panchayat.

4. On the same day, at about 3.30 pm, PW6, the deceased and two labourers, namely Jetha (PW8) and Natha (PW7) went to the plot and began the construction work as directed and they were assisted by Manjibhai and Patel who were teachers working in the Primary School. When they began digging for laying the foundation, A1 along with his brothers A2 and A3 came near the plot and asked them not to dig the pit. After verbal exchange, A1 took out a double bore tamancha from his pocket and pointed at PW6, and threatened him to leave. On his refusal to leave, A1 opened fire which caused injury on his right hand and thereafter, again fired on the chest of PW6. Meantime, A2 also fired from tamancha on the person of Mulu Dada due to which Mulu Dada fell down, after which A3 caused injury on the head with an axe which he was carrying with him. Thereafter they fled from the place of incident. Due to the injuries caused, Mulu Dada died on the spot. Immediately, PW5 reported the incident to the Police Station, Dhari and on the basis of the written report the Station Officer took-up the investigation and on completion thereof charge-sheet was filed against the accused persons for the offences punishable under Sections 302, 307 read with Section 34 of the Indian Penal Code (for short 'the IPC').

5. To substantiate its accusation, prosecution examined several witnesses to prove its case before the Trial Court. The Trial Court, after considering the entire evidence on record, acquitted the accused persons, on the ground that the prosecution failed to prove its case beyond reasonable doubt.

6. Aggrieved by the same, the State preferred an appeal before the Gujarat High Court. The Court, after examining the entire evidence on record, has set aside the judgment and order passed by the Trial Court, and convicted A2 and A3 under Section 302 read with Section 34 of the IPC, sentencing them to life imprisonment and a fine of Rs. 1000/- each.

However, as far as A1 was concerned, the appeal had abated due to his death. Aggrieved by the conviction and sentence passed by the High Court, the accused -appellants are before us in this appeal.

7. Shri. Dholakia, learned senior counsel, submitted that the Trial Court was justified in acquitting the accused persons, as the Trial Court had recorded that there are material contradictions in the statements of PW5 and PW6 recorded by the police under section 161 of the Code of Criminal Procedure, 1973 [hereinafter referred to as "the Code"] and the evidence that was tendered in the Court during the trial. He further submits that the tamancha allegedly used, was a single barrel gun, which needs to be reloaded after firing a single shot and that there was no evidence of such reloading. By referring to the testimony of the ballistic expert (PW 18), the learned senior counsel would state that the answer given by him was not conclusive whether such a fire arm could have been used. He would submit that since the conviction and sentence is imposed under Section 302 r/w Section 34, it was required for the prosecution to prove which injury was caused by which accused and which injury was fatal to the life of the accused. He would emphasize that there must be a live link between all the alleged events, in order to prove the guilt of the appellants beyond reasonable doubt, which he would submit, is missing in this case.

8. The four main contradictions/discrepancies that Shri. Dholakia points out in the prosecution story are: (a) The eye witnesses (PW5 and PW6), when they were shown the arms recovered, emphatically denied that those were not the arms used on the date of the incident; (b) the sequence of the shooting by A1 and A2, and who shot whom was not clear from the testimony of PW5 and PW6 when read along with their statements recorded under section 161 of the Code; (c) that the clothes of PW5, which were seized and who is said to have carried the body of the deceased, had absolutely no blood

stains on his clothes; and (d) the conduct of the injured witness (PW6), in running away from the scene of the incident to a room and locking himself, and then running back to the scene of the incident, was suspicious and abnormal. Shri. Dholakia would then submit that if two views are possible, then the one that was in favour of the accused requires to be adopted. In conclusion, it is submitted that the Trial Court, which had observed the demeanour of the witnesses and considered all the facts and circumstances, had rightly acquitted the appellants of all charges. It is also contended that in the absence of any perversity or omission to consider material evidence or apparent error in law, the judgment of the Trial Court was not open to interference in an appeal against acquittal.

9. Smt. Madhavi Divan, learned counsel appearing for the respondent-State would fairly submit that some contradictions or discrepancies could be found in the evidence recorded, but would contend that if the evidence is read as a whole, there would not be even an iota of doubt left as to the guilt of the appellants. She would further submit that even if portions of the evidence of the hostile witnesses are eschewed from consideration, still it is possible to arrive at the same conclusion as has been done by the High Court. The learned counsel would rely on the testimony of PW6, who is an injured witness to establish the presence of all the three accused at the time of the incident. PW6 has further described the kind of injuries that he had sustained, which, she would submit would corroborate with the medical evidence as well as the testimony of the doctor who had treated the injured witness. The learned counsel would submit that though, PW6 may be confused about the sequence of the gun shots, there is absolutely no dispute as to who fired the shots at the deceased person. Smt. Divan would further refer to the evidence of PW12 (Manjibhai), a teacher in the Primary School, who has also testified that the three accused were present at the scene of occurrence and they were carrying tamanchas and one of them an axe, and that there was an heated altercation between the accused persons and the

deceased (PW5 and PW6), when he (PW12) left the scene. She would also state that he had heard the gun shots, and when he came out, saw the corpse of the deceased in pool of blood. The learned counsel would then refers to the evidence of PW7 and PW8, the labourers who were present at the place of the incident, who have also testified that the accused had come to the place with tamanchas and axe, and that there was altercation between the accused and the deceased, PW5 and PW6. They also testified that they had heard the gun shots. She would then refer to the evidence of PW16 (Lakha), who had also heard the gun shots fired, and was told about the incident by PW5.

10. Smt. Divan would fairly submit that though PW7, PW8 and PW12 are all declared hostile, yet, she would state that by reading their evidence with the evidence of PW5, PW6 and PW16, it is clear that the deceased, PW5 and PW6 were present at the place of the incident, and so were the accused appellants armed with tamanchas and axe. She would further submit that the factum of an altercation between the two parties was also established from the evidence on record, and that of the gun shots fired. With this evidence, Smt. Divan would submit, it is clear beyond any doubt that the death of the deceased was caused by the accused appellants, and strongly refuted the contention of Shri. Dholakia that two views were possible, stating that on this evidence no other view was possible, apart from the view taken by the High Court.

11. Smt. Madhavi Divan, learned counsel, would submit that this Court must not give undue importance to the non-recognition of the weapons by PW5 and PW6 during the trial. According to the learned counsel, the panch witnesses have identified the weapons recovered at the instance of the accused during the trial. She would, for this purpose, refers to the evidence of PW10 (Vallabhbhai), who not only narrated the place and manner in which the axe and the other weapons were recovered at the instance of A2, but also identified the same

when shown the same in Court. She would further state that it is reasonable for the eyewitnesses, one of whom was injured in the incident, not to have seen the weapons in the commotion of the incident properly. To sum up, the learned counsel submits that the High Court, after re-appreciating the entire evidence on record, has come to the conclusion that the Trial Court has fallen in error in magnifying the minor contradictions to arrive at a conclusion that the prosecution has failed to prove the guilt of the accused beyond all reasonable doubt.

12. The circumstances in which an appellate court will interfere with the finding of the Trial Court are now well settled by catena of decisions of this Court. In *Dwarka Dass v. State of Haryana,* (2003) 1 SCC 204, the dicta of all these decisions has been crystallized thus:

> "2. While there cannot be any denial of the factum that the power and authority to apprise the evidence in an appeal, either against acquittal or conviction stands out to be very comprehensive and wide, but if two views are reasonably possible, on the state of evidence: one supporting the acquittal and the other indicating conviction, then and in that event the High Court would not be justified in interfering with an order of acquittal, merely because it feels that it, sitting as a trial court, would have taken the other view. While re-appreciating the evidence, the rules of prudence requires that the High Court should give proper weight and consideration to the views of the trial Judge..."

13. In the case of *Narinder Singh v. State of Punjab* 2000 Crl. LJ 3462 (SC), this Court has held that the High Court is entitled to re- appreciate the evidence if it is found that the view taken by the acquitting Court was not a possible view or that it was a perverse or infirm or palpably erroneous view or the Trial Court taken into consideration inconsequential circumstances or has acted with material irregularity or has rejected the evidence of eye-witnesses on wrong assumptions.

14. It is also now well settled that in a criminal trial the guilt of the accused must be proved beyond reasonable doubt, in order to convict him. This court in the case of *State of U.P. v. Krishna Gopal,* (1988) 4 SCC 302, held:

> "25. A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to "proof" is an exercise particular to each case. Referring to the interdependence of evidence and the confirmation of one piece of evidence by another a learned Author says:
>
> > "The simple multiplication rule does not apply if the separate pieces of evidence are dependent. Two events are dependent when they tend to occur together, and the evidence of such events may also be said to be dependent. In a criminal case, different pieces of evidence directed to establishing that the defendant did the prohibited act with the specified state of mind are generally dependent. A juror may feel doubt whether to credit an alleged confession, and doubt whether to infer guilt from the fact that the defendant fled from justice. But since it is generally guilty rather than innocent people who make confessions, and guilty rather than innocent people who run away, the two doubts are not to be multiplied together. The one piece of evidence may confirm the other."
>
> Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over- emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack

of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.

26. The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately, on the trained intuitions of the Judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimisation of trivialities would make a mockery of administration of criminal justice."

15. In the case of *Gurbachan Singh v. Satpal Singh,* (1990) 1 SCC 445, it is observed:

"4……. The standard adopted must be the standard adopted by a prudent man which, of course, may vary from case to case, circumstances to circumstances. Exaggeration devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice, according to law.

5. The conscience of the court can never be bound by any rule but that is coming itself dictates the consciousness and prudent exercise of the judgment. Reasonable doubt is simply that degree of doubt which would permit a reasonable and just man to come to a conclusion.

Reasonableness of the doubt must be commensurate with the nature of the offence to be investigated."

16. Now coming back to the facts of the case, it is not in dispute that in the incident, said to have taken place on 30th March, one person is killed and the other person is seriously injured. In the trial, the injured has fully supported the case of the prosecution. His evidence finds support from the evidence of PW6 and the evidence of Doctor, PW 16. While hearing the learned counsel appearing for the parties, we have also perused the entire evidence on record, we are of the view that Trial Court had erred in holding that the prosecution had not been able to prove the case beyond reasonable doubt. We are inclined to agree with the submission of Smt. Madhavi Divan, learned counsel appearing for the respondent, that by relying on the evidence of PW5, PW6, PW7, PW8, PW12 and PW 16, there can be no doubt that the A1, A2 and A3 were present at the place of the incident and were carrying tamanchas and axe, and that, there was an altercation between the accused persons and PW5, PW6 and the deceased, and that gun shots were fired and the deceased died because of the gun shot injuries and the blow on the head with the axe by A3. Perhaps the Trial Court took a hyper-technical view by primarily concentrating on minor contradictions to hold that the prosecution has failed to prove the guilt of the accused beyond reasonable doubt. We are not in agreement with the findings and conclusions reached by the Trial Court.

17. The argument canvassed by Shri. S.K. Dholakia, learned senior counsel, appearing for the appellants, that there was material discrepancies in the evidence adduced by the eyewitnesses PW5 and PW6, with regard to the sequence of shots fired and who shot whom. This, the learned senior counsel would submit, is enough to punch a hole in the prosecution story. He would further state that the High Court has brushed aside these contradictions merely terming them as minor contradictions. Per contra, Smt. Divan, learned counsel

appearing for the respondent, while not denying that there were some discrepancies in the evidence given by PW5 and PW6, would state that on a complete reading of the evidence, there is no doubt about the guilt of the accused. We are inclined to agree with the learned counsel for the respondent.

18. In the case of *Leela Ram v. State of Haryana,* (1999) 9 SCC 525, this Court held:

> "12. It is indeed necessary to note that one hardly comes across a witness whose evidence does not contain some exaggeration or embellishment — sometimes there could even be a deliberate attempt to offer embellishment and sometimes in their overanxiety they may give a slightly exaggerated account. The court can sift the chaff from the grain and find out the truth from the testimony of the witnesses. Total repulsion of the evidence is unnecessary. The evidence is to be considered from the point of view of trustworthiness. If this element is satisfied, it ought to inspire confidence in the mind of the court to accept the stated evidence though not however in the absence of the same."

19. This Court, in the case of *Sunil Kumar Sambhudayal Gupta (Dr.) v. State of Maharashtra,* (2010) 13 SCC 657, summarized the law on material contradictions in evidence thus:

> "Material contradictions
>
> 30. While appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The trial court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and

> the appellate court in normal course would not be justified in reviewing the same again without justifiable reasons. (Vide *State v. Saravanan.*)
>
> 31. Where the omission(s) amount to a contradiction, creating a serious doubt about the truthfulness of a witness and the other witness also makes material improvements before the court in order to make the evidence acceptable, it cannot be safe to rely upon such evidence. (Vide *State of Rajasthan v. Rajendra Singh.*)
>
> 32. The discrepancies in the evidence of eyewitnesses, if found to be not minor in nature, may be a ground for disbelieving and discrediting their evidence. In such circumstances, witnesses may not inspire confidence and if their evidence is found to be in conflict and contradiction with other evidence or with the statement already recorded, in such a case it cannot be held that the prosecution proved its case beyond reasonable doubt. (Vide *Mahendra Pratap Singh v. State of U.P.*)
>
> 33. In case, the complainant in the FIR or the witness in his statement under Section 161 CrPC, has not disclosed certain facts but meets the prosecution case first time before the court, such version lacks credence and is liable to be discarded. (Vide *State v. Sait.*)
>
> 34. In *State of Rajasthan v. Kalki,* while dealing with this issue, this Court observed as under: (SCC p. 754, para 8)
>
> > "8. … In the depositions of witnesses there are always normal discrepancies however honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence, and the like. Material discrepancies

are those which are not normal, and not expected of a normal person."

35. The courts have to label the category to which a discrepancy belongs. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. (See *Syed Ibrahim v. State of A.P.*[6] and *Arumugam v. State.*)

36. In *Bihari Nath Goswami v. Shiv Kumar Singh* this Court examined the issue and held: (SCC p. 192, para 9)

"9. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test the credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility."

37. While deciding such a case, the court has to apply the aforesaid tests. Mere marginal variations in the statements cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution case, render the testimony of the witness liable to be discredited."

20. Moreover, by reading the evidence of the PW1 (Kamlesh), PW2 (Dr. Savjibhai) and PW3 (Dr. Shobhanaben), the injuries on PW6 and the deceased have come to light. These injuries are consistent with the testimony of the evidence tendered by the eyewitnesses, namely PW5 and PW6. This Court, in the case of *Rakesh v. State of M.P.,*(2011) 9 SCC 698, held:

"13. It is a settled legal proposition that the ocular evidence would have primacy unless it is established that oral evidence is totally irreconcilable with the medical evidence. More so, the ocular testimony of a witness has a greater

evidentiary value vis-à-vis medical evidence; when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence if proved, the ocular evidence may be disbelieved. (Vide *State of U.P. v. Hari Chand, Abdul Sayeed v. State of M.P. and Bhajan Singh v. State of Haryana.*)"

21. When the medical evidence is in consonance with the principal part of the oral/ocular evidence thereby supporting the prosecution story, there is no question of ruling out the ocular evidence merely on the ground that there are some inconsistencies or contradictions in the oral evidence. We are not inclined to agree with Shri. Dholakia on this count.

22. Shri. Dholakia would lay emphasis on the unusual conduct of PW6 after the occurrence of the incident and therefore submits that the learned trial judge was justified in disbelieving the evidence of PW6. We cannot agree. This Court, in the case of *Appabhai v. State of Gujarat,* 1988 Supp SCC 241, held:

"11.... Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth

with due regard to probability if any, suggested by the accused. The court, however, must bear in mind that witnesses to a serious crime may not react in a normal manner. Nor do they react uniformly. The horror stricken witnesses at a dastardly crime or an act of egregious nature may react differently. Their course of conduct may not be of ordinary type in the normal circumstances. The court, therefore, cannot reject their evidence merely because they have behaved or reacted in an unusual manner. In *Rana Pratap v. State of Haryana Chinnappa Reddy,* J., speaking for this Court succinctly set out what might be the behaviour of different persons witnessing the same incident. The learned Judge observed: [SCC p. 330, SCC (Cri) p. 604, para 6]

"Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way.""

23. We are in agreement with the above observations. When an eyewitness behaves in a manner that perhaps would be unusual, it is not for the prosecution or the Court to go into the question as to why he reacted in such a manner. As has been rightly observed by his lordship O. Chinnappa Reddy, J., in *Rana Pratap's* case (supra.) there is no fixed pattern of reaction of an eyewitness to a crime. When faced with what is termed as 'an unusual reaction' of an eyewitness, the Court must only examine whether the prosecution story is in anyway

affected by such reaction. If the answer is in the negative, then such reaction is irrelevant. We are afraid that the unusual behaviour of the injured eyewitness, PW6, will not, in anyway, aid the appellants to punch a hole on to the prosecution story.

24. Shri. Dholakia, learned senior counsel, would emphasis on the fact that when the eyewitnesses PW5 and PW6 were shown the weapons recovered, they explicitly stated that these were not the weapons used for by the accused. He would state that this was a major discrepancy in the case of the prosecution. In support of this, he would rely on the case of *Mahendra Pratap Singh v. State of UP,* (2009) 11 SCC 334. In reply, Smt. Divan, learned counsel, would submit that it would be more reliable to rely on the evidence of the Panch witness (PW10) and the PSI (PW20) than on the eyewitnesses for the purpose of identifying the weapons, especially when the weapons were recovered at the instance of the accused persons. She would further state that in the commotion of the incident, it is possible that the eyewitnesses might not have clearly seen the weapons. We find that the argument of the learned counsel for the respondent is reasonable and therefore, we accept the same.

25. When the entire evidence on record is considered, the fact that the eyewitnesses did not recognize the weapons used, makes no difference to the prosecution story.

26. We are afraid the decision of this Court in the case of *Mahendra Pratap Singh* (supra.) cited by Shri. Dholakia would not help the appellants, as in the case not only were the weapons used identified, but also the evidence on record did not inspire confidence in the story of the prosecution. In that case, this Court came to conclude that two views were possible, and therefore gave the benefit of the same to the accused. In the instant case, cumulative reading of the entire evidence makes the prosecution story believable, thereby proving the guilt of the accused appellants beyond any doubt. The High

Court in the impugned judgment has correctly appreciated the evidence on record, and we do not find any infirmity in the same, therefore we uphold the conviction of guilt and sentence imposed by the High Court.

27. In the light of the above discussion, we see no merit in the appeal and accordingly, the same is dismissed. The appellants have been enlarged on bail during the pendency of this appeal before this Court. Therefore, the Jurisdictional Jail Superintendent is directed that the appellants herein be taken into custody forthwith to serve out the sentence of life imprisonment.

B.B.B. Appeal dismissed.

NAGESH

v.

STATE OF KARNATAKA

(Criminal Appeal No. 671 of 2005)

MAY 8, 2012

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

PENAL CODE, 1860: s.302 - Murder - Conviction based on circumstantial evidence - Allegation that victim-deceased who was residing with accused no.1 in Belgaum was alone in the house on the day of occurrence - Appellant-accused no.2 came there and tried to outrage her modesty and when she resisted such attempts, appellant assaulted her and administered poison to her - Witnesses saw accused no.1 taking the deceased in a car brought by accused no.2 - Accused no.1 told neighbours that he was taking the deceased to hospital as she has taken poison - Police jeep also came there - Deceased was put into the car and the car and the police jeep left the place - Instead of taking deceased to hospital she was taken to her parent's house next morning - Her father saw the dead body of his daughter and bruises on her body but was forced to cremate hurriedly - FIR filed subsequently - Trial court convicted appellant but acquitted other accused- High Court upheld the decision of the trial court - On appeal, held: Statement of witnesses provided complete chain as to how the deceased was last seen with the appellant whereafter she died and her body was cremated in the village despite protest by her parents - Appellant was last seen with the deceased but offered no explanation - The statements of witnesses established the facts which formed the very basis of the case of the prosecution - Evidence was admissible and was appreciated in consonance with the rules of prudence and law - Findings of courts below were neither perverse nor improper - Interference with the order of conviction not called for merely because another view on the

same evidence was possible - Director General of Police/ Commissioner of Police directed to take disciplinary action against the police officers/officials at Belgaum, who were present at the place of occurrence when the deceased was brought from her room downstairs where the car was parked, but failed to take appropriate action and register a case despite the fact that it was openly stated that the deceased had consumed poison - Further, disciplinary action directed against the police officers/officials who were present when the body of the deceased was cremated and failed to take charge of the dead body and proceed in accordance with law, it being an unnatural death, and did not discharge their public duty and mandatory obligations under the provisions of the Police Manual and the Code of Criminal Procedure - Constitution of India, 1950 - Article 136.

CONSTITUTION OF INDIA, 1950: Article 136 - Scope of interference - Held: When the evidence is legally admissible and has been appreciated by the courts in its correct perspective then merely because another view is possible, Supreme Court, in exercise of its powers under Article 136 of the Constitution, would be very reluctant to interfere with the concurrent findings of the courts below.

The prosecution case was that the victim-deceased was daughter of PW4 and PW9 and was a college student. Accused no.1 was close relative of the deceased and was resident of Belgaum. The appellant and accused no.2 were brothers-in-law of accused no.1. Accused no.1 had pressed upon the parents of the deceased for sending her from their village Gokarna to Belgaum with him. At the relevant time, she was staying with accused no.1 at Belgaum. On the fateful day, at 5.00 p.m. when accused no.1 had gone to the temple leaving the deceased alone in the house, the appellant came to the house of accused no.1 and tried to outrage the modesty of the deceased and have sexual intercourse with her. But

when she resisted such attempts, the appellant assaulted her and murdered her by administering poison. PW1, the neighbour saw accused no.1 returning to the house at about 8.30 p.m. and taking the deceased along with him outside the house by holding her hands. On her enquiry, he told that the deceased was not well and was being taken for treatment to the doctor. PW1 also tried to enquire from the deceased as to what had happened to her but she was unable to give any reply except producing or making some groaning/moaning sound of "huhu huhu". Upon this, PW1 gave some saline water to her. In the meantime, accused no.2 came there in an Ambassador car. By then, some persons from the neighbourhood had also gathered there. Even a police jeep had come there. Thereafter, the deceased was put into the car and the police jeep as well as the car left the place. PW2, another neighbour who was watching television in his house at about 8.45 p.m., came out of his house upon hearing some commotion outside the house. He also saw the arrival of the Ambassador car and the deceased being put into the car by the accused persons. He was also told that the deceased was not well. The next morning, the dead body of the victim was brought to the house of his parents in the Ambassador car. PW9 noticed some marks of violence on the body of the deceased when she was brought inside the house. When PW9 enquired from the accused no.1 as to how his daughter had died, the accused no.1 jumped into the well but was rescued by some persons. Despite resistance, the body of the deceased was cremated. Thereafter, all the accused immediately returned to Belgaum. PW9 lodged a complaint with the police. The trial court acquitted all the accused for all offences except the appellant who was convicted for the offence under Section 302 IPC and awarded imprisonment for life and a fine of Rs.2,000/, in default, to undergo rigorous imprisonment for six months. The High Court confirmed the judgment of the trial court.

The instant appeal was filed challenging the order of the High Court.

Dismissing the appeal, the Court

HELD: 1. Every case has to be appreciated on its own facts and in light of the evidence led by the parties. It is for the Court to examine the cumulative effect of the evidence in order to determine whether the prosecution has been able to establish its case beyond reasonable doubt or that the accused is entitled to the benefit of doubt. In the instant case, there was no eye-witness to the actual scene of crime that resulted in the death of the deceased. To that limited extent, it was a case of circumstantial evidence. Certain enough, the statement of the parents of the deceased, PW4 and PW9, the neighbours, PW1 and PW2 and the Investigating Officer, PW15 clearly establishes the case of the prosecution. PW1 has stated that the accused no.1 had gone to the temple and the deceased was in the room along with the appellant. At 8.30 p.m., accused no.1 came and he brought the deceased by holding her hand and, upon enquiry from PW1, she was told that the deceased was not feeling well. Seeing her condition and the moaning sound made by the deceased, PW1 gave her saline water. Then, accused no.2 also came there in the Ambassador car. Even other people gathered by that time. The Police also came at the spot and the deceased was taken to the hospital in the Ambassador car. Later, it was learnt that the police had come to the spot and informed that the deceased had died. Similarly, PW2 is the other neighbour who had been watching TV at about 8.45 p.m. on that day but after hearing the commotion, had come out of his house saw that the deceased was being taken away in the Ambassador car and he was told by the accused that they were taking her to a doctor as she was not well. PW4 is the mother of the deceased while PW9 is the father of the deceased. Both of them have

stated that accused no.1 had pressurized them to send their daughter to Belgaum with him. On 8th October, 1993, the accused brought her dead body in the car and at that time her nose was bleeding and there were blood clotting on the cheeks as well. Accused no.1 and the appellant had informed the parents that she died as a result of consuming poison. They did not give any further information. Further, the father of the deceased, PW9, had objected that her body be not cremated but despite his protest, the dead body was cremated in the village. PW11 who was running a tea shop at Belgaum, stated that he had seen the accused persons in the Ambassador car and he even knew the driver. He was standing near the taxi stand when the driver brought the three accused persons in the car and there was a girl sleeping in the car. The statement of these witnesses examined in light of the statement of the Investigating Officer, PW15, provides a complete chain as to how the deceased was brought to Belgaum and was last seen with the appellant whereafter she died and her body was cremated in the village despite protest by her parents. All the three accused had put the deceased into the car and never took her to the doctor but instead they went to the village Gokarna where they reached next morning and handed over the dead body of the deceased to the parents. [Paras 13-15] [886-A-H; 887-A-D]

Kali Ram v. State of H.P. **(1973) 2 SCC 808: 1974 (1) SCR 722;** *Amarsingh Munnasingh Suryawanshi v. State of Maharashtraa* **(2007) 15 SCC 455: 2007 (11) SCR 1;** *Birendar Poddar v. State of Bihar* **(2011) 6 SCC 350: 2011 (6) SCR 873;** *Sucha Singh & Anr. v. State of Punjab* **(2003) 7 SCC 643: 2003 (2) Suppl. SCR 35 - relied on.**

2. There is no major discrepancy or even an iota of real doubt in the case of the prosecution and secondly, despite clear irresponsible attitude on the part of the

Police officials who were present at the residence of the accused persons when the deceased was brought to the car on the pretext of taking her to a doctor for treatment but her body was taken away, still the prosecution has been able to establish the complete chain of events pointing undoubtedly towards the guilt of the appellant. Another very important aspect of this case is that the accused in their statement under Section 313, Cr.P.C. took up the stand of complete denial of their involvement in the crime and offered no explanation before the Court. The law required the appellant in particular to provide some explanation as he was last seen in the room with the deceased. Rather than providing some explanation of the circumstances under which the deceased died, the appellant offered complete denial. But strangely when PW4, the mother of the deceased, was cross-examined by the defence, they put the suggestion to her that the deceased was having a love affair with a student from her college and her parents had sent her to Belgaum to ensure that the said love affair failed. The deceased had become desperate at Belgaum and had taken poison and died. If this be the stand of the accused, then there was no occasion for the accused to deny every material piece of evidence as well as not to give any explanation when the accused were specifically asked for. The purpose of a statement under Section 313 Cr.PC is to put to the accused the material evidence appearing in the case against him as well as to provide him an opportunity to explain his conduct or his version of the case. [Para 17] [888-G-H; 889-A-F]

3. It is also possible and permissible that an accused may remain silent but in that circumstance and with reference to the facts and circumstances of a given case, the Court may be justified in drawing an adverse inference against the accused. PW5 was another vital witness who had seen the deceased when she was

brought to the Ambassador car and, according to her, lips of the deceased were blackish and her neck had black marks on two sides and when she enquired about her from the accused, she was told that the deceased had taken poison. The statements of PW1, PW4 and PW9 read with the statement of this witness, establish the facts which form the very basis of the case of the prosecution and they have been proved in accordance with law. The trend of cross-examination on behalf of the accused implies admission of the death of the deceased having taken place in the premises in question by taking poison, however, the accused have failed to offer any explanation therefor which was least expected of him. When the evidence is legally admissible and has been appreciated by the Courts in its correct perspective then merely because another view is possible, this Court, in exercise of its powers under Article 136 of the Constitution, would be very reluctant to interfere with the concurrent findings of the Courts below. Of course, there are exceptions but they are very limited ones. Where upon careful appreciation of evidence, this Court finds that the courts below have departed from the rule of prudence while appreciating the evidence in a case or the findings are palpably erroneous and are opposed to law or the settled judicial dictums, then the Court may interfere with the concurrent findings. Still, it is not possible to exhaustively state the principles or the kind of cases in which the Court would be justified in disturbing the concurrent findings. It will always depend upon the facts and circumstances of a given case. It was primarily for the reason that the courts had departed from the Rule of Prudence in appreciation of evidence. In the present case, the evidence is admissible evidence and has been appreciated in consonance with the rules of prudence and law. These findings can neither be termed as perverse or so improper that no person of common prudence can arrive at that conclusion. In light of the above noted

principles of appreciation of evidence, we would not interfere merely because it is possible to take another view on the same evidence. [Paras 19, 21, 23] [892-B-E; G-H; 893-A-B-H; 894-A-B]

Asraf Ali v. State of Assam **(2008) 16 SCC 328: 2008 (10) SCR 1115;** *Manu Sao v. State of Bihar* **(2010) 12 SCC 310: 2010 (8) SCR 811;** *Mousam Singha Roy & Ors. v. State of W.B.* **(2003) 12 SCC 377 - relied on.**

4. The Director General of Police/Commissioner of Police, Karnataka is directed to take disciplinary action against the police officers/officials at Belgaum, whether in service or not, who were present at the place of occurrence when the deceased was brought from her room downstairs where the car was parked, and failed to take appropriate action and register the case despite the fact that it was openly stated that the deceased had consumed poison. Further, disciplinary action is directed against the police officers/officials, whether in service or not, at village Gokarna who were present when the body of the deceased was cremated and they failed to take charge of the dead body and proceed in accordance with law, it being an unnatural death. They did not discharge their public duty and mandatory obligations under the provisions of the Police Manual and the Code of Criminal Procedures. The Director General of Police is directed to view the matter seriously and ensure completion of the disciplinary proceedings within six months from the date of this order. [Para 24] [894-C-F]

Case Law Reference:

1974 (1) SCR 722	**relied on**	**Para 11**
2007 (11) SCR 1	**relied on**	**Para 12**
2011 (6) SCR 873	**relied on**	**Para 12**
2003 (2) Suppl. SCR 35	**relied on**	**Para 16**
2008 (10) SCR 1115	**relied on**	**Para 17**
2010 (8) SCR 811	**relied on**	**Para 18**
(2003) 12 SCC 377	**relied on**	**Para 22**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 671 of 2005.

From the Judgment & Order dated 19.12.2003 of the High Court of Karnataka in Criminal Appeal No. 150 of 2000.

Seeraj Bagga (A.C.) for the Appellant.

V.N. Raghupathy, Azeen A. Kalebudde for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. A Bench of the High Court of Karnataka at Bangalore vide its judgment dated 19th December, 2003 while rejecting all the contentions raised by the accused Nagesh, confirmed the judgment of conviction and order of sentence passed by the trial court vide its judgment dated 18th January, 2000 convicting the accused for an offence under Section 302 of the Indian Penal Code, 1860 (IPC) and sentencing him to undergo imprisonment for life and pay a fine of Rs.2000/- in default to undergo further rigorous imprisonment for six months. Aggrieved from the judgment of the High Court, the accused has preferred the present appeal.

2. We may, at the very outset, briefly refer to the facts as per the case of the prosecution. The deceased, Smt. Nagaratna, was a student of second year Pre-University College (PUC) at the relevant time. Her parents, namely Smt. Sumitra, PW4 and Shivarai Shetti, PW9, had six daughters. PW9 was running a small tea shop at Gokarna. The deceased was earlier staying with her parents. The accused No.1, Anant, was a close relative of Nagaratna and was unmarried at the

relevant time. Accused No.1 also was the resident of Gokarna but at that time was residing at Belgaum. The other two accused, namely, Venketesh, Accused No.1 and Nagesh, Accused No.3, were brothers-in-law of Anant. All of them were residents of village Gokarna. Anant had pressed upon the parents of Nagaratna for sending her to Belgaum with him. During the Ganapathi festival, she had visited her parents at Gokarna and was very reluctant to go back to Belgaum. However, Anant again persuaded her parents to send her to Belgaum promising them to secure her a good job at Belgaum. Her parents, thus, had sent her back with him to Belgaum. Hence, at the relevant time, she was staying with Anant at Belgaum.

3. PW1, Smt. Roopa, is the owner of the building called 'Sai Prasad', bearing No.304/31 and CCB No. 18 situated at Shastri Nagar, Goodshed Road, Belgaum comprising of three blocks. She herself was staying in one of the blocks with her husband and children while Anant was staying in the second block along with the deceased, Nagaratna. Chotubhai, PW2, was also residing in the upstairs portion of the same block. In other words, PW1 and PW2, both were the immediate neighbours of Anant.

4. On 7th October, 1993 at about 5.00 p.m. in the evening, Anant had gone to the temple leaving Nagaratna alone in the house. The accused Nagesh, appellant herein, came to the house of Anant and tried to outrage the modesty of the deceased and have sexual intercourse with her. But when she resisted such attempts then Nagesh assaulted her and is stated to have murdered her by administering poison.

5. Smt. Roopa, PW1, saw Anant returning to the house at about 8.30 p.m. and taking the deceased Nagaratna along with him outside the house by holding her hands. On her enquiry, she was told by Anant that Nagaratna was not well and was being taken for treatment to the doctor. PW1 also tried to enquire from Nagaratna as to what had happened to her but

she was unable to give any reply except that she was producing or making some groaning/moaning sound of "huhu huhu". Upon this, PW1 gave some saline water to Nagaratna. In the meantime, Venketesh came there with an Ambassador car. By then, some persons from the neighbourhood had also gathered there. Even a police jeep had come there. Thereafter, the deceased was put into the car and the police jeep as well as the car left from the place.

6. It is stated that Chotubhai, PW2 who was watching television in his house at about 8.45 p.m., came out of his house upon hearing some commotion outside the house. He saw the arrival of the Ambassador car and the deceased being put into the car by the accused persons. He was also told that Nagaratna was not well. Later, it was learnt that Nagaratna had expired.

7. On 8th October, 1993, at about 7.30 a.m. in the morning, the deceased Nagaratna was brought to the house of PW9 in the Ambassador car. By that time, she is stated to have already died. Her father, PW9, noticed some marks of violence on the body of the deceased when she was brought inside the house. It is stated that on seeing the dead body of Nagaratna, PW9 fainted and when he regained consciousness, he enquired from the accused Anant, as to how his daughter died. Thereon the accused Anant jumped into the well but was rescued by some persons. Despite resistance, the body of the deceased was cremated. Thereafter, the accused including Nagesh did not stay in the village and they immediately returned to Belgaum. The father of the deceased, PW9, lodged a complaint with the police, Ex.P6 on the basis of which the First Information Report (FIR) Exhibit P10 was registered and the investigative machinery was set into motion. The Investigating Officer, upon completing the investigation, filed charge-sheet stating that the five accused, namely, Anant Ramanna Kudatalkar, Venkatesh Shesha Revankar, Nagesh Shriniwas Raikar, Prabhakar Ramnath Raikar, and Veerbhadra Purshottam Shetty had

committed the offence. Accused No.3 Nagesh was charged with an offence under Section 302 IPC while all others were stated to have committed an offence punishable under Sections 201 and 202 read with Section 34 IPC. All the accused stood the trial and vide judgment dated 18th January, 2000, the Trial Court acquitted all the accused for all offences except Nagesh, accused No.3 who was convicted for the offence under Section 302 IPC and, as already noticed, awarded imprisonment for life and a fine of Rs.2,000/, in default, to undergo rigorous imprisonment for six months. As already noticed, the High Court has confirmed the judgment of the Trial Court, giving rise to the present appeal.

8. The learned counsel appearing for the sole appellant-accused No.3 argued with some vehemence that this is a case of circumstantial evidence and the prosecution has failed to establish the complete chain of events pointing towards the guilt of the appellant. As in the peculiar circumstances of the case two views are possible, the Court should take a view which is favourable to the accused.

9. It is further contended that the story of the prosecution is based upon conjectures and surmises. There are serious and patent discrepancies in the case of the prosecution. The conduct of the appellant is such that absolves him of any liability under the criminal law because he had throughout participated in taking the deceased to the hospital, attended her funeral and never ran away. If the appellant had committed the offence, the first thing he would have done was to disappear. The statements of the witnesses do not establish the offence under Section 302 against the appellant.

10. In response to this submission, the counsel appearing for the State argued that the prosecution has been able to establish its case beyond any reasonable doubt, not only by circumstantial evidence but also by the statement of the witnesses who saw the deceased and the accused immediately prior and after the occurrence in question.

11. This Court in the case of *Kali Ram v. State of H.P.* [(1973) 2 SCC 808], held as under :

"25. Another golden thread which runs through the web of the 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. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced in the case is consistent only with the hypothesis of the guilt of the accused and is inconsistent with that of his innocence, the Court should refrain from recording a finding of guilt of the accused. It is also an accepted rule that in case the Court entertains reasonable doubt regarding the guilt of the accused, the accused must have the benefit of that doubt. Of course, the doubt regarding the guilt of the accused should be reasonable; it is not the doubt of a mind which is either so vacillating that it is incapable of reaching a firm conclusion or so timid that is is hesitant and afraid to take things to their natural consequences. The rule regarding the benefit of doubt also does not warrant acquittal of the accused by report to surmises, conjectures or fanciful considerations. As mentioned by us recently in the case of State of Punjab v. Jagir Singh a criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the offence with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the Court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in

the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the Courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures."

12. The Court also cautioned that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system much worse, however, is the wrongful conviction of an innocent person. In the case of *Amarsingh Munnasingh Suryawanshi v. State of Maharashtraa* [(2007) 15 SCC 455], this Court, while dealing with a situation where the accused-husband was absconding and the husband and wife were living together and at the time of death they were alone in the room, observed that it was for the accused-husband to explain as to how the deceased met her death. Again, while dealing with a case based upon circumstantial evidence, this Court, in a recent judgment in the case of *Birendar Poddar v. State of Bihar* [(2011) 6 SCC 350], held as under :

"7. It is obviously true that this case rests solely on circumstantial evidence. It is true that in cases where death takes place within the matrimonial home, it is very difficult to find direct evidence. But for appreciating circumstantial evidence, the court has to be cautious and find out whether the chain of circumstances led by the prosecution is complete and the chain must be so complete and conclusive as to unmistakably point to the guilt of the accused. It is well settled that if any hypothesis or possibility arises from the evidence which is incompatible with the guilt of the accused, in such case, the conviction of the accused which is based solely on circumstantial evidence is difficult to be sustained. {See *Hanumant Govind Nargundkar v. State of M.P.* [AIR 1952 SC 343], *Bhagat Ram v. State of Punjab* [AIR 1954 SC 621]and *Eradu v. State of Hyderabad* [AIR 1956 SC 316]}"

13. It is neither possible nor prudent to state a straight-

jacket formula or principle which would apply to all cases without variance. Every case has to be appreciated on its own facts and in light of the the evidence led by the parties. It is for the Court to examine the cumulative effect of the evidence in order to determine whether the prosecution has been able to establish its case beyond reasonable doubt or that the accused is entitled to the benefit of doubt.

14. In the present case, there is no eye-witness to the actual scene of crime that resulted in the death of the deceased. To that limited extent, it is a case of circumstantial evidence. Certain enough, the statement of the parents of the deceased, PW4 and PW9, the neighbours, PW1 and PW2 and the Investigating Officer, PW15 clearly establishes the case of the prosecution. PW1 has stated that the accused Anant had gone to the temple and the deceased was in the room along with the appellant. At 8.30 p.m., Anant came and he brought the deceased by holding her hand and, upon enquiry from PW1, she was told that the deceased was not feeling well. Seeing her condition and the moaning sound made by the deceased, PW1 gave her saline water. Then, the accused Venkatesh also came there in the Ambassador car. Even other people gathered by that time. The Police also came at the spot and the deceased was taken to the hospital in the Ambassador car. Later, it was learnt that the police had come to the spot and informed that Nagaratna had died. Similarly, PW2 is the other neighbour who had been watching TV at about 8.45 p.m. on that day but after hearing the commotion, had come out of his house saw that Nagaratna was being taken away in the Ambassador car and he was told by the accused that they were taking her to a doctor as she was not well. PW4 is the mother of the deceased while PW9 is the father of the deceased. Both of them have stated that Anant had pressurized them to send their daughter to Belgaum with him. On 8th October, 1993, the accused brought her dead body in the car and at that time her nose was bleeding and there were blood clottings on the cheeks as well. Anant and Nagesh had informed the parents

that she died as a result of consuming poison. They did not give any further information. Further, the father of the deceased, PW9, had objected that her body be not cremated but despite his protest, the dead body was cremated in the village. PW11, Praveen, who was running a tea shop at Belgaum, stated that he had seen the accused persons in the Ambassador car and he even knew the driver. He was standing near the taxi stand when the driver brought the three accused persons in the car and there was a girl sleeping in the car. The statement of these witnesses examined in light of the statement of the Investigating Officer, PW15, provides a complete chain as to how the deceased was brought to Belgaum and was last seen with accused Nagesh, whereafter she died and her body was cremated in the village despite protest by her parents.

15. All the three accused had put the deceased into the car and never took her to the doctor but instead they went to the village Gokarna where they reached next morning and handed over the dead body of the deceased to the parents.

16. A contention has also been raised to argue that the First Information Report (FIR), Exhibit P10, is an afterthought as it was lodged after deliberation and planning, that too, after a considerable time. The Court cannot ignore the fact that young daughter of PW4 and PW9 had died allegedly by consuming poison. No other details were brought to their notice, they had other daughters present in the house and the dead body of the deceased was cremated against their wish. After the cremation, the FIR was lodged. The delay, if any, in the circumstances of the case, thus, stands properly explained. The Court has to examine the evidence in its entirety, particularly, in the case of circumstantial evidence, the Court cannot just take one aspect of the entire evidence led in the case like delay in lodging the FIR in isolation of the other evidence placed on record and give undue advantage to the theory of benefit of doubt in favour of the accused. This Court, in the case of *Sucha Singh & Anr. v. State of Punjab* [(2003) 7 SCC 643] has stated:

> "20. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape thatn punish an innocent. Letting guilty escape is not doing justice according to law. (See *Gurbachan Singh v. Satpal Singh & Ors.* (AIR 1990 SC 209). Prosecution is not required to meet any and every hypothesis put forward by the accused (See *State of U.P. v. Ashok Kumar Srivastava* (AIR 1992 SC 840). A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish. (See *Inder Singh and another v. State (Delhi Admn.)* (AIR 1978 SC 1091. Vague hunches cannot take place of judicial evaluation. 'A Judge does not preside over a criminal trial, merely to see that no innocent man is punished. A Judge also presides to see that a guilty man, does not escape. Both are public duties.' (*Per Viscount Simen in Stirland v. Director of Public Prosecutor* 91944 AC (PC 315) quoted in *State of U.P. v. Anil Singh* (AIR 1988 SC 1998). Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth."

17. Firstly, we are unable to find any major discrepancy or even an iota of real doubt in the case of the prosecution and secondly, despite clear irresponsible attitude on the part of the Police officials who were present at the residence of the accused persons when the deceased was brought to the car

on the pretext of taking her to a doctor for treatment but her body was taken away, still the prosecution has been able to establish the complete chain of events pointing undoubtedly towards the guilt of the appellant. Another very important aspect of this case is that the accused in their statement under Section 313 of the Code of Criminal Procedure, 1973 (Cr.PC) took up the stand of complete denial of their involvement in the crime and offered no explanation before the Court. As noticed above, the law required the accused Nagesh in particular to provide some explanation as he was last seen in the room with the deceased. Rather than providing some explanation of the circumstances under which the deceased died, the appellant offered complete denial. But strangely when PW4, the mother of the deceased, was cross-examined by the defence, they put the suggestion to her that the deceased was having a love affair with a student from her college and her parents had sent her to Belgaum to ensure that the said love affair failed. The deceased had become desperate at Belgaum and had taken poison and died. If this be the stand of the accused, then there was no occasion for the accused to deny every material piece of evidence as well as not to give any explanation when the accused were specifically asked for. The purpose of a statement under Section 313 Cr.PC is to put to the accused the material evidence appearing in the case against him as well as to provide him an opportunity to explain his conduct or his version of the case. This Court in the case of *Asraf Ali v. State of Assam* [(2008) 16 SCC 328] has observed as follows :

> "21. Section 313 of the Code casts a duty on the court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as a necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.

> 22. The object of Section 313 of the Code is to establish a direct dialogue between the court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice. This Court also expressed a similar view in *S. Harnam Singh v. State (Delhi Admn.)* while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non-indication of inculpatory material in its relevant facts by the trial court to the accused adds to the vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise."

18. Again, in its recent judgment in *Manu Sao v. State of Bihar* [(2010) 12 SCC 310], a Bench of this Court to which one of us, Swatanter Kumar, J., was a member, has reiterated the above-stated view as under :

> "12. Let us examine the essential features of this Section 313 CrPC and the principles of law as enunciated by judgments, which are the guiding factors for proper application and consequences which shall flow from the provisions of Section 313 of the Code.
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> 13. As already noticed, the object of recording the statement of the accused under Section 313 of the Code is to put all incriminating evidence against the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also to permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise

in the crime. The court has been empowered to examine the accused but only after the prosecution evidence has been concluded. It is a mandatory obligation upon the court and besides ensuring the compliance therewith the court has to keep in mind that the accused gets a fair chance to explain his conduct. The option lies with the accused to maintain silence coupled with simpliciter denial or in the alternative to explain his version and reasons for his alleged involvement in the commission of crime. This is the statement which the accused makes without fear or right of the other party to cross-examine him. However, if the statements made are false, the court is entitled to draw adverse inferences and pass consequential orders, as may be called for, in accordance with law. The primary purpose is to establish a direct dialogue between the court and the accused and to put to the accused every important incriminating piece of evidence and grant him an opportunity to answer and explain. Once such a statement is recorded, the next question that has to be considered by the court is to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the courts have explained this concept and now it has attained, more or less, certainty in the field of criminal jurisprudence.

14. The statement of the accused can be used to test the veracity of the exculpatory nature of the admission, if any, made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in the case. The provisions of Section 313(4) explicitly provides that the answers given by the accused may be taken into consideration in such enquiry or trial and put in evidence against the accused in any other enquiry or trial for any other offence for which such answers may tend to show he has committed. In other words, the use is permissible as per the provisions of the Code but has its own limitations. The courts may rely on a portion of the

statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this section should not be considered in isolation but in conjunction with evidence adduced by the prosecution."

19. It is also possible and permissible that an accused may remain silent but in that circumstance and with reference to the facts and circumstances of a given case, the Court may be justified in drawing an adverse inference against the accused. PW5, Smt. Pushpa, is another vital witness who had seen the deceased when she was brought to the Ambassador car and, according to her, lips of the deceased were blackish and her neck had black marks on two sides and when she enquired about her from the accused, she was told that the deceased had taken poison. The statements of PW1, PW4 and PW9 read with the statement of this witness, establish the facts which form the very basis of the case of the prosecution and they have been proved in accordance with law. The trend of cross-examination on behalf of the accused implies admission of the death of the deceased having taken place in the premises in question by taking poison, however, the accused have failed to offer any explanation therefor which was least expected of him.

20. Lastly, we may also notice the contention of the appellant that learned courts below have not appreciated the evidence in its proper perspective and in accordance with law. The findings are based upon surmises and conjectures. Resultantly, the findings are incorrect in law and unsustainable.

21. When the evidence is legally admissible and has been appreciated by the Courts in its correct perspective then merely because another view is possible, this Court, in exercise of its powers under Article 136 of the Constitution, would be very reluctant to interfere with the concurrent findings of the Courts below. Of course, there are excpetions but they are very limited ones. Where upon careful appreciation of evidence, this Court

finds that the courts below have departed from the rule of prudence while appreciating the evidence in a case or the findings are palpably erroneous and are opposed to law or the settled judicial dictums, then the Court may interfere with the concurrent findings. Still, it is not possible to exhaustively state the principles or the kind of cases in which the Court would be justified in disturbing the concurrent findings. It will always depend upon the facts and circumstances of a given case.

22. While noticing the caution expressed by Baron Alderson with regard to the possibility of our minds getting swayed by the tragic facts of the case and our assessment of the case being influenced by the preconceived notions, the Court in the case of *Mousam Singha Roy & Ors. v. State of W.B.* [(2003) 12 SCC 377 held as under :

> "Appropos what was observed by this Court in the case of *Hanumant Govind* (supra), it will be useful to note the warning addressed by Baron Alderson to the jury in *Reg. V. Hodge* 1838 2 Lewin 227 which is also quoted with approval by this Court in the case of *Hanumant Govind* (supra) :
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> > 'The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

23. In view of the above factual matrix and upon appreciation of evidence, the Court found itself unable to concur with the findings recorded by the courts below. It was primarily for the reason that the courts had departed from the Rule of Prudence in appreciation of evidence. In the present case, the

evidence is admissible evidence and has been appreciated in consonance with the rules of prudence and law. These findings can neither be termed as perverse or so improper that no person of common prudence can arrive at that conclusion. In light of the above noted principles of appreciation of evidence, we would not interfere merely because it is possible to take another vie on the same evidence.

24. Before we close our judgment, we will be failing in our duty if we do not direct the Director General of Police/ Commissioner of Police, Karnataka to take disciplinary action against the police officers/officials at Belgaum, whether in service or not, who were present at the place of occurrence when Ms. Nagaratna was brought from her room downstairs where the car was parked, and failed to take appropriate action and register the case despite the fact that it was openly stated that Ms. Nagratna had consumed poison. Further, we direct disciplinary action to be taken against the police officers/ officials, whether in service or not, at village Gokarna who were present when the body of the deceased was cremated and they failed to take charge of the dead body and proceed in accordance with law, it being an unnatural death. They did not discharge their public duty and mandatory obligations under the provisions of the Police Manual and the Code of Criminal Procedures. We further direct that the Director General of Police shall view the matter seriously and ensure completion of the disciplinary proceedings within six months from the date of this order.

25. In view of the above discussion we find no substance in the submissions made on behalf of the accused-appellant. They merit rejection and are hereby rejected accordingly.

26. We find no merit in the present appeal, the same is dismissed accordingly.

D.G. Appeal dismissed.