RAJESH BHATNAGAR
v.
STATE OF UTTARAKHAND
(Criminal Appeal No. 851 of 2010)

MAY 10, 2012

[SWATANTER KUMAR AND RANJAN GOGOI, JJ.]

Penal Code, 1860 - s.304-B - Dowry death - Prosecution case that husband, brother-in-law and mother-in-law of a woman burnt her to death after pouring kerosene on her, as she and her parents failed to satisfy their demands of dowry - Courts below convicted all the three accused u/s.304-B IPC - Appeals by husband and brother-in-law before Supreme Court - Held: PW2, mother of the deceased, deposed that demand of dowry in relation to various items persisted right from date of engagement, uptil the death of deceased - Statement of PW2 corroborated by PW1, an uncle of the deceased - Definite ocular, expert and documentary evidence to show that deceased died an unnatural death, she was subjected to cruelty and ill-treatment, there was demand of dowry of specific items like refrigerator, television and cooler and she died within seven years of her marriage - Thus, ingredients of s.304-B fully satisfied - Projection by defence that deceased had died because of an accident of stove fire while cooking the food cannot be accepted - If accused-husband had attempted to save the deceased, as claimed by him, then he would have suffered some burn injuries - But not even a single burn injury found on his body - Accused-husband suffered bruises or minor cuts which one could suffer only if he was struggling or fighting with another person - Absence of any cooking material in the kitchen also belie the stand of this accused - An accused who raises a false plea before the Court would normally earn the criticism of the Court leading to adverse inference - Furthermore, the conduct of the

accused prior to and immediately after the occurrence clearly shows that they were not innocent - Otherwise, there was no occasion for them to abscond after the body of the deceased was handed over to her relations - Circumstances consistent only with hypothesis that the accused had killed the deceased by setting her on fire - Clearly accused not entitled to any benefit, much less acquittal - No merit in the appeals.

Penal Code, 1860 - s.304-B - Dowry death - Life imprisonment - Justification - Held: There were no mitigating circumstances in favour of the accused in the instant case - Offence of s.304-B was proved - Manner in which the offence was committed was found to be brutal - It had been committed for satisfaction of dowry demands, particularly, for material goods like television or cooler - Furthermore the accused took up a false defence before the Court to claim that it was a case of an accidental death and not that of dowry death - In the circumstances, Court normally would not exercise its judicial discretion in favour of the accused by awarding lesser sentence than life imprisonment.

Penal Code, 1860 - s.304-B - Ingredients of - Stated - Held: The requirement of s.304-B is that the death of a woman be caused by burns, bodily injury or otherwise than in normal circumstances, within seven years of her marriage - Further, it should be shown that soon before her death, she was subjected to cruelty or harassment by her husband or her husband's family or relatives and thirdly, that such harassment should be in relation to a demand for dowry - Once these three ingredients are satisfied, her death shall be treated as a 'dowry death' and once a 'dowry death' occurs, such husband or relative shall be presumed to have caused her death - Thus, by fiction of law, the husband or relative would be presumed to have committed the offence of dowry death rendering them liable for punishment unless the presumption is rebutted - It is not only a presumption of law in relation to a death but also a deemed liability fastened upon the husband/relative by operation of law.

The prosecution case was that the husband ('M'), brother-in-law ('R') and mother-in-law of a woman burnt her to death after pouring kerosene on her, as she and her parents failed to satisfy their demands of dowry. The trial court held all the three accused guilty under Section 304-B IPC and sentenced them to undergo life imprisonment. The High Court confirmed the conviction and sentence. 'M' and 'R' preferred the instant appeals contending that the ingredients of Section 304-B IPC were not satisfied and as such, they could not be convicted thereunder.

Dismssing the appeals, the Court

HELD: 1. The requirement of Section 304-B is that the death of a woman be caused by burns, bodily injury or otherwise than in normal circumstances, within seven years of her marriage. Further, it should be shown that soon before her death, she was subjected to cruelty or harassment by her husband or her husband's family or relatives and thirdly, that such harassment should be in relation to a demand for dowry. Once these three ingredients are satisfied, her death shall be treated as a 'dowry death' and once a 'dowry death' occurs, such husband or relative shall be presumed to have caused her death. Thus, by fiction of law, the husband or relative would be presumed to have committed the offence of dowry death rendering them liable for punishment unless the presumption is rebutted. It is not only a presumption of law in relation to a death but also a deemed liability fastened upon the husband/relative by operation of law. [Para 7] [907-D-G]

Bansi Lal v. State of Haryana **(2011) 11 SCC 359: 2011 (1) SCR 724;** *Biswajit Halder alias Babu Halder & Anr. v. State of West Bengal* **(2008) 1 SCC 202: 2007 (4) SCR 120 - relied on.**

Meka Ramaswamy v. Dasari Mohan & Ors. **AIR 1998 SC 774;** *Rajesh Tandon v. State of Punjab* **1994 (1) SCALE 816 - cited.**

2.1. In the instant case, immediately upon the death of the deceased, PW2, the mother of the deceased had lodged report with the police where she had given in writing the complete facts. When her deposition was recorded in the Court, she, again, on oath, reiterated the complete facts. According to her, the demand of dowry in relation to various items persisted right from the date of engagement, uptil the death of the deceased. Firstly, demand was raised in relation to purchase of a refrigerator, for which a sum of Rs.10,000/- was given and it was only thereafter that the engagement ceremony could be completed. Thereafter, television and cooler were also demanded, for which they had thrown out the deceased from her matrimonial home and it was only upon the assurance given by the mother and the uncle of the deceased that 'M' and his family had agreed to take her back to the matrimonial home. Not only this, while 'R' was leaving her home for the last time along with 'M', after 'M' was assured that in future they would arrange for television and cooler, she had categorically stated that she apprehends danger to her life and she may not come back to her home. These circumstances clearly show the kind of threat and fear under which the deceased was living. PW1 is the uncle of the deceased, who also fully corroborated the statement of PW2. According to this witness, 'M' had climbed up to the roof and said that he would not come down and would not permit the engagement ceremony to be completed, unless a fridge was brought. Then Rs.10,000/- was given to his brother 'R', whereafter the ceremony was completed. There is no contradiction or variation in the statements of PW1 and PW2. [Para 9] [909-D-H; 910-A-C]

2.2. From the evidence, it is clear that there was persistent demand of dowry by the accused persons and they had killed her by sprinkling kerosene on her and putting her on fire. The deceased died an unnatural death within seven years of her marriage. Thus, the ingredients of Section 304-B are fully satisfied in the present case. It cannot be said that merely because the letters on record (as written by deceased) do not specifically mention the dowry demands, such letters have to be construed by themselves without reference to other evidence and rebutting the presumption of a dowry death, giving the benefit of doubt to the accused. These letters have to be read in conjunction with the statements of PW1 and PW2. The letters clearly spell out the beatings given to the deceased, the cruelties inflicted on her and reference to the conduct of the family. The evidence has to be appreciated in its entirety. Neither the letters can be ignored nor the statements of PW1 and PW2. If the letters had made no reference to beatings, cruelty and ill-treatment meted out to the deceased and not demonstrating the grievance, apprehensions and fear that she was entertaining in her mind, but were letters simpliciter mentioning about her well being and that she and her in-laws were living happily without complaint against each other, the matter would have been different. There is definite ocular, expert and documentary evidence to show that the deceased died an unnatural death, she was subjected to cruelty and ill-treatment, there was demand of dowry of specific items like refrigerator, television and cooler and she died within seven years of her marriage. [Para 11] [911-C-H; 912-C-D]

3.1. The contention that accused 'M' had suffered 12 injuries on his person in an attempt to rescue the deceased and there was no proximity between the demand of refrigerator and the occurrence, and therefore, the accused cannot be held guilty of the offence charged,

is liable to be rejected. No doubt the accused had suffered number of injuries, but the question is as to how and when the accused 'M' suffered the injuries. According to the accused, he had suffered these injuries when he was trying to break open the door of the kitchen with the intention to save the deceased, because it was projected by the defence that the deceased had died because of an accident of stove fire while cooking the food. This entire gamut of projections by the defence are not only afterthoughts but, in fact, nothing but falsehood. This aspect has been well considered by the Trial Court, which rightly rejected this theory propounded on behalf of the defence. [Paras 13, 15] [913-H; 914-A-B; 916-G-H; 917-D-E]

3.2. Furthermore, the entire conduct of the accused is such as to lead to only one plausible conclusion, i.e., all the accused together had caused the death of the deceased. The arguments of the defence are strange because if the accused had attempted to save the deceased, then he would have suffered some burn injuries. But as per the details of injuries, there was not even a single burn injury found on the body of the accused 'M'. These injuries were such that one could suffer only if he was struggling or fighting with another person, as then alone could he suffer such bruises or minor cuts. Absence of any cooking material in the kitchen is another very important circumstance which would belie the stand of this accused. An accused who raises a false plea before the Court would normally earn the criticism of the Court leading to adverse inference. [Para 14] [915-D-G]

3.3. The contention of the accused that there was no proximity or nexus between the alleged demand of refrigerator and the death of the deceased and the accused is, thus, entitled to benefit of acquittal is also liable to be rejected. The demand for refrigerator was the

first demand of dowry, that too, at the time of engagement. This demand was instantaneously fulfilled by the family of the deceased under compulsion and threat that the engagement ceremony would not be performed if the refrigerator or money was not given. The demand of dowry raised by the accused persons later for television and cooler could not be satisfied by the family of the deceased for financial limitations upon the death of father of the deceased. As a result, the deceased was treated with cruelty and physical assault. In fact, it ultimately led to her brutal murder at the hands of the husband and his family members. Not only this, the conduct of the accused prior to and immediately after the occurrence clearly shows that they were not innocent. Otherwise, there was no occasion for them to abscond after the body of the deceased was handed over to her relations. These circumstances, along with the circumstances stated by the Trial Court, are inconsistent with their innocence and consistent only with hypothesis that they had killed the deceased by setting her on fire. No explanation, much less a satisfactory explanation, has been rendered by the accused persons in their statements under Section 313 Cr.P.C. On the contrary, the trend of cross-examination of the prosecution witnesses and explanations given by the defence for accused 'M' having suffered injuries on his body are patently false and not worthy of credence. In these circumstances, it isrtrtytttrd clear that the accused are not entitled to any benefit, much less acquittal, from this Court. [Paras 15, 16] [916-G-H; 917-A-F]

Kundula Bala Subrahmanyam & Anr. v. State of Andhra Pradesh **(1993) 2 SCC 684: 1993 (2) SCR 666 - relied on.**

Asraf Ali v. State of Assam **(2008) 16 SCC 328: 2008 (10) SCR 1115 - referred to.**

4. There are no mitigating circumstances in favour of

the accused to take any view other than the view taken by the Trial Court on the question of quantum of sentence. When the offence of Section 304-B is proved, the manner in which the offence has been committed is found to be brutal, it had been committed for satisfaction of dowry demands, particularly, for material goods like television or cooler and furthermore the accused takes up a false defence before the Court to claim that it was a case of an accidental death and not that of dowry death, then the Court normally would not exercise its judicial discretion in favour of the accused by awarding lesser sentence than life imprisonment. [Para 17] [917-H; 918-A-C]

Hemchand v. State of Haryana **(1994) 6 SCC 727: 1994 (4) Suppl. SCR 295 - referred to.**

Case Law Reference:

AIR 1998 SC 774	**cited**	**Para 6**
1994 (1) SCALE 816	**cited**	**Para 6**
2011 (1) SCR 724	**relied on**	**Para 7**
2007 (4) SCR 120	**relied on**	**Para 8**
1994 (4) Suppl. SCR 295	**referred to**	**Para 12, 17**
2008 (10) SCR 1115	**referred to**	**Para 14**
1993 (2) SCR 666	**relied on**	**Para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 851 of 2010 etc.

From the Judgment & Order dated 14.10.2009 of the High Court of Uttarakhand at Nainital in Criminal Appeal No. 1659 of 2001 (Old Criminal Appeal No. 2205 of 1996.

WITH

Crl. A. No. 850 of 2010.

Dinesh Kumar Garg, Meha Aggarwal, Ashutosh Garg for the Appellant.

S.S. Shamshery, Rahul Verma, Abhishek Atrey, Jatinder Kumar Bhatia for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Learned Second Additional District Judge, Haridwar, vide its judgment dated 2nd December, 1996 held all the three accused, namely, Mukesh Bhatnagar, Rajesh Bhatnagar and Smt. Kailasho @ Kailashwati, guilty of an offence punishable under Section 304B of the Indian Penal Code, 1860 (IPC) for causing the death of Smt. Renu motivated by non-payment of dowry demands and sentenced all of them to undergo life imprisonment. Against this judgment, the appellants preferred an appeal before the High Court. The High Court vide its judgment dated 14th October, 2009 dismissed the appeal of all the accused confirming the conviction and order of sentence passed by the learned Trial Court. Aggrieved therefrom, two of the accused have preferred separate appeals. Criminal Appeal No.851 of 2010 has been preferred by the accused Rajesh Bhatnagar while Criminal Appeal No.850 of 2010 has been preferred by Mukesh Bhatnagar. As both these appeals arise from a common judgment, we shall dispose of these appeals by this common judgment. The prosecution filed a charge sheet in terms of Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C.). After completing the investigation and examining the witnesses, the investigating officer presented the charge sheet stating that these three appellants had committed an offence punishable under Section 304B IPC as together they had burnt, by pouring kerosene, Renu, the deceased wife of the accused Mukesh Bhatnagar, as she and her parents failed to satisfy their demands of dowry.

2. The facts, as they appear from the record of the case, are that Ms. Renu (deceased) was daughter of Smt. Vimla Devi

Bhatnagar, widow of Rajbahadur, resident of Mohalla Kayasthwada, Sikandrabad, Police Station Bulandshahar. Vimla Devi had sought a marriage alliance for her daughter Ms. Renu. Finally, the mother of Ms. Renu and Mukesh's family had agreed to alliance of marriage between Mukesh and Renu. When the engagement (sagai) ceremony was to be performed at the house of Mukesh, family of Ms. Renu along with their relations, Sanjay Bhatnagar, Shailendera Bhatnagar and others had gone to the house of Mukesh. At that time itself, Mukesh, his brother Rajesh and his mother Kailasho (all the accused) demanded a refrigerator as dowry. The mother and relations of the deceased expressed their inability to buy a refrigerator but their request brought no results and the accused family pressurized them to pay Rs.10,000/- for purchasing the refrigerator then and there. Upon persuasion by their own relations, the family of Ms. Renu paid a sum of Rs.10,000/- to Rajesh Bhatnagar for purchasing the refrigerator, whereafter the ceremony was performed. On 26th May, 1994, the marriage between the parties was solemnized as per Hindu rites at Roorkee. The family of Ms. Renu had come to Roorkee from Sikandrabad to perform the marriage at Roorkee to the convenience of the boy's family. After performing the marriage, Ms. Renu went to her matrimonial home while her other family members came back to their house at Sikandrabad (Bulandshahar). Not even one and a half months of the marriage had elapsed but Mukesh is stated to have brought Renu to her parental home, where he informed her family that a television and a cooler had not been given as dowry in the marriage and these articles should be given immediately. If this was not done, he would not take Renu back to her matrimonial home. The members of Renu's family tried to impress upon Mukesh not to pressurize them so much, but Mukesh persisted with his demands. At that time, Ms Renu also informed her family members that all the accused persons were beating her frequently for not bringing television and cooler as part of the dowry. However, left with no alternative, the mother and uncle of Ms. Renu assured Mukesh that everything would be settled

and he need not worry. However, the television and cooler were not given at that time. The behavior of the accused towards Ms. Renu did not change and whenever she came to her parental home, she complained about the behavior of her in-laws and demands of dowry from them. She even wrote letters to her family from time to time complaining of cruel behavior of the accused towards her. In May 1995, Ms. Renu gave birth to a male child. On 18th October, 1995, unfortunately, the father of Ms. Renu expired and thereafter the family was not able to meet the dowry demands raised by the accused persons. Sometime in the second week of November 1995, Ms. Renu came to her parental home at 11.00 p.m. in the night. She was alone and had not even brought her child with her. Being surprised, her mother had asked her what had happened. She started crying and informed her mother and uncle that the accused persons were very unhappy, as the television and cooler had not been given and they had turned her out of the matrimonial home, refusing to even give her, her child. The mother and the uncle tried to pacify Ms. Renu and told her that with the passage of time, things would get settled and she should go back to her matrimonial home. After 20-25 days, Mukesh came to his in-laws' house. During their meeting, the mother and uncle of Ms. Renu told Mukesh to treat her properly and said that the child should not be kept away from Ms. Renu. They also assured him that as soon as they could make some arrangement, they would give the television and cooler to Mukesh. After this assurance, Mukesh took Renu with him to the matrimonial home. While leaving, Renu told her mother that though they were sending her to her matrimonial home, her in-laws would kill her and she may not come back at all.

3. On 17th February, 1996, the uncle of Renu received a call from PW3, Anoop Sharma, resident of Roorkee, informing him that some accident had taken place and Renu was not well. He asked them to come to Roorkee immediately. Mother and uncle of Renu came to Roorkee, where they learnt and believed that for failing to give television and cooler, Renu's mother-in-

law, brother-in-law and husband had sprinkled kerosene and set Renu on fire. Before setting her on fire, accused Mukesh had also beat her and when Renu attempted to defend herself, even Mukesh received some bruises on his person. On 17th February, 1996 itself, the mother of the deceased lodged a complaint with the Police Station Gangnahar, Roorkee and case No.32 of 1996 under Section 304B IPC was registered on that very day.

4. PW5, Sub-Inspector R.P. Purohit and PW7, Deputy S.P., M.L. Ghai, along with other police officers, reached the place of occurrence, filled the panchayatnama, Ext.Ka-7, prepared the sketch of the place of occurrence and took the body of the deceased into custody vide Exts.Ka-8 and Ka-1. The dead body was sent for post mortem and photographs of the dead body were taken vide Exts. 1, 3 and 3. The articles found at place of occurrence, like container containing kerosene, empty container which was having smell of kerosene, the stove pin, burnt ash, cloth rope, bangles, cloths of the deceased, one match box, etc. were recovered from the site and were taken into custody vide Exts. 18 to 27. The post mortem report of the deceased was Ext. Ka-6 whereafter the dead body was handed over to her family members. Injuries were also found on the person of the accused Mukesh and he was subjected to medical examination on 17th February, 1996 at about 12.30 p.m. vide Ext. Ka-22. When M.L. Ghai, PW7, on 17th February, 1996 before the arrest of the accused persons went to their house, he found the house open and the accused were absconding. He had directed that a lock be put on the door of the house, which was later opened and the site map Ext.Ka-9 was prepared.

5. All the accused faced the trial and were convicted. Their conviction and the sentence awarded by the Trial Court were confirmed by the High Court, as already noticed above. This is how the present appeals come up for consideration of this Court.

6. First and foremost, it has been contended on behalf of the appellants that in the present case, the ingredients of Section 304 B IPC are not satisfied and as such, they cannot be convicted for that offence. This contention is sought to be buttressed by the counsel while relying upon the letters Exts. Ka-2 to Ka-5 (four letters). The argument is that since no complaint of dowry has been made in these letters, therefore, it must follow that there was no demand of dowry made by the accused persons. In absence of such demand, the rigours of Section 304B do not come into play. Reliance has been placed upon the judgments of this Court in the cases of *Meka Ramaswamy v. Dasari Mohan & Ors.* [AIR 1998 SC 774] and *Rajesh Tandon v. State of Punjab* [1994 (1) SCALE 816].

7. Before we examine the merit or otherwise of this contention, it will be useful to state the basic ingredients of Section 304B IPC. The requirement of Section 304B is that the death of a woman be caused by burns, bodily injury or otherwise than in normal circumstances, within seven years of her marriage. Further, it should be shown that soon before her death, she was subjected to cruelty or harassment by her husband or her husband's family or relatives and thirdly, that such harassment should be in relation to a demand for dowry. Once these three ingredients are satisfied, her death shall be treated as a 'dowry death' and once a 'dowry death' occurs, such husband or relative shall be presumed to have caused her death. Thus, by fiction of law, the husband or relative would be presumed to have committed the offence of dowry death rendering them liable for punishment unless the presumption is rebutted. It is not only a presumption of law in relation to a death but also a deemed liability fastened upon the husband/ relative by operation of law. This Court, in the case of *Bansi Lal v. State of Haryana* [(2011) 11 SCC 359], while analyzing the provisions of Section 304B of the Act, held as under :

> "18. In such a fact situation, the provisions of Section 113-B of the Evidence Act, 1872 providing for presumption that

> the accused is responsible for dowry death, have to be pressed in service. The said provisions read as under:
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> **"113-B. Presumption as to dowry death.**-When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the court shall presume that such person had caused the dowry death."
>
> (emphasis supplied)
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> 19. It may be mentioned herein that the legislature in its wisdom has used the word "shall" thus, making a mandatory application on the part of the court to presume that death had been committed by the person who had subjected her to cruelty or harassment in connection with any demand of dowry. It is unlike the provisions of Section 113-A of the Evidence Act where a discretion has been conferred upon the court wherein it had been provided that court may presume abetment of suicide by a married woman. Therefore, in view of the above, onus lies on the accused to rebut the presumption and in case of Section 113-B relatable to Section 304-B IPC, the onus to prove shifts exclusively and heavily on the accused. The only requirements are that death of a woman has been caused by means other than any natural circumstances; that death has been caused or occurred within 7 years of her marriage; and such woman had been subjected to cruelty or harassment by her husband or any relative of her husband in connection with any demand of dowry.
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> 20. Therefore, in case the essential ingredients of such death have been established by the prosecution, it is the duty of the court to raise a presumption that the accused has caused the dowry death. It may also be pertinent to

mention herein that the expression "soon before her death" has not been defined in either of the statutes. Therefore, in each case, the Court has to analyse the facts and circumstances leading to the death of the victim and decide if there is any proximate connection between the demand of dowry and act of cruelty or harassment and the death. (Vide *T. Aruntperunjothi v. State; Devi Lal v. State of Rajasthan; State of Rajasthan v. Jaggu Ram,* SCC p. 56, para 13; *Anand Kumar v. State of M.P.* and *Undavalli Narayana Rao v. State of A.P.*)"

8. Similar view was also taken by this Court in the case of *Biswajit Halder alias Babu Halder & Anr. v. State of West Bengal* [(2008) 1 SCC 202].

9. In light of the enunciated principles, now we will revert back to the facts of the present case. Immediately upon death of the deceased, PW2, Smt. Vimla Devi, mother of the deceased had lodged the report with the police where she had given in writing the complete facts, as we have stated above, and it is not necessary for us to repeat her complaint here. When her deposition was recorded in the Court, she, again, on oath, reiterated the complete facts. According to her, the demand of dowry in relation to various items persisted right from the date of engagement, uptil the death of the deceased. Firstly, demand was raised in relation to purchase of a refrigerator, for which a sum of Rs.10,000/- was given and it was only thereafter that the engagement ceremony could be completed. Thereafter, television and cooler were also demanded, for which they had thrown out the deceased Ms. Renu from her matrimonial home and it was only upon the assurance given by the mother and the uncle of the deceased that Mukesh and his family had agreed to take her back to the matrimonial home. It must be noticed that on 18th October, 1995, the father of the deceased had died, but despite such death, the demands of dowry persisted from the accused persons. Not only this, while Ms. Renu was leaving her home for the last time along with Mukesh,

after Mukesh was assured that in future they would arrange for television and cooler, she had categorically stated that she apprehends danger to her life and she may not come back to her home. These circumstances clearly show the kind of threat and fear under which the deceased was living. PW1 is the uncle of the deceased, who also fully corroborated the statement of PW2. According to this witness, Mukesh had climbed up to the roof and said that he would not come down and would not permit the engagement ceremony to be completed, unless a fridge was brought. Then Rs.10,000/- was given to his brother Rajesh Bhatnagar, whereafter the ceremony was completed. There is no contradiction or variation in the statements of PW1 and PW2.

10. One Anoop Sharma had informed them on 17th February, 1996 that Ms. Renu had met with an accident. Anoop Sharma was examined by the prosecution as PW3, and this witness admitted that he had got the marriage arranged between Renu and Mukesh and when he had gone to meet his aunt, who lived in Roorkee, while passing by the place situated near the house of Mukesh, then he saw the gathering of people there and had made the call to Ms. Renu's family from the STD booth to Sikandrabad. This is another circumstance which shows that the accused persons were totally irresponsible and did not even care to inform the family of the deceased, about her death. Dr. Vipin Kumar Premi, PW4, along with Dr. R.K. Pande, had performed the post mortem on the dead body of the deceased Renu. According to the doctor, the whole of the body was burnt up to the stage of first and second degree burns and the deceased had expired due to ante mortem injuries and shock. Sub Inspector R.P. Purohit, the Investigating Officer, (PW5) has testified with regard to the inquest investigation, recovery of articles from the place of occurrence and recording of statements of witnesses. In his examination, he specifically denied that the body of the deceased was handed over to Mukesh and Rajesh after post mortem. Deputy Superintendent of Police M.L. Ghai, PW-7 had also visited the spot after

complainant Smt. Vimla Devi was examined. He prepared the site plan and conducted the inquest. This witness clearly stated that when at 8.00 p.m. on 17th February, 1996, he went to the house of Mukesh, to make inquiries upon the formal registration of the case, he did not find the accused persons on the spot and, in fact, they had left the house open and fled. Therefore, he had got the house locked by a Havaldar of Chowki Tehsil.

11. From the above evidence, it is clear that there was persistent demand of dowry by the accused persons and they had killed her by sprinkling kerosene on her and putting her on fire. There can be no dispute that the deceased died an unnatural death within seven years of her marriage. Thus, the ingredients of Section 304B are fully satisfied in the present case. We are least satisfied with the contention of the learned counsel appearing for the appellants, that merely because the letters on record do not specifically mention the dowry demands, such letters have to be construed by themselves without reference to other evidence and rebutting the presumption of a dowry death, giving the benefit of doubt to the accused. These letters have to be read in conjunction with the statements of PW1 and PW2. It is difficult for one to imagine that these letters should have been worded by the deceased as submitted on behalf of the accused. She never knew with certainty that she was going to die shortly. The letters clearly spell out the beatings given to her, the cruelties inflicted on her and reference to the conduct of the family. The evidence has to be appreciated in its entirety. Neither the letters can be ignored nor the statements of PW1 and PW2. If the letters had made no reference to beatings, cruelty and ill-treatment meted out to the deceased and not demonstrating the grievance, apprehensions and fear that she was entertaining in her mind, but were letters simpliciter mentioning about her well being and that she and her in-laws were living happily without complaint against each other, the matter would have been different. In the judgment relied upon by the learned counsel appearing for the accused, it has specifically been recorded that the letters

produced in those cases had clearly stated that relations between the parties were cordial and there was no reference to any alleged cruelty or harassment meted out to the deceased by any of the accused in that case. On the contrary, in the letters, it was specifically recorded that the deceased was happy with all the members of the family. The oral and documentary evidence in those cases had clearly shown that the deceased was never subjected to any cruelty or harassment. In those cases, there was no evidence of demand of dowry and cruelty to the deceased, which certainly is not the case here. In the case before us, there is definite ocular, expert and documentary evidence to show that the deceased died an unnatural death, she was subjected to cruelty and ill-treatment, there was demand of dowry of specific items like refrigerator, television and cooler and she died within seven years of her marriage.

12. Then the learned counsel appearing for the appellant contended that the accused Mukesh had suffered 12 injuries on his person in attempts to rescue the deceased and there was no proximity between the demand of refrigerator and the occurrence. Therefore, the accused cannot be held guilty of the offence charged. According to him, in any case, the courts ought not to have awarded the punishment of life imprisonment to the accused persons keeping in view the entire facts of the case and the fact that both the accused were young persons while their mother was an aged lady. He placed reliance upon the judgment of this Court in the case of *Hemchand v. State of Haryana* [(1994) 6 SCC 727]. These contentions again are without any substance. No doubt, as per the statement of the doctor, there were nearly 12 injuries found on the body of the accused Mukesh. Question is, how did he suffer these injuries? No doubt the accused had suffered number of injuries. PW8, Dr. D.D. Lumbahas explained the injuries on the body of the accused Mukesh as follows :

"(1) Abraded swelling 2.0 cm x 1.5 cm, right upper eyelid.

(2) Abraded swelling 3.0 cm x 1.5 cm, right side face, just below right eye.

(3) Abrasion 1.0 cm x 0.2 cm, left side neck, front middle past.

(4) Three abrasions in an area of 6.0 cm x 3.5 cm, each measuring 0.8 cm x 0.2 cm, 0.6 cm x 0.4 cm, and 0.8 cm x 0.2 cm, right upper arm inner side lower past.

(5) Two faint contusions 2.0 cm apast, each measuring 1.5 cm x 0.5 cm and 2.0 cm x 0.8 cm right chest, front, upper past.

(6) Faint contusion 2.5 cm x 0.4 cm, left side chest, front upper past.

(7) Abrasion 1.4 cm x 0.3 cm, left side chest outer side 9.0 cm below armpit.

(8) Two abrasion 1.5 cm apast, each measuring 5.0 x 0.5 cm and 6.0 x 0.5 cm, left upper arm outer side, middle past.

(9) Abrasion 0.8 x 0.2 cm, left upper arm, back, lower past.

(10) Abrasion 0.7 cm x 0.4 cm, right back upper past.

(11) Two abrasion 2.0 cm apast, each measuring 3.0 cm x 0.3 cm and 6.0 cm x 0.5 cm, right back outer site/at to the right armpit.

(12) Abrasion 13.0 cm x 0.5 cm, right upper arm back outer upper 2/3."

13. The question that arises for consideration of this Court is as to how and when the accused Mukesh suffered the injuries. According to the accused, he had suffered these injuries when

he was trying to break open the door of the kitchen with the intention to save the deceased, because it was projected by the defence that the deceased had died because of an accident of stove fire while cooking the food. This entire gamut of projections by the defence counsel are not only afterthoughts but, in fact, nothing but falsehood. This aspect has been well considered by the Trial Court, which recorded the following reasons for rejecting this theory propounded on behalf of the defence :

"(1) On the spot, a pin of stove was opened, however, the stove was not burning. The switch of heater was also off and it was also not found on.

(2) There was no cooked food.

(3) On the spot the empty container was found which contained kerosene oil smell. Besides this, the one container containing kerosene oil was found.

XXXXXX XXX

(5) From the body of deceased and from earth, kerosene oil smell was coming.

(6) The deceased was not wearing synthetic clothes. No half burnt cloth was found.

(7) About 12 injuries were found on the person of accused Mukesh on different parts of the body. On the spot, the broken bangles of deceased were found. All these things go to prove that deceased was fighting for her life. No explanation was given by Mukesh for his injuries.

(8) The entrance of kitchen was not having any door and the statement given by defence that the door of the kitchen was closed and he had to open the

door by pushing it from his hands and chest, is a false statement.

(9) Before the death, deceased has discharged faecal matter and there was rigor mortis on her dead body, which indicates that deceased was afraid of her death. This fact goes to prove that occurrence had not taken place as has been said by accused persons.

(10) The dead body was having first degree and second degree burn injuries and it goes to prove that kerosene oil was sprinkled on the body. It completely rules out the death of accident."

14. The above reasoning given by the Trial Court deserves acceptance by us. Furthermore, the entire conduct of the accused is such as to lead to only one plausible conclusion, i.e., all the accused together had caused the death of the deceased. The arguments of the defence are strange because if the accused had attempted to save the deceased, then he would have suffered some burn injuries. But as per the above details of injuries, there was not even a single burn injury found on the body of the accused Mukesh. These injuries were such that one could suffer only if he was struggling or fighting with another person, as then alone could he suffer such bruises or minor cuts. Absence of any cooking material in the kitchen is another very important circumstance which would belie the stand of this accused. An accused who raises a false plea before the Court would normally earn the criticism of the Court leading to adverse inference. This Court in the case of *Asraf Ali v. State of Assam* [(2008) 16 SCC 328] has held 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 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."

15. As far as the contention of the accused that there was no proximity or nexus between the alleged demand of refrigerator and the death of the deceased and the accused is, thus, entitled to benefit of acquittal is concerned, it requires to be noticed only for being rejected. The demand for refrigerator was the first demand of dowry, that too, at the time of engagement. This demand was instantaneously fulfilled by the family of the deceased under compulsion and threat that the engagement ceremony would not be performed if the

refrigerator or money was not given. The demand of dowry raised by the accused persons later for television and cooler could not be satisfied by the family of the deceased for financial limitations upon the death of father of the deceased. As a result, the deceased was treated with cruelty and physical assault. In fact, it ultimately led to her brutal murder at the hands of the husband and his family members. Not only this, the conduct of the accused prior to and immediately after the occurrence clearly shows that they were not innocent. Otherwise, there was no occasion for them to abscond after the body of the deceased was handed over to her relations. These circumstances, along with the circumstances stated by the Trial Court, are inconsistent with their innocence and consistent only with hypothesis that they had killed the deceased by setting her on fire. No explanation, much less a satisfactory explanation, has been rendered by the accused persons in their statements under Section 313 Cr.P.C. On the contrary, the trend of cross-examination of the prosecution witnesses and explanations given by the defence for accused Mukesh having suffered injuries on his body are patently false and not worthy of credence.

16. In these circumstances, we have no hesitation in holding that the accused are not entitled to any benefit, much less acquittal, from this Court. We may also refer to the judgment of this Court in the case of *Kundula Bala Subrahmanyam & Anr. v. State of Andhra Pradesh* [(1993) 2 SCC 684] where, under somewhat similar circumstances, the Court rejected the plea of the innocence of the accused taking into consideration the conduct of the accused and his failure to furnish a satisfactory explanation.

17. Now we are left with the last contention of the counsel for the appellant that this is a case where the Court may not uphold the sentence of life imprisonment imposed by the courts below. We see no mitigating circumstances in favour of the accused which will persuade us to take any view other than the

view taken by the Trial Court on the question of quantum of sentence. Even in the case of *Hemchand* (supra), relied upon by the appellant, this Court had said that it is only in rare cases that the Court should impose punishment of life imprisonment. When the offence of Section 304B is proved, the manner in which the offence has been committed is found to be brutal, it had been committed for satisfaction of dowry demands, particularly, for material goods like television or cooler and furthermore the accused takes up a false defence before the Court to claim that it was a case of an accidental death and not that of dowry death, then the Court normally would not exercise its judicial discretion in favour of the accused by awarding lesser sentence than life imprisonment.

18. For the reasons afore-recorded, we find no merit in the appeals. Both the appeals are dismissed accordingly.

B.B.B. Appeals dismissed.

MRUDUL M. DAMLE & ANR.
v.
C.B.I. NEW DELHI
(Transfer Petition (Crl.) No. 17 of 2012)

MAY 10, 2012

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

Code of Criminal Procedure, 1973 - s. 406 - Prayer for transfer of criminal case from Delhi to Thane, Maharashtra - On ground of convenience of the two petitioners-accused and the witnesses cited in the charge sheet by the prosecution - Petitioners facing prosecution under the Prevention of Corruption Act, 1988 for amassing assets disproportionate to known sources of income - 82 out of the 92 witnesses from Maharashtra - Petitioner no.1 working in Thane while petitioner no.2 posted in Gujarat - Held: Trial in Rohini Court at Delhi would be inconvenient not only to the accused persons but also to almost all the witnesses cited by the prosecution except 4 who may be in or around Delhi - Case even otherwise not Delhi centric in the true sense inasmuch as the only reason the FIR was registered in Delhi was the fact that petitioner No.2 was posted in Delhi during a part of the check period - CBI is fully equipped with an office at Bombay and a Court handling CBI cases is established at Thane also, thus, no reason why the transfer of the case would cause any hardship to the prosecution especially when searches relied upon by the prosecution were conducted at Thane in which the prosecution claims to have discovered a part of the assets allegedly acquired by the petitioners - Expeditious disposal of the trial is also a facet of fairness of the trial and speedy trial is infact a fundamental right - When witnesses from distant places are sought to be summoned, early conclusion of trial becomes so much more difficult apart from the fact that the prosecution has to bear additional burden

by way of travelling expenses of the official and non-official witnesses summoned to appear before the Court - Criminal Case pending in the Court of Special Judge, CBI Cases, Rohini Courts, New Delhi accordingly transferred to the Court of Special Judge, CBI Cases, Court of Sessions at Thane, Maharashtra - Prevention of Corruption Act, 1988 - s.13(1)(e) and 13(2).

In the instant petition under Section 406 of the Code of Criminal Procedure, 1973, the petitioners prayed for transfer of Criminal Case pending in the Court of Special Judge, CBI Cases, Rohini Courts, New Delhi to the Court of Special Judge, CBI Cases, Court of Sessions at Thane, Maharashtra on the ground of convenience of the parties and the witnesses cited in the charge sheet by the prosecution.

The petitioners are husband and wife. While petitioner No.2-husband is currently posted as Assistant Commissioner, Central Excise, Customs and Service Tax at Vapi, Gujarat, the petitioner no.1-wife is practicing as a Chartered Accountant in the State of Maharashtra. They are facing prosecution under Sections 13(1)(e) and 13(2) of the Prevention of Corruption Act, 1988 for amassing assets disproportionate to the known sources of income. 88 out of the 92 witnesses listed in the charge-sheet are from the State of Maharashtra. The petitioners asserted that transfer of the case from Delhi to Thane would not only be convenient to the two accused persons facing the trial but also to the witnesses cited by the prosecution who shall find it easier to appear for their deposition at Thane rather than travelling all the way to Delhi.

Allowing the petition, the Court

HELD: 1. Section 406 of the Cr.P.C. empowers this Court to transfer cases from one High Court to another High Court or from a Criminal Court subordinate to one

High Court to another Criminal Court of equal or superior jurisdiction subordinate to another High Court whenever it is made to appear to this Court that an order to that effect is expedient for the ends of justice. The question of expediency depends upon the facts of each case, the paramount consideration being the need to meet the ends of justice. [Para 5] [925-F-H; 926-A-B]

Dr. Subramaniam Swamy v. Ramakrishna Hegde **(1990) 1 SCC 4: 1989 (1) Suppl. SCR 469 - relied on.**

2.1. The material facts relevant to the determination of the question of expediency are not in dispute. The charge-sheet enlists 92 witnesses, 88 out of whom are from outside Delhi and from different places in Maharashtra. Petitioner No.1 is a Chartered Accountant practising in Thane, while petitioner No.2, the only other accused in the case is currently posted at Vapi in the State of Gujarat which is in comparison to Delhi closer to Thane. In light of these facts, it is obvious that the trial in Rohini Court at Delhi would be inconvenient not only to the accused persons but also to almost all the witnesses cited by the prosecution except 4 who may be in or around Delhi. The case is even otherwise not Delhi centric in the true sense inasmuch as the only reason the FIR was registered in Delhi was the fact that petitioner No.2 was posted in Delhi during a part of the check period. [Para 6] [926-B-E]

2.2. In light of the fact that CBI is fully equipped with an office at Bombay and a Court handling CBI cases is established at Thane also, there is no reason why the transfer of the case would cause any hardship to the prosecution especially when searches which have been relied upon by the prosecution have been conducted at Thane in which the prosecution claims to have discovered a part of the assets allegedly acquired by the petitioners. [Para 11] [928-D-F]

2.3. There is no gainsaying that a trial at Delhi in which witnesses are expected to travel from Maharashtra is bound to linger on for years. Expeditious disposal of the trial is also a facet of fairness of the trial and speedy trial is infact a fundamental right. When witnesses from distant places are sought to be summoned, early conclusion of the trial becomes so much more difficult apart from the fact that the prosecution will have to bear additional burden by way of travelling expenses of the official and non-official witnesses summoned to appear before the Court. [Para 12] [929-B-D]

Bhiaru Ram and Ors. v. CBI **(2010) 7 SCC 799: 2010 (9) SCR 554 and** *Nahar Singh v. Union of India* **(2011) 1 SCC 307: 2010 (13) SCR 851- distinguished.**

Abdul Nazar Madani v. State of Tamil Nadu, **(2000) 6 SCC 204: 2000 (3) SCR 1028;** *Shree Baidyanath Ayurved Bhawan Pvt. Ltd. v. State of Punjab and Ors.* **(2009) 9 SCC 414: 2009 (12) SCR 326;** *Mrs. Sesamma Phillip v. P. Phillip* **(1973) 1 SCC 405;** *Captain Amarinder Singh v. Prakash Singh Badal* **(2009) 6 SCC 260: 2009 (9) SCR 194;** *Jayendra Saraswathy Swamigal v. State of Tamil Nadu* **(2005) 8 SCC 771: 2005 (4) Suppl. SCR 556 and** *Hussainara Khatoon & Ors. v. Home Secretary, State of Bihar, Patna* **(1980) 1 SCC 81: 1979 (3) SCR 169 - relied on.**

3. In the result, Criminal Case No.45 of 2008 entitled C.B.I v. Mrudul Milind Damle & Anr. pending in the Court of Special Judge, CBI Cases, Rohini Courts, New Delhi is transferred to the Court of Special Judge, CBI Cases, Court of Sessions at Thane, Maharashtra. [Para 13] [929-E-F]

Case Law Reference:

1989 (1) Suppl. SCR 469	**relied on**	**Para 5**
2000 (3) SCR 1028	**relied on**	**Para 8**

2009 (12) SCR 326	**relied on**	**Para 9**
(1973) 1 SCC 405	**relied on**	**Para 10**
2009 (9) SCR 194	**relied on**	**Para 10**
2005 (4) Suppl. SCR 556	**relied on**	**Para 10**
2010 (9) SCR 554	**distinguished**	**Para 11**
2010 (13) SCR 851	**distinguished**	**Para 11**
1979 (3) SCR 169	**relied on**	**Para 12**

CRIMINAL ORIGINAL JURISDICTION : Transfer Petition (Crl.) No. 17 of 2012.

Petition under Section 406 of the Code of Criminal Procedure, 1973.

Vinay Navare, Keshav Ranjan, Satyajeet Kumar, Abha R. Sharma for the Petitioners.

H.P. Rawal, ASG, Ranjana Narayan, Anando Mukherje, Arvind Kumar Sharma for the Respondent.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. In this petition under Section 406 of the Code of Criminal Procedure, 1973, the petitioners pray for transfer of Criminal Case No. 45 of 2008 pending in the Court of Special Judge, CBI Cases, Rohini Courts, New Delhi to the Court of Special Judge, CBI Cases, Court of Sessions at Thane, Maharashtra on the ground of convenience of the parties and the witnesses cited in the charge sheet by the prosecution.

2. Petitioners are husband and wife. While petitioner No.2-husband is currently posted as Assistant Commissioner, Central Excise, Customs and Service Tax at Vapi, Gujarat, petitioner No.1-wife is practicing as a Chartered Accountant in

the State of Maharashtra. Both the petitioners are facing prosecution in Criminal Case No.45 of 2008 for offences punishable under Sections 13(1)(e) and 13(2) of the Prevention of Corruption Act, 1988 read with Section 109 IPC. The said case was registered on 14th July, 2005 against the petitioner-husband on the basis of recovery of cash and other property in the course of searches conducted at his houses in New Delhi and Thane. The bank locker in the name of the petitioner No.1-wife was also seized in the course of the said search operations.

3. The prosecution case, it appears, is that the petitioner No.2-Milind Purushottam Damle while posted as Assistant Commissioner, Central Excise, Customs and Service Tax at New Delhi, has amassed assets disproportionate to the known sources of his income in his name and in the name of his family during the period 1.4.2000 to 2.2.2005. Upon completion of the investigation a charge-sheet was filed against the couple in which the prosecution charged the husband with the commission of offences punishable under Sections 13(1)(e) and 13(2) of the Prevention of Corruption Act, 1988 while the wife was accused of abetment of the said offence punishable under Sections 13(1)(e) and 13(2) of the Prevention of Corruption Act, 1988 read with Section 109 IPC. The charge-sheet in question was initially filed before the Special Judge, CBI cases, Patiala House, New Delhi but subsequently transferred to the Court of Special Judge, CBI cases, Rohini, New Delhi. The charge-sheet enlists as many as 92 witnesses to prove the prosecution case. It is not in dispute that 88 out of the said 92 witnesses are from the State of Maharashtra, most of them being either from Thane, Mumbai or Navi Mumbai districts while some are from Pune or Satara districts of that State. The remaining 4 witnesses cited at serial nos.62, 68, 91 and 92 of the charge-sheet are from Delhi. Two of the said four witnesses are said to be no longer in Delhi. The petitioners allege that they have been regularly attending the Court in Delhi ever since the charge-sheet was filed but not much progress

has been made towards the conclusion of the trial so far. Petitioner No.1, who happens to be a practising Chartered Accountant in Thane, has apart from her professional commitments, responsibility towards her mother who is aged 75 years and who stays with her. Appearance of the said petitioner in Delhi would, therefore, cause inconvenience to her on personal, professional and even the family front. So also petitioner No.2 who is currently posted at Gujarat finds it extremely inconvenient to travel all the way to Delhi on every date of hearing. The petitioners assert that transfer of the case from Delhi to Thane would, in the above circumstances, not only be convenient to the two accused persons facing the trial but also to the witnesses cited by the prosecution who shall find it easier to appear for their deposition at Thane rather than travelling all the way to Delhi.

4. The petition has been opposed by the respondent who has filed a counter-affidavit sworn by Sr. Supdt. of Police, ACU-IV, CBI, New Delhi, in which the respondent has tried to justify the filing of the chargesheet in Delhi on the ground that petitioner No.2 was during the check period i.e. 1.4.2000 to 2.2.2005 posted at Central Excise, New Delhi as Assistant Commissioner w.e.f. 19th December, 2002 till the registration of the FIR. The counter-affidavit does not however dispute the fact that 88 out of 92 witnesses cited by the prosecution are from Maharashtra.

5. We have heard learned counsel for the petitioners and Mr. H.P. Rawal, Additional Solicitor General for the respondent. Section 406 of the Cr.P.C. empowers this Court to transfer cases from one High Court to another High Court or from a Criminal Court subordinate to one High Court to another Criminal Court of equal or superior jurisdiction subordinate to another High Court whenever it is made to appear to this Court that an order to that effect is expedient for the ends of justice. The source and the plentitude of the power to transfer are not disputed before us by Mr. Rawal, counsel appearing for the

respondent. Even otherwise as observed by this Court in *Dr. Subramaniam Swamy v. Ramakrishna Hegde* (1990) 1 SCC 4, the question of expediency depends upon the facts of each case, the paramount consideration being the need to meet the ends of justice.

6. The material facts relevant to the determination of the question of expediency are not in dispute inasmuch as the respondent do not dispute that the chargesheet enlists 92 witnesses, 88 out of whom are from outside Delhi and from different places in Maharashtra. It is also not in dispute that petitioner No.1 is a Chartered Accountant practising in Thane, petitioner No.2 who is the only other accused in the case who is currently posted at Vapi in the State of Gujarat which is in comparison to Delhi closer to Thane. It is in the light of those admitted facts obvious that the trial in Rohini Court at Delhi would be inconvenient not only to the accused persons but also to almost all the witnesses cited by the prosecution except 4 who may be in or around Delhi. The case is even otherwise not Delhi centric in the true sense inasmuch as the only reason the FIR was registered in Delhi was the fact that petitioner No.2 was posted in Delhi during a part of the check period.

7. Mr. Rawal no doubt argued that a transfer of the case outside Delhi will cause prejudice to the respondent but was unable to show how that would be so. Mr. Rawal had in fact taken time to examine whether the list of witnesses could be suitably pruned to expedite the conclusion of the trial. But after taking instructions, Mr. Rawal submitted that it would not be possible at this stage to make any such statement, and rightly so, because it is only the public prosecutor who can take a call on that aspect after the trial starts, depending upon how the facts sought to be proved are seen by him or have been proved.

8. In *Abdul Nazar Madani v. State of Tamil Nadu,* (2000) 6 SCC 204, this Court while dealing with a prayer for transfer of the criminal case from one Court to other emphasized the

importance of fairness of a trial and observed that while no universal or hard and fast rules can be prescribed for deciding a transfer petition which has always to be decided on the basis of the facts of each case, convenience of the parties including the witnesses to be produced at the trial is a relevant consideration. This Court observed:

> "7. The purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that public confidence in the fairness of a trial would be seriously undermined, any party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 Cr.P.C. The apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary, based upon conjectures and surmises. If it appears that the dispensation of criminal justice is not possible impartially and objectively and without any bias, before any court or even at any place, the appropriate court may transfer the case to another court where it feels that holding of fair and proper trial is conducive. No universal or hard and fast rules can be prescribed for deciding a transfer petition which has always to be decided on the basis of the facts of each case. Convenience of the parties including the witnesses to be produced at the trial is also a relevant consideration for deciding the transfer petition. The convenience of the parties does not necessarily mean the convenience of the petitioners alone who approached the court on misconceived notions of apprehension. Convenience for the purposes of transfer means the convenience of the prosecution, other accused, the witnesses and the larger interest of the society."

9. Similarly, in *Shree Baidyanath Ayurved Bhawan Pvt. Ltd. v. State of Punjab and Ors.* (2009) 9 SCC 414, this Court held that the convenience of the parties including the witnesses to be produced at the trial is a relevant consideration while directing transfer of criminal case from one Court situated in one State to another situated in another State.

10. In *Mrs. Sesamma Phillip v. P. Phillip* (1973) 1 SCC 405, which happened to be a matrimonial case, a five-Judge Bench of this Court transferred a criminal case on the ground of safety of the women-petitioner from Delhi to Durg. So also in *Captain Amarinder Singh v. Prakash Singh Badal* (2009) 6 SCC 260, this Court held that an impartial trial and convenience of the parties & witnesses are relevant considerations for deciding a transfer petition. In *Jayendra Saraswathy Swamigal v. State of Tamil Nadu* (2005) 8 SCC 771, this Court transferred a case from Kanchipuram to Pondicherry having regard to the convenience of the prosecuting agency and the language in which almost all the witnesses had to depose before the Trial Court.

11. In the light of the above decisions and the fact that CBI is fully equipped with an office at Bombay and a Court handling CBI cases is established at Thane also, we see no reason why the transfer of the case would cause any hardship to the prosecution especially when searches which have been relied upon by the prosecution have been conducted at Thane in which the prosecution claims to have discovered a part of the assets allegedly acquired by the petitioners. Reliance placed by Mr. Rawal upon the decision of this Court in *Bhiaru Ram and Ors. v. CBI* (2010) 7 SCC 799, is of no assistance to him. In *Bhiaru Ram's* case (supra) the main accused had not filed for transfer of the case and the number of witnesses cited were not so large as in the present case nor were bulk of the witnesses located in the State to which the case was sought to be transferred. This Court also had noticed the serious apprehensions regarding the fairness of the trial keeping in view the fact that the accused was an influential person. So also the decision in *Nahar Singh v. Union of India* (2011) 1 SCC 307, relied upon by Mr. Rawal was dealing with a totally different fact situation. The prayer for transfer in that case was not based so

much on the ground of convenience of the accused and the witnesses as it was on the independence of the Court before whom the matter was pending. This Court felt that transfer on that ground would be a reflection upon the credibility of not only the entire judiciary but also the prosecuting agency. That is not the position or the ground in the case at hand.

12. There is no gainsaying that a trial at Delhi in which witnesses are expected to travel from Maharashtra is bound to linger on for years. Expeditious disposal of the trial is also a facet of fairness of the trial and speedy trial is infact a fundamental right as observed by this court in *Hussainara Khatoon & Ors. v. Home Secretary, State of Bihar, Patna* (1980) 1 SCC 81. When witnesses from distant places are sought to be summoned, early conclusion of the trial becomes so much more difficult apart from the fact that the prosecution will have to bear additional burden by way of travelling expenses of the official and non-official witnesses summoned to appear before the Court.

13. In the result, we allow this petition and transfer Criminal Case No.45 of 2008 entitled C.B.I v. Mrudul Milind Damle & Anr. pending in the Court of Special Judge, CBI Cases, Rohini Courts, New Delhi to the Court of Special Judge, CBI Cases, Court of Sessions at Thane, Maharashtra. The record of the case shall be forthwith transferred to the transferee Court which shall take up the matter and dispose of the same as expeditiously as possible.

B.B.B. Transfer Petition allowed.

SALIM GULAB PATHAN

v.

STATE OF MAHARASHTRA THROUGH SHO

(Criminal Appeal No. 1882 of 2010)

MAY 10, 2012

[SWATANTER KUMAR AND RANJAN GOGOI, JJ.]

Penal Code, 1860 - s. 302 - Murder of wife - By setting her on fire - Statement of deceased implicating the accused - Before three witnesses PWs 1, 3 and 4 immediately after the incident and to police constable (PW6) in the hospital - Doctor certifying that deceased was in fit mental condition to make the statement - Plea of discrepancies in the evidence of PW1 - Conviction by courts below - On appeal, held: Conviction justified in view of the dying declaration and the evidence of PWs 1, 3 and 4 - Dying declaration was admissible - Discrepancies in the evidence of PW 1 not material - Dying Declaration.

Evidence Act, 1872 - s. 32 - Dying Declaration - Dying declaration recorded by Police Officer - Efficacy of - The statement of a deceased recorded by police officer as a complaint and not as a dying declaration, can be treated as a dying declaration, if other requirements in this regard are satisfied.

The prosecution case was that the accused-appellant and his wife were living in the house of PW1 (father-in-law of the accused); that on the incident date, after a quarrel between the couple, the accused poured kerosene on his wife and set her on fire. She came running out of the house in a burning condition. PW1 alongwith PWs 3 and 4 extinguished the fire. The deceased stated to the witnesses that she was set on fire by the accused. She was taken to the hospital where,

after certification of the doctor (PW2), she made statement before the police constable (PW6). The trial court convicted the accused u/s. 302 IPC. The High Court affirmed the conviction.

In the instant appeal, the appellant challenged his conviction contending that the alleged dying declaration (i.e. the statement of deceased as recorded by PW 6) was unworthy of credence and, that PWs 1, 3 and 4 being related to the deceased were interested witnesses and, as such, not reliable.

Dismissing the appeal, the Court

HELD: 1.1. A dying declaration would not lose its efficacy merely because it was recorded by a police officer and not by a Magistrate. The statement of a decseased recorded by a police officer as a complaint and not as a dying declaration can in fact be treated as a dying declaration, if the other requirements in this regard are satisfied. [Para 9] [938-C-D]

Paras Yadav vs. State of Bihar **1999 (2) SCC 126: 1999 (1) SCR 55;** *Balbir Singh vs. State of Punjab* **2006 (12) SCC 283: 2006 (6) Suppl. SCR 636;** *Atbir vs. Government (NCT of Delhi)* **2010 (9) SCC 1: 2010 (9) SCR 993 - relied on.**

1.2. In a situation where PW 2 (doctor) has clearly certified, both at the time of commencement of the recording of the statement of the deceased as well as at the conclusion thereof, that deceased was fully conscious and in a fit mental condition to make the statement, the said opinion of the doctor who was present with the deceased at the relevant time is acceptable. Coupled with the above, there is the evidence of PW 1, PW 3 and PW 4 that immediately after the incident, the deceased had implicated her husband. In addition, the dying declaration stands fortified by the case

history of the deceased recorded by PW 2 at the time of her admission into the hospital. As regards the plea that having regard to the extent of burn injuries suffered by the deceased, it was not possible on her part to make the statement which was recorded by PW-6, no such question was put to PW-2 in cross-examination. PW-2 has clearly deposed that the deceased had narrated the history of the injuries suffered by her in the course of which she had implicated her husband. PW-2 has also deposed that the police constable (PW 6) had visited the burn ward and had recorded the statement of the deceased. PW 2 and PW 6 cannot be attributed with any intention to falsely implicate the accused. [Paras 11 and 13] [940-A-D; 941-A-C]

2.1. The collection of sample of earth alone by the police from the place of occurrence as testified by PW 1 has to be understood in the context of the evidence of PW 5 who has deposed that in addition to samples of earth other articles were also seized and collected from the place of occurrence. Once again, PW 5 is an independent witness. The discrepancies in the evidence of PW 1, therefore, have to be understood as aberrations or omissions that have occurred due to efflux of time. [Para 13] [941-C-E]

2.2. The fact that the couple was living happily as deposed by PW 1, PW 3 and PW 4 cannot certainly rule out the incident, if the same can be established by other evidence. The burn injuries on the accused besides not being proved can also be understood to have occurred in the exchange that may have taken place after the deceased had been set on fire. The alleged injuries on the leg of the accused as claimed by him in his examination under Section 313 Cr. P.C., remain unproved and unexplained by the defence. [Para 13] [941-E-F]

3. The courts below rightly convicted and sentenced the accused-appellant and there is no occasion to interfere with the same. [Para 14] [941-G-H]

Case Law Reference:

1999 (1) SCR 55	**Relied on**	**Para 9**
2006 (6) Suppl. SCR 636	**Relied on**	**Para 9**
2010 (9) SCR 993	**Relied on**	**Para 10**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1882 of 2010.

From the Judgment & Order dated 08.02.2007 of the High Court of Judicature at Bombay in Criminal Appeal No. 720 of 2002.

S. Mahendran, C.G. Sivakumaran for the Appellant.

Shankar Chillarge (for Asha Gopalan Nair) for the Respondent.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. This Appeal is directed against the judgment and order dated 08/02/2007 passed by the High Court of Bombay whereby the High Court has dismissed the Criminal Appeal filed by the appellant and confirmed the conviction recorded against the appellant under Section 302 IPC by the learned Trial Court. Following the aforesaid conviction, the accused-appellant has been sentenced to undergo R.I. for life along with fine.

2. The short case of the prosecution, inter-alia, is that the deceased Nazabi was wife of the accused-appellant. They were staying in the house of PW 1, Akbar Sheikh, who is father of the deceased. According to the prosecution, at about 8.00 - 8.30 PM of 04.09.2001, PW 1 was sitting outside the house. At that time, there was some altercation going on inside

between the accused-appellant and the deceased. Thereafter, the deceased came out and was sitting with her father. After sometime, the accused-appellant called the deceased inside and locked the door of the house. There was again a quarrel between the accused and the deceased in the course of which the accused poured kerosene on the deceased and set her on fire. According to the prosecution, the deceased came running out of the house in a burning condition and was followed by the accused who fled away from there. PW 1 along with PW 3 and PW 5 extinguished the fire and in the presence of the said witnesses, on being asked by PW 1, the deceased stated that she had been set on fire by the accused-appellant. Thereafter, according to the prosecution, the deceased was taken to the hospital where her statement was recorded by the doctor who informed the police of the incident. PW 6, Laxman, police constable, recorded the statement of the deceased at about 4.30 AM of 05.09.2001. Shortly thereafter at about 9.40 AM, the deceased, Nazabi, died. Inquest was held and the dead body was sent for postmortem examination. Thereafter, the First Information Report (Exhibit 10) was lodged by PW 1, Akbar Sheikh.

3. After registration of the case, investigation was conducted by PW 5 in the course of which, PW 5 seized from the place of occurrence a plastic can containing kerosene; a match box with two burnt match sticks; broken pieces of bangles; samples of earth smelling kerosene; half burnt polyester sari etc. The said items were sent for chemical analysis. The report of analysis confirmed the presence of kerosene in all the said items. At the conclusion of the investigation, charge-sheet was submitted against the accused-appellant under Section 302 IPC. Charge under Sec. 302 IPC having been framed against the accused-appellant, the accused pleaded not guilty and wanted to be tried. In the course of trial, 7 witnesses were examined by the prosecution and none by the defence. From the statement made by the accused in his examination under Section 313 Cr. P.C., it appears that the

case of the accused-appellant was that the deceased had set herself on fire due to an altercation with her brother, who did not approve of the deceased staying in the house of her father. In fact, according to the accused, he had tried to put out the fire and was attacked by his brother-in-law resulting in injuries, which, the accused claims to have reported to the police. At conclusion of the trial held against the accused, the learned trial court, on the grounds and reasons mentioned, found him guilty of the offence under Section 302 IPC and accordingly, sentenced him to undergo RI for life along with fine. The said conviction and sentence having been affirmed by the High Court in appeal, the present appeal has been filed by the accused upon grant of leave by this Court.

4. Learned counsel for the appellant has contended that the principal basis of the conviction recorded against the accused is the statement of the deceased recorded by PW 6, the police constable which has been treated by the courts below as a dying declaration. Pointing out the evidence of PW 1, it has been urged that this witness has categorically stated that the deceased had not spoken to anybody while in the hospital and, in fact, the police had not come to meet the deceased at any time after her admission in the hospital till her death. In view of the aforesaid evidence, according to the learned counsel, the alleged dying declaration becomes unworthy of credence. Such a view, according to the learned counsel, is strengthened by certain other facts which have been proved by the evidence of the other prosecution witnesses. In this regard, the evidence of PW 1 that the police had collected only samples of earth from the place of occurrence and no other articles had been seized from the said place has been pointed out in contra distinction to the evidence of PW 5 that they had also seized broken bangles, a half burnt sari and a can of kerosene from the place of occurrence. The evidence of PW 1 that the deceased had suffered extensive burn injuries on both her legs and hands has been pointed out to question the authenticity of the left thumb impression of the deceased allegedly appearing

in the dying declaration. The fact that the accused and the deceased were living happily, as deposed to by PW 1, PW 3 and PW 4, has also been relied upon by the learned counsel to demolish the prosecution case. Learned counsel has pointed out that the evidence of PW 1, PW 3 and PW 4, particularly, the statement made by the deceased that she had been burnt by her husband should not be accepted by the Court as the said witnesses are related to the deceased and are interested witnesses. No reliance, therefore, can be placed on the said evidence either as evidence corroborating the alleged dying declaration or as independent evidence in support of the guilt of the accused.

5. The learned counsel for the appellant has also vehemently contended that in the present case, the evidence of PW 2 would go to show that the deceased had suffered burn injuries to the extent of 92%. Learned counsel has pointed out that, according to the prosecution, the said burn injuries were caused at about 8.00 - 8.30 PM of 04.09.2001. The evidence of PW 2, according to the learned counsel, established that the deceased was brought to the hospital at 3.15 AM of 05.09.2001. She is alleged to have made the dying declaration between 4.30 and 5.30 AM whereafter she died at about 9.40 AM. Pointing out the aforesaid details, learned counsel has contended that it is extremely doubtful as to whether the deceased was in a position to make the statement which was allegedly recorded by PW 6 as a dying declaration. The endorsements made by PW 2, both at the beginning and conclusion of the recording of the statement of the deceased, to the effect that she was conscious and in a position to make the statement has been seriously contested by the learned counsel. It is argued that the prosecution story has been engineered at the instance of the nephew of PW 1 who is a lawyer and the certification of the doctor is per-se unbelievable.

6. Opposing the contentions advanced on behalf of the accused-appellant, learned State Counsel has vehemently contended that the dying declaration recorded by PW 6 is a

true and voluntary account of the circumstances in which the deceased had died. In fact, referring to the case history narrated by the deceased at the time of her admission in the hospital (Exhibit-12), learned counsel has pointed out that even at that time the deceased has implicated her husband which was further elaborated in the dying declaration recorded by PW 6. PW 2, the doctor as well as PW 6 the police constable, according to learned counsel, are independent persons who will have no occasion to falsely implicate the accused. It has been pointed out that PW 2 in his deposition had very clearly stated that after recording the case history as narrated by deceased at the time of her initial medical examination, namely, that she was burnt by her husband, he had informed the police. Thereafter, according to PW 2, PW 6 had come to the burn ward where the deceased was admitted and on being certified by him that she was fully conscious and fit to make a statement, the dying declaration was recorded. PW 2 has identified his handwriting and signatures containing the aforesaid endorsements (Exhibit-13) and has also identified the certification made by him on completion of the recording of the statement of the deceased (Exhibit-14). He has also identified the signatures of the police constable (PW 6) in the aforesaid statement of the deceased.

7. Learned counsel has also argued that the said dying declaration had been corroborated by PW 1, PW 3 and PW 4 before whom the deceased has narrated the same version immediately after the incident. The dying declaration also has been corroborated by the case history of the patient (the deceased) recorded by PW 2 at the time of her admission into the hospital. The evidence of PW 1, that the deceased did not speak to anybody in the hospital and that the police had not come to the hospital, have been sought to be explained by the learned counsel as mere inconsistencies/omissions which do not affect the core of the prosecution case. In short, the learned State Counsel has submitted that the dying declaration made by the deceased does not suffer from any infirmity so as to

throw any doubt as to its credibility. As the same finds sufficient corroboration from the evidence of PW 1, PW 2, PW 3 and PW 4, there is no justification for not relying on the same. Learned counsel, has submitted that the dying declaration which is duly corroborated is a sufficient and safe basis for the conviction of the accused.

8. The principles governing the admissibility of a dying declaration as a valid piece of evidence, though no longer res-integra, may be usefully reiterated at this stage.

9. In *Paras Yadav Vs. State of Bihar*[1] and also in *Balbir Singh Vs. State of Punjab*[2], it has been held that a dying declaration would not lose its efficacy merely because it was recorded by a police officer and not by a magistrate. In *Paras Yadav* case (supra), it has been held that the statement of a deceased recorded by a police officer as a complaint and not as a dying declaration can in fact be treated as a dying declaration if the other requirements in this regard are satisfied.

10. In *Atbir Vs. Government*[3] *(NCT of Delhi)* after an elaborate consideration of several decisions of this Court, the following propositions have been laid down with regard to the admissibility of a dying declaration:

"22. The analysis of the above decisions clearly shows that:

(i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the court.

(ii) The court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.

1. [1999 (2) SCC126.
2. [2006 (12) SCC 283.
3. [2010 (9) SCC 1.

(iii) Where the court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.

(iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

(v) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.

(vi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

(viii) Even if it is a brief statement, it is not to be discarded.

(ix) When the eyewitness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

(x) If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration."

11. Elaborate arguments have been advanced by the learned counsel for the appellant that having regard to the extent of burn injuries suffered by the deceased, it was not possible on her part to make the statement which was recorded by PW 6. In this regard, it will be sufficient to observe that no such

question was put to PW 2 in cross-examination. No expert opinion to that effect or any such view of any of the learned authors of acknowledged works on the subject have been cited before us to enable us to come to such a conclusion. In a situation where PW 2 has clearly certified, both at the time of commencement of the recording of the statement of the deceased as well as at the conclusion thereof, that deceased was fully conscious and in a fit mental condition to make the statement we will have no occasion not to accept the said opinion of the doctor who was present with the deceased at the relevant time. Coupled with the above, there is the evidence of PW 1, PW 3 and PW 5 that immediately after the incident the deceased had implicated her husband. In addition, the dying declaration stands fortified by the case history of the deceased recorded by PW 2 at the time of her admission into the hospital.

12. Viewed against the above evidence there are, indeed, certain statements in the evidence of the prosecution witnesses which may appear, at first blush, to be in favour of the accused, namely, that the accused and the deceased were living happily together; that the police had not come to visit the deceased in the hospital at any time before her death; that the deceased did not speak to anybody while in hospital; that only samples of earth were taken by PW 5, that the deceased had suffered burn injuries on both hands besides the fact that accused had also suffered some injuries.

13. A close reading of the evidence of the prosecution witnesses which we have undertaken leaves us satisfied that each of the aforesaid statement stands out in isolation and does not constitute a cohesive version of the prosecution case. That apart, several of the aforesaid statements can be reasonably understood in a manner different from the one that the appellant contends. That the deceased did not speak to anybody in the hospital and that the police did not visit the deceased in the hospital as stated by PW 1, has to be understood in the light of and balanced with the conflicting versions of PW 2 and PW 6 before any final conclusion can

be reached. PW 2 has clearly deposed that the deceased had narrated the history of the injuries suffered by her in the course of which she had implicated her husband. PW 2 has also deposed that the police constable (PW 6) had visited the burn ward and had recorded the statement of the deceased. PW 6, in his evidence had clearly disclosed that before meeting the deceased, PW 6 had spoken to PW 1 and another relation of the deceased. PW 2 and PW 6 cannot be attributed with any intention to falsely implicate the accused. The story of the nephew of PW 1 being involved in concocting the prosecution version stands unsupported by any evidence whatsoever. Similarly, the collection of sample of earth alone by the police from the place of occurrence as testified by PW 1 has to be understood in the context of the evidence of PW 5 who has deposed that in addition to samples of earth other articles were also seized and collected from the place of occurrence. Once again, PW 5 is an independent witness. The above discrepancies in the evidence of PW 1, therefore, have to be understood as aberrations or omissions that have occurred due to efflux of time. The fact that the couple was living happily as deposed by PW 1, PW 3 and PW 4 cannot certainly rule out the incident if the same can be established by other evidence. The burn injuries on the accused on which much argument has been made, besides not being proved can also be understood to have occurred in the exchange that may have taken place after the deceased had been set on fire. The alleged injuries on the leg of the accused as claimed by him in his examination under Section 313 Cr. P.C. similarly remain unproved and unexplained by the defence.

14. The above discussions lead us to the conclusion that the conviction of the accused-appellant as recorded by the courts below has been rightly made. We will, therefore, have no occasion to interfere with the said conviction as well as the sentence imposed on the appellant. The appeal consequently is dismissed.

K.K.T. Appeal dismissed.

PARA SEENAIAH & ANR.
v.
STATE OF ANDHRA PRADESH & ANR.
(Criminal Appeal No. 802 of 2012 etc.)

MAY 10, 2012

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

Penal Code, 1860 - ss. 324 and 326 - Assault - Subsequent death - Four witnesses to the incident - The deceased in his statement to police implicating the accused - Medical evidence proving injuries on the deceased - Charge u/ss. 147, 148, 324, 307, 341, 302 r/w. s. 149 IPC - Trial court acquitting the accused persons of all the said charges but convicting A-1, A-2 and A-4 u/s. 326 - High Court affirming conviction of A-2 and A-4, but altering the conviction of A-1 to u/s. 324 and reducing the sentence - On appeal, held: Though the injuries on the deceased not proved to be cause of death, prosecution case cannot be rejected in toto - Prosecution case supported by the evidence of four witnesses, statement of the deceased and the medical evidence - Conviction and sentence as ordered by High Court, justified.

Appellants-accused were charged for offences u/ss. 147, 148, 324, 307, 341 r/w s. 149 and s. 302 r/w s. 149 IPC for having caused death of one person. Prosecution case was that the accused and the complainant party formed two factions in the village and were having strained relationship and enmity. In order to avenge the attack on the life of son of A-3, the accused assaulted the deceased. The incident was seen by PWs 1 to 4. The deceased also made a statement to the Investigating Officer (Ex. P-25) implicating the accused persons.

Trial court acquitted all the accused of all the charges, but convicted A-1, A-2 and A-4 for offences

punishable u/s. 326 IPC and sentenced them to R1 for three years and fine of Rs. 500/-. Accused, State and also the complainant challenged the order of the trial court. High Court affirmed the conviction of A-2 and A-4 u/s. 326 IPC and the sentence, but altered the conviction of A-1 to u/s. 324 IPC and sentenced him to R1 for one year and a fine of Rs. 1000/-. Hence the present appeals.

Dismissing the appeals, the Court

HELD: 1. There is no infirmity or irregularity in the view taken by the High Court that the statement of the deceased made to the Investigating Officer (Ex.P-25) is corroborated by the evidence of PW 1 to 4 about the truthfulness of the overt acts attributed to A-1, A-2 and A-4. The fact that the witnesses had seen the initial attack on the deceased and returned to the scene of occurrence after the accused had made their escape good, to enquire from him as to what had happened is not unnatural in the facts and circumstances of the case. In the absence of any compelling reason to the contrary there is no reason to interfere with the findings recorded by the High Court, as to the genesis of the incident and the persons responsible for the same. The prosecution has failed to establish that the deceased eventually died on account of injuries sustained by him resulting in the acquittal of accused persons u/s. 302 IPC, but that part of the order passed by the courts below does not warrant rejection of the prosecution case in toto. There is sufficient medical evidence on record, especially in the form of depositions of the doctor (PW18) and the doctor (PW19) who conducted the autopsy over the dead-body of the deceased. There is, thus, ample medical evidence to support the prosecution case that the deceased had sustained injuries, no matter the same had not been proved to be the cause of his death a week later. [Paras 12 and 13] [950-B-E; 951-D]

2. Even on the question of sentence awarded to the appellants, there is no reason, much less a cogent one to interfere. The conviction of A2 and A4 under Section 326 with a sentence of three years and fine with a default sentence awarded by the trial court as also the conviction of A1 under Section 324 and sentence of one year with a fine of Rs.1,000/- and in default imprisonment for three months in the circumstances of the case is perfectly justified. [Para 14] [951-E-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 802 of 2012 etc.

From the Judgment & Order dated 28.12.2010 of the High Court of Judicature Andhra Pradesh, Hyderabad in Criminal Appeal No. 2241 of 2004.

WITH

Crl. A. Nos. 804-805 & 806 of 2012.

K.T.S. Tulsi, Chava Badrai Nath Babu, G.V. Rayudu, C.M. Angadi, Rameshwar Prasad Goyal, Priyanka Agarwal for the Appellants.

V. Sridhar Reddy, Ch. Leela Sarveshwar (for V.N. Raghupathy), D. Mahesh Babu, Rameshwar Prasad for the Respondents.

The Judgment of the Court was delivered by

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

2. This is yet another case in which degenerate village politics has turned violent to claim a valuable human life. The prosecution story is that out of two factions in village Nagulavellatur one was led by Para Braimaiah (A-3) while the other was championed by Bodduluru Rathanam. In the election for the post of Sarpanch of Nagulavellatur village, Smt. Mahalakshmamma mother of Bodduluru Rathanam contested against Smt. Karnam Lalithamma who was supported by the

accused persons. Smt. Karnam Lalithamma won the said election in the process embittering the relationship between the two groups. It is also the case of the prosecution that complaints and counter-complaints by the members of the two factions were being made against each other before the police and other authorities in relation to different issues to wreak revenge against each other. The strained relationship and enmity between the two factions led to an incident in which the deceased is alleged to have made an attempt on the life of one Para Yandaiah, son of accused No.3 on 6th April, 1996; resulting in the registration of FIR No.17/96 against the former. As an act of reappraisal accused Nos. 1 to 6, 8 to 10 and 18 are alleged to have attacked one Bathala Hajarathaiah and one Thalluru Chinnaiah on 30th May, 1996 resulting in the registration of Crime No.28/1996 against them. On the same date at about 12.00 noon all the accused persons are alleged to have formed themselves into an unlawful assembly armed with deadly weapons like cart pegs and rods with the common object of killing the deceased left Nagulavellatur village in a tractor and trailor belonging to A-1 for Yerraballi village which is situate at some distance on the north eastern side of Nagulavellatur. The prosecution case is that the accused found the deceased coming along the garden of one Pendem Venugopal, got down from the tractor and attacked him. The deceased is alleged to have run for his life towards the West but the accused persons overpowered him and caused multiple injuries including fractures on his forearm and legs. The incident is alleged to have been seen by PWs 1 and 4 who informed PWs. 5 and 6 about the same. PW6 rushed to the scene of occurrence where he found the deceased lying in an injured condition. On inquiry the deceased told him about the incident and the fact that the accused had attacked and injured him using cart pegs and rods. The deceased was shifted to Chejarla Police Station in a tractor where his statement was recorded by Sub-Inspector of Police. The police then shifted the injured to the hospital at Nellore and registered Crime No.27 of 1996 for offences under Sections 147, 148, 324, 307, 341

read with Section 149 IPC. In the course of investigation the police claimed to have seized nine cart pegs and one 'Bitchuva' on the disclosure made by the accused. The deceased eventually died on 7th June, 1996 that resulted in the addition of Sections 148 and 302 read with Section 149 IPC to the case already registered. The Court of Judicial First Class Magistrate, committed the case to the Court of Additional Sessions Judge, Fast Track Court at Nellore where the accused pleaded not guilty and claimed a trial.

3. In support of its case the prosecution examined as many as 23 witnesses while the accused led no evidence in defence. The Trial Court eventually came to the conclusion that the prosecution had failed to prove the charge of murder against the accused persons and accordingly acquitted all the accused persons of the said charges. The Court, however, convicted A-1, A-2 and A-4 for offences punishable under Section 326 IPC and sentenced them to undergo RI for a period of three years and a fine of Rs.500/- each, in default to further undergo SI for a period of three months each.

4. Aggrieved by the judgment and order passed by the Trial Court the appellants filed Criminal Appeal No.2241 of 2004 while the State of Andhra Pradesh filed Criminal Appeal No.839 of 2007 against all the accused persons questioning their acquittal for offences with which they were charged at the trial. Criminal Revision No.138 of 2005 was filed by the complainant against the order of acquittal of accused persons.

5. By the judgment and order under challenge in this appeal, the High Court has, while dismissing the acquittal Appeal and the criminal revision mentioned above, affirmed the conviction of A-2 and A-4 for the offence punishable under Section 326 IPC and the sentence of imprisonment for a period of three years awarded to them. In so far as A-1 is concerned, the High Court has set aside the conviction of the said accused and instead convicted him for an offence punishable under Section 324 IPC and sentenced him to undergo rigorous

imprisonment for a period of one year and a fine of Rs.1,000/- and in default to undergo further imprisonment for a period of three months.

6. We have heard Mr. K.T.S. Tulsi, learned senior counsel for the appellant and Mr. V. Sridhar Reddy, counsel for the respondent-State who have taken us through the relevant portions of the two judgments of the Courts below and the evidence adduced at the trial.

7. The prosecution case rests primarily on the depositions of PWs 1 to 3, 4, 6, 11 and 12, apart from the statement of Dr. Krishnaiah (PW18) who happened to be the Civil Surgeon posted at the relevant time at Government Hospital at Nellore and Dr. C. Manohar (PW19) who conducted the post-mortem examination of the dead-body of the deceased.

8. The Trial Court has upon appreciation of the depositions of PWs 1 to 4 observed:

> "As seen from the evidence of P.Ws. 1, 2, 3 and 4 who claimed themselves as eye witnesses to the incident it is clear that even though they depose that they actually witnessed all accused attacking the deceased it is clear from their evidence itself that when once the attack on the deceased by accused commences all these 4 (four) witnesses left that place out of fear.
>
> P.W.1 at para 2 made it clear that after seeing the accused making an attempt to attack the deceased he was frightened and on hearing the cries of Chowdary, P.W.2, P.W.3 and P.W.4 came there and he started running P.W.3 and P.W.2 started running towards southern side and P.W.4 ran towards northern side of the main road.
>
> In the evidence of P.W.2 (1st page last line and 2nd page 5th line) it is said that P.W.2 out of fear ran away from the place.

> In the evidence of P.W.3 (page 2 to 15 lines) he deposed that due to fear of accused he did not go to rescue Demineni Chowdary and out of fear he (P.W. 3), P.W.1, P.W.3 went to the village Yerraballi and informed about the incident to the villagers of Yerraballi.
>
> In the evidence of P.W.4 (page 2, 15 to 19 lines) she deposed that due to fear she ran towards main road running from Chejerla to Kambampadu and in the village she found K. Penchalaiah (P.W.9) and narrated the incident to him."

9. After discussing the evidence, the trial court concluded that PWs 1 to 4 were witnesses only to the initial attack made on the deceased and that the prosecution case mainly rested on the dying declaration made by the deceased before the Investigating Officer. The Court observed:

> "It is said in the earlier part of the judgment that when the eye witnesses, P.W.1 to 4 are treated as the persons who had only a chance to witnessing the initial attack made on the deceased by accused and immediately thereafter all these 4 (four) witnesses leaving that place out of fear. The case of prosecution depends upon the statement of the deceased given to P.W. 22 under Ex.P.25 and since Chowdary is no more, the said statement can be used as a dying declaration given to P.W.22."

10. The Court also recorded a finding that since the accused had caused injury only on the non-vital part of body of the deceased, there was no intention to do away with his life. The Court accordingly acquitted the accused of the charge of murder but convicted them for the offence punishable under Section 326 IPC while acquitting them of other charges framed against them.

11. The High Court has, upon reappraisal of the evidence, affirmed the above finding and observed:

"It is true that learned Sessions Judge found that the evidence of P.Ws. 1 to 4 as to the actual attack on the deceased cannot be considered for the reasons from their own evidence. They have left the scene after seeing the accused chasing the deceased and they came only after the attack on the deceased. The positive evidence of the witnesses P.Ws. 1 to 4 is that they have enquired with the deceased and the deceased has given a statement to them as to the assailants on him. So far as the over tacts attributed by the deceased in Ex.P25 is concerned, there is no variation in the statements of P.Ws. 1 to 4 about the attack on him by A1, A2 and A4. Therefore, if Ex.P25 is to be considered as a document pressed into service, the evidence of P.Ws. 1 to 4, who have immediately gone to the scene after the injured received the injuries in the attack, have clearly stated that they have made enquiries. Apart from it even if their evidence as to actual attack is not believed by the lower court, the fact remains that they were near the scene before attack cannot be excluded because all of them have stated that they have seen the accused going in the tractor and the deceased being present near the scene. In a factious village naturally when such an attack is likely to take place most of the persons who are disinterested will be withdrawing from the scene and going away for their own safety and therefore, there is no unnaturality in P.Ws. 1 to 4 withdrawing from the scene and going to the village and thereafter returning only after the attack on the deceased. The conduct of P.Ws. 1 to 4 cannot be said to be unnatural and there is no reason to discard their evidence about the information given by the deceased to them immediately after the attack and within a short time and without there being any influence on the deceased to implicate the accused. Therefore, though there are some shortcomings in recording of Ex.P25 since we find corroboration from the evidence of P.Ws. 1 to 4 about the truthfulness over the overtacts attributed to A1, A2 and A4 which are relied on by the

lower court from the evidence of P.Ws. 1 to 4, we find that no appreciation of evidence was done by the lower court and the lower court has rightly accepted the statement of the deceased Ex.P.25, which is corroborated by the evidence of P.Ws. 1 to 4."

12. We do not see any infirmity or irregularity in the view taken by the High Court in adopting the above line of reasoning. The fact that the witnesses had seen the initial attack on the deceased and returned to the scene of occurrence after the accused had made their escape good, to enquire from him as to what had happened is not unnatural in the facts and circumstances of the case. In the absence of any compelling reason to the contrary we do not see any reason to interfere with the findings recorded by the High Court, as to the genesis of the incident and the persons responsible for the same. The prosecution has indeed failed to establish that the deceased eventually died on account of injuries sustained by him resulting in the acquittal of accused persons under Section 302 IPC, but that part of the order passed by the Courts below does not warrant rejection of the prosecution case in toto. There is sufficient medical evidence on record, especially in the form of depositions of Dr. Krishnaiah (PW18) who noticed and certified the following injuries on the person of the deceased when he was brought to the hospital on 13th May, 1996 at 6.45 p.m.:

"1. Patient semi conscious. Responding to deep stimulaus only.

2. Deformity and generalized tenderness of left fore arm at its middle.

3. 2" long x 1" wide muscle deep lacerated wound on lower 1/3rd of the left leg. Bleeding present.

4. 1" diameter punctured wound x ½" deep on middle of left leg. Bleeding present.

5. Diffused swelling of both ankle joints.

6. Semi lunar lacerated injury on sole of left big toe. 2 ½" long x ½" wide muscle deep. Bleeding present.

7. 3" long x ½" wide muscle deep lacerated wound in the web between right thumb and index finger. Bleeding present.

8. 3" long x 2" wide reddish contusion over left buttock.

13. Even Dr. C. Manohar (PW19) who conducted the autopsy over the dead-body of the deceased has noticed the fracture of lower end of both tibia and fibula on both sides with bruising in the surrounding soft tissue and fracture of lower end of left fore arm bones with bruising in the left soft tissue. There is, thus, ample medical evidence to support the prosecution case that the deceased had sustained injuries no matter the same had not been proved to be the cause of his death a week later.

14. Even on the question of sentence awarded to the appellants, we see no reason, much less a cogent one to interfere. In our view the conviction of A2 and A4 under Section 326 with a sentence of three years and fine with a default sentence awarded by the Trial Court as also the conviction of A1 under Section 324 and sentence of one year with a fine of Rs.1,000/- and in default imprisonment for three months in the circumstances of the case is perfectly justified.

15. In the circumstances these appeals fail and are hereby dismissed.

K.K.T. Appeals dismissed.

SANDEEP

v.

STATE OF U.P.

(Criminal Appeal No. 1651 of 2009 etc.)

MAY 11, 2012

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

Penal Code, 1860 - ss. 302/34 and 316/54 - Murder - Prosecution for - Accused persons apprehended with the victim who was in injured condition - By PWs police officials while on patrolling duty - Victim implicating the accused - Accused admitting the facts narrated by the victim and confessing the guilt - Recoveries made - Subsequent death of the victim - Trial court convicting both the accused for murder and sentencing them to death - High Court confirming the conviction of both the accused - Death sentence of main accused upheld while that of co-accused commuted to life sentence - On appeal, held: The chain of circumstances alleged against the accused persons conclusively proved without any missing link - Conviction of both the accused and life sentence of co-accused affirmed - Death sentence of main accused commuted to life sentence with order that he would serve a minimum of 30 years in jail without remissions - Sentence/Sentencing.

Evidence Act, 1872:

s. 106 - Burden of proving fact specially within knowledge - Accused taking plea of alibi - Held: Burden to establish the plea is on the accused since it was within his special knowledge.

ss. 25 and 8 - Admission of facts and confession by accused before police officials - Admissibility of - Held:

Statement of accused consisting mixture of admission and confession required to be sifted - Distinction required to be drawn between admission and confession - Part of statement which does not implicate the accused would amount to mere admission and not confession and hence can be relied upon and would be covered by s. 8 - s. 25 can be pressed into service only to the part of the statement that would implicate the accused - When reliance is placed upon admissible portion, the entirety of the statement cannot be rejected outrightly by application of s. 25.

Evidence - Establishment of the fact that accused was biological father foetus - Plea that improper preservation of the foetus sample resulted in wrong report - Two Samples of foetus was preserved, one in formalin solution and the other one by ice preservation - Sample preserved in formalin solution was not accepted because standard protocol analysis was not available in the laboratory - However, Second sample preserved in ice was tested which confirmed that the accused was father of the foetus - Thus fatherhood of the accused with the foetus was established.

Code of Criminal Procedure, 1973 - s. 157 - Delay in forwarding the express report to Magistrate - Effect of, on prosecution case - Held: Where FIR is recorded without delay and investigation started on the basis of the FIR and no infirmity brought out, mere delay in forwarding the express report to the Magistrate, in absence of any prejudice to the accused, cannot be said to have tainted the investigation.

Appellants-accused were prosecuted for having caused death of a girl. The prosecution case was that when the police officials PW1 to PW-5 and were on patrolling duty, they were informed by two constables that they heard some screaming noise from a moving car. PW-1 alongwith others, when went in that direction, at a distance saw a car. They saw two young men trying to pull out a girl in injured condition by opening the rear

door of the car. PW-1 and others caught hold of the two young men and also noticed a girl with injuries all over and on whom acid was also sprinkled. When PW-1 questioned her, she told her name, parents name and address and also told that she had developed friendship with accused 'S' (main accused); that she got pregnant; that on being told by the main accused that he would marry her at Haridwar, she went with him; that while they were moving in the vehicle driven by the co-accused, the main accused asked her to get the foetus aborted; that when she disagreed, and told that she would reveal the facts to his family members and the police, he started beating her with jack and spanner and cut her with a blade and also poured acid on her head; and that they tried to throw her into field when PW-1 arrived here. The accused persons, on being apprehended, admitted the facts as revealed by the victim. They also admitted having purchased two bottles of acid and four shaving blades. They confessed that they caused injuries to the deceased. The police party seized the vehicle, a jack, a spanner, four blades and two empty bottles of acid. The victim was sent to the hospital. Statement of PW-1 was registered as FIR against both the accused u/ss. 307, 326, 324 and 328 IPC. The same was later altered u/s. 302/34 after the victim was declared dead. The trial court charged the accused u/ss. 302/34 and s. 316/34 IPC. Accused were found guilty of offences u/ss. 302/34 and 316/34 IPC and capital punishment was inflicted on both the accused. High Court upheld the conviction of both the accused. However, while confirming the death sentence of the main accused, altered the sentence of the co-accused into imprisonment for life. Hence the present appeals.

Partly allowing the appeal of the main accused and dismissing the appeal of the co-accused, the Court

HELD: 1.1 The chain of circumstances alleged

against the appellants was conclusively proved without any missing link. There is no scope to interfere with the conviction arrived at against the appellants by the trial court as confirmed by the Division Bench of the High Court. [Para 35] [990-F-G]

State of W.B. v. Mir Mohammad Omar and Ors. **2000 (8) SCC 382:2000 (2) Suppl. SCR 712;** *Somappa Vamanappa Madar andShankarappa Ravanappa Kaddi v. State of Mysore* **(1980) 1 SCC 479:***Sunil Kumar and Anr. vs. State of Rajasthan* **(2005) 9 SCC 283: 2005 (1) SCR 612;** *Ram Kumar v. State (NCT) of Delhi* **(1999) 9 SCC 149- referred to.**

1.2 The case of prosecution that the deceased made a statement about the sequence of the occurrence was really made as spelt out by the witnesses PW Nos. 1 to 5. In view of the description of the injuries, as noted by the doctor who conducted the post-mortem, it cannot be said that the injury in the mouth was such as the deceased could not have made any oral statement at all to the witnesses. The Doctor (PW-6) who had examined the injuries sustained by the deceased did not rule out the possibility of the deceased making any statement irrespective of injuries sustained by her. Accused themselves, before the High Court, specifically contended that the deceased sustained multiple injuries and except one injury, all other injuries were simple in nature and none of the injuries were sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, even going by the stand of the accused, the condition of the deceased, even after sustaining multiple injuries, was such that she was alive, conscious and her death was not instantaneous. [Paras 20 and 21] [975-C-H; 976-A]

1.3 The grievance of the appellants as regards non-examination of any independent witness cannot be taken

as a factor to put the case against the prosecution and to hold that the whole case of the prosecution should be set at naught. From the evidence of PWs 1 and 3 what all that can be inferred was that a crusher unit was at least 100 yards away from the place of occurrence and that even at that point of time, the unit was working with at least 3-4 labourers. Beyond the above fact, it was not the case of the appellant that any worker from the crusher unit was present at the spot and yet he was neither shown as a witness nor examined and thereby any prejudice was caused to the appellants. It is also not the case of the appellants that apart from the labourers working in the crusher unit, any other independent witness was present at the spot who was not cited nor examined as a witness. Apart from the above, no other point was raised as regards the non-examination of any independent witness as to the occurrence narrated by the prosecution. [Para 22] [977-C-H]

1.4 The witnesses who were examined were able to unfold the narration of events in a cogent and convincing manner and the non-examination of the Constable and the jeep driver was, therefore, not fatal to the case of the prosecution. In examination of the sequence of events, it is found that after gathering whatever information from the deceased, as regards the occurrence implicating the accused, which were the required details for PW-1 to lodge the necessary complaint, his immediate priority was to attend on the injured person in order to save her life. Such a course adopted by PW-1 and other police personnel at the place of occurrence was quite natural and appreciable. The appellants could not demonstrate as to any prejudice that was caused by the non-examination of the Constable and the jeep driver in order to find fault with the case of the prosecution on that score. [Para 24] [977-F-H; 978-B-C, F-G]

Tej Prakash v. The State of Haryana **(1995) 7 JT 561 - relied on.**

1.5 When the main accused took a positive stand that he was not present at the place of occurrence by relying upon a fact situation, namely, he was not responsible for bringing the Indica car belonging to his mother at the place of occurrence along with the deceased, the burden was heavily upon him to establish the plea that the car was stolen on that very date of occurrence, and, therefore, he could not have brought the deceased in that car at that place. Apart from merely suggesting that the Indica car was stolen which was not fully supported by any legally admissible evidence, no other case was suggested by the appellants. By merely making a sketchy reference to the alleged theft of the car in the written statement and the so-called complaint said to have been filed with the police station nothing was brought out in evidence to support that stand. In this situation, Section 106 of the Evidence Act gets attracted. When according to the accused, they were not present at the place of occurrence, the burden was on them to have established the said fact since it was within their special knowledge. The failure of the main accused in not having taken any steps to prove the said fact strikes at the very root of the defence, namely, that he was not present at the place of occurrence. As a sequel to it, the case of the prosecution as demonstrated before the court stood fully established. [Paras 26 and 27] [980-C-G; 981-E-F]

Prithipal Singh and Ors. vs. State of Punjab and Anr. **(2012) 1 SCC 10 - relied on.**

1.6 When there was no serious infirmity in the registration of the FIR based on the complaint on 17.11.2004 (i.e.) immediately after the occurrence and every follow-up action was being taken meticulously, a

minor discrepancy in the timing of alteration of the crime by itself cannot be held to be so very serious to suspect the registration of the crime or go to the extent of holding that there was any deliberate attempt on the part of the prosecution to ante date the FIR for that purpose. The accused miserably failed to substantiate the stand that he was not present at the spot of occurrence whereas he was really apprehended on the spot by the prosecution witnesses and was brought to the police station from whom other recoveries were made. The submission by referring to certain insignificant facts relating to the delay in the alteration of crime cannot be held to be so very fatal to the case of the prosecution. [Para 31] [987-F-H; 988-A-B]

Pala Singh and Anr. v. State of Punjab **AIR 1972 SC 2679: 1973 (1) SCR 964 - relied on.**

1.7 Where the FIR was actually recorded without delay and the investigation started on the basis of that FIR and there is no other infirmity brought to the notice of the court then, however improper or objectionable the delay in receipt of the report by the Magistrate concerned as stipulated u/s. 157 Cr.P.C. in the absence of any prejudice to the accused, it cannot by itself justify the conclusion that the investigation was tainted and prosecution insupportable. In the present case, while pointing out the delay in the forwarding of the FIR to the Magistrate, no prejudice was said to have been caused to the appellants by virtue of the said delay. As far as the commencement of the investigation is concerned, there was no dearth in that aspect. In such circumstances, there is no infirmity in the case of prosecution on that score. [Para 32] [988-D-G]

Ishwar Singh v. State of Uttar Pradesh **AIR 1976 SC 2423;***Subhash Chander etc. v. Krishan Lal and Ors.* **AIR 2001 SC 1903 - relied on.**

1.8 There were no good grounds to dis-believe the statement of the deceased. No other motive or any other basis was shown to disbelieve the statement. When the reliance placed upon the admissible portion of the statement of the accused is considered, the entirety of the statement cannot be rejected outrightly by application of Section 25 of the Evidence Act. Section 25 can be pressed into service only insofar as it related to such of the statements that would implicate himself while the other part of the statement not relating to the crime would be covered by Section 8 of the Evidence Act and that a distinction can always be drawn in the statement of the accused by carefully sifting the said statement in order to identify the admission part of it as against the confession part of it. The evidence of PW-1 where the said witness narrated the statement made by the main accused which consisted of mixture of admission as well as confession. The part of the statement which does not in any way implicate the accused but is mere statement of facts would amount to mere admissions which can be relied upon for ascertaining the other facts which are intrinsically connected with the occurrence, while at the same time, the same would not in any way result in implicating the accused into the offence directly. The first statement only reveals the fact of the main accused's friendship with the deceased and the physical relationship developed by him with her. Acceptance of the said statement cannot be held to straightway implicate the accused into the crime and consequently it cannot be construed as a confessional statement in order to reject the same by applying Section 25 of the Evidence Act. [Paras 28, 29 and 30] [982-A-B; D-F; 983-F-G; 984-A-B]

Bheru Singh S/o Kalyan Singh v. State of Rajasthan **(1994) 2 SCC467: 1994 (1) SCR 559 - relied on.**

1.9 The circumstance, namely, the report of the DNA

in having concluded that the main accused was the biological father of the recovered foetus of the deceased was one other relevant circumstance to prove the guilt of the main accused. In the light of the expert evidence, it cannot be said that improper preservation of the foetus would have resulted in a wrong report to the effect that the main accused was found to be the biological father of the foetus received from the deceased. In the evidence of Junior Scientific Officer of Central Forensic Laboratory PW-10, it was brought out that the blood samples of the main accused and the foetus was received by him on 27.01.2005 and that necessary test was conducted based on which a report on 13B/1, 13A/2 and 13C/3 were forwarded which confirmed that the main accused was the biological father of the foetus. It has also come in his evidence that the collection of samples, preservation of samples and transportation of samples if not carefully done, it may affect the result, but in the case on hand the result reported by him was not based on wrong facts. The plea that the proper preservation of the foctus resulted in wrong report is not supported by any relevant material on record and the appellant was not able to substantiate the said argument with any other supporting material. [Para 34] [989-E-F; 990-A-D]

2.1 There is no scope to interfere with the sentence of life and other sentences imposed against the co-accused u/s. 302, IPC r/w. s. 34, IPC by the High Court and the other sentences u/s. 316 r/w s. 34 IPC. [Para 36] [990-H; 991-A]

2.2 It is well-settled that awarding of life sentence is the rule, death is an exception. The application of the 'rarest of rare case' principle is dependant upon and differs from case to case. However, the principles laid down earlier and restated in the various decisions of Supreme Court can be broadly stated that in a deliberately planned crime, executed meticulously in a diabolic manner, exhibiting inhuman conduct in a ghastly

manner touching the conscience of everyone and thereby disturb the moral fibre of the society would call for imposition of capital punishment in order to ensure that it acts as a deterrent. Though the case of the prosecution based on the evidence displayed, confirmed the commission of offence by the appellants, without any iota of doubt, still the case does not fall within the four corners of the principle of the 'rarest of the rare case'. However, considering the plight of the hapless young lady, who fell a victim to the avaricious conduct and lust of the main accused, the manner in which the life of the deceased was snatched away by causing multiple injuries all over the body with all kinds of weapons, no leniency can be shown to the main accused. [Para 37] [992-C-G]

Bachan Singh v. State of Punjab **1980 (2) SCC 684;** *Machhi Singh v. State of Punjab* **AIR 1983 SC 957;** *Swamy Shraddananda v. State of Karnataka* **2008 (13) SCC 767: 2008 (11) SCR 93;** *Santosh KumarSatishbushan Bariyar v. State of Maharashtra* **2009 (6) SCC 498: 2009 (9) SCR 90;** *Mohd. Farooq Abdul Gafur v. State of Maharashtra* **2010 (14) SCC 641: 2009 (12) SCR 1093;** *Haresh Mohandas Rajput v. State of Maharashtra* **2011(12) SCC 56;** *State of Maharashtra v. Goraksha Ambaji Adsul* **AIR 2011 SC 2689 - relied on.**

2.3. In the facts and circumstances of the present case, while holding that the imposition of death sentence to the main accused was not warranted and while awarding life imprisonment it is held that the main accused must serve a minimum of 30 years in jail without remissions before consideration of his case for premature release. [Para 38] [993-B-C]

Shraddananda v. State of Karnataka **2008 (13) SCC 767: 2008 (11) SCR 93;** *Ramaraj v. State of Chhattisgarh* **AIR 2010 SC 420: 2009 (16) SCR 367 - relied on.**

Case Law Reference:

2000 (2) Suppl. SCR 712	**Referred to**	**Para 12**
Mysore (1980) 1 SCC 479	**Referred to**	**Para 12**
2005 (1) SCR 612	**Referred to**	**Para 14**
(1999) 9 SCC 149	**Referred to**	**Para 14**
(1995) 7 JT 561	**Relied on**	**Para 24**
(2012) 1 SCC 10	**Relied on**	**Para 27**
1994 (1) SCR 559	**Relied on**	**Para 29**
1973 (1) SCR 964	**Relied on**	**Para 32**
AIR 1976 SC 2423	**Relied on**	**Para 32**
AIR 2001 SC 1903	**Relied on**	**Para 32**
1980 (2) SCC 684	**Relied on**	**Para 37**
AIR 1983 SC 957	**Relied on**	**Para 37**
2008 (11) SCR 93	**Relied on**	**Para 37**
2009 (9) SCR 90	**Relied on**	**Para 37**
2001 (2) SCR 864	**Relied on**	**Para 37**
2011(12) SCC 56	**Relied on**	**Para 37**
AIR 2011 SC 2689	**Relied on**	**Para 37**
2009 (16) SCR 367	**Relied on**	**Para 37**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1651 of 2009 etc.

From the Judgment & Order dated 28.05.2009 of the High Court of Uttar Pradesh at Allahabad in Criminal (Capital) Appeal No. 4148 DB of 2007.

WITH

Crl. A. No. 1425-1426 of 2011.

Sushil Kumar, Vinod Kumar, Aditya Kumar, Meenakshi, S.K. Chaudhary, Harichand, Daya Krishan Sharma, Vinay Arora, Debasis Misra, D.P. Chaturvedi for the Appellant.

Ratnakar Dash, Rajeev Dubey, Kamlendra Mishra for the Respondent.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. These appeals arise out of the common judgment of the Division Bench of the High Court of Allahabad in Criminal Appeal No.4148/2007 along with Criminal Reference No.19/2007 by which, the High Court while accepting the Criminal Reference insofar as it related to appellant Sandeep in Criminal Appeal No.1651/2009, rejected the same insofar as it related to appellant Shashi Bhushan in Criminal Appeal Nos.1425-26/ 2011. In other words, while upholding the sentence of death awarded to Sandeep, the appellant in Criminal Appeal No.1651/2009, the Division Bench modified the sentence into one of life imprisonment insofar as it related to Shashi Bhushan, the appellant in Criminal Appeal Nos.1425-26/2011.

2. Shorn of unnecessary facts, the case of the prosecution as projected before the trial Court was that on 17.11.2004 I D.N. Verma (PW- 1) along with Sub-Inspector Chander Pal Singh (PW-2), Constable Rambir Singh, Constable Sukhram, Constable Ashok Kumar and Driver Yashvir Singh were on patrolling duty; that when they reached ahead of Badsu on Khatoli Road leading towards Falut, they met Constable Rajesh Kumar and another Constable Ramavtar who informed PW-1 and other persons accompanying him that one Indica car took a turn for going towards Falut road and that they heard some screaming noise from that vehicle. PW-1, accompanied by the other personnel referred to above, proceeded towards Falut

road and after a distance saw an Indica car. They stated to have seen through the focus light of the police jeep two young men trying to pull out a girl in an injured condition by opening the rear door of the car. It is stated that it was around 21.30 hours. The police jeep in which PW-1 and others were proceeding stopped ahead of the Indica car and caught hold of the two young men and also noticed a girl, with injuries all over, on whom acid was also sprinkled. The girl had also sustained injuries on the head as well as on her right cheek. On noticing the above, according to PW-1, when he questioned her, she responded by stating that her name was Jyoti and she is the daughter of one Baljeet Singh, R/o Lane No.16, House No.56, Jagatpuri, P.S. Preet Vihar, New Delhi and that her mother's name was Varsha whose cell number was 9871020368. Inspector D.N. Verma (PW-1) stated to have gathered information from her that she developed friendship with the appellant Sandeep while she was working in a mobile shop. She also stated to have revealed that she was pregnant. According to the information gathered from Jyoti, accused Sandeep had called her on that evening and asked her to come to Laxmi Nagar market, Delhi, around 6 p.m. promising her that he will marry her at Haridwar. Believing his words, she went to Laxmi Nagar market from where she was taken in a car and that while they were moving in the vehicle, accused Sandeep asked Jyoti to get the foetus aborted at Meerut, to which she disagreed. On this, he started beating her inside the vehicle right from the point of Modinagar. She stated to have further informed PW-1 and others that she told accused Sandeep that she would reveal all facts to his family members as well as to the police and that when the vehicle in which they were travelling turned towards an isolated place near Khatoli, they tried to throw her into the sugarcane field at which point of time PW-1 and other police members reached the spot. According to her information to PW-1, accused Sandeep and Shashi Bhushan caused the injuries on her with the aid of a jack and pana (spanner) apart from cutting her with a blade and also by pouring acid on her head. PW-1 stated that on noticing the condition of the girl, he arranged for

shifting her to Muzaffarnagar Government Hospital in the police jeep along with Constable Rambir Singh and the driver of the jeep. It was further stated that accused Sandeep and Shashi Bhushan, on being apprehended, also revealed their names and informed that accused Sandeep used to visit deceased Jyoti while she was working in a mobile shop in Mayur Vihar Phase-I for the last six months prior to the date of occurrence and developed friendship with her, and that in course of time, deceased Jyoti pressurized him to marry her. On the date of occurrence, around 6 p.m. he stated to have called her over phone to meet him at Laxmi Nagar red light, that she responded to his call and came to Laxmi Nagar red light where accused Sandeep was waiting along with his friend Shashi Bhushan who drove the vehicle Indica car bearing registration No. DL 3CR 6666 which belonged to his mother. Accused Sandeep stated to have extended a promise to marry her at Haridwar. While the vehicle started moving, accused Sandeep asked Jyoti to get the foetus aborted to which she did not agree instead threatened him by saying that she will reveal all facts to his parents as well as to the police and that as they reached Modinagar, he started beating her. According to the version of accused Sandeep, as told to PW-1, at Modinagar he purchased two bottles of acid and four shaving blades, that when they reached Khatoli, on seeing an isolated place, they tried to pull out the injured Jyoti from the vehicle and that at that point of time they were apprehended by the police. It is the case of the prosecution that while both the accused were taken into custody, the vehicle in which they were travelling was also seized along with the jack and pana, four blades and two acid bottles. The articles, namely, blood stained floor mat, empty bottles of acid, one pair of ladies footwear were stated to have been seized after preparing a seizure memo. A copy of the seizure memo was stated to have been handed over to the accused. It is the specific case of the prosecution that since it was late in the night and it was a lonely place, there were no independent witnesses other than the police personnel. The seizure memo was marked as Exhibit K-1.

3. The statement of PW-1 was registered as FIR No.Nil/ 2004 on the files of P.S. Ratanpuri on 17.11.2004 against both the accused persons for offences under Sections 307, 326, 324 and 328, Indian Penal Code (in short 'IPC') which came to be subsequently altered later on as one under Sections 302/ 34 IPC after the victim was declared dead by the hospital authorities. On the above set of facts, District and Sessions Judge, Muzaffarnagar framed charges against both the accused persons for offences under Section 302, IPC read with Section 34, IPC and Section 316, IPC read with Section 34, IPC and proceeded with the trial. In support of the prosecution as many as 10 witnesses were examined.

4. When the accused persons were questioned under Section 313, Cr.P.C. for offences under Section 304, IPC read with Section 34, IPC and Section 316 read with Section 34, IPC, both the accused pleaded not guilty and also filed a written statement to that effect. The trial Court in its judgment dated 02.06.2007 ultimately found the accused persons guilty of offences under Section 302 read with Section 34, IPC and 316 read with Section 34, IPC and after hearing both the accused persons on the question of sentence, took the view that having regard to the magnitude and the diabolic manner in which the offences were committed by them and also having regard to the various principles laid down in the decisions of this Court in relation to the award of death penalty concluded that, the case on hand was one such case which fell under the category of 'rarest of rare case' in which the accused deserved to be inflicted with the capital punishment of death under Section 302, IPC read with Section 34, IPC. Ultimately, the trial Court convicted and sentenced both the accused persons to death under Section 302 read with Section 34, IPC apart from imposing a fine of Rs.30,000/- each and also sentenced them to undergo 10 years rigorous imprisonment and pay a fine of Rs.10,000/- each for offences under Section 316 read with Section 34, IPC and in default of payment of fine sentenced them to undergo further rigorous imprisonment for one year. The

sentences were to run concurrently. On realization of fine from the accused persons, a sum of Rs.50,000/- was directed to be paid to the parents of the deceased Jyoti as compensation.

5. While hearing the Criminal Reference No.19/2007 as well as Criminal Appeal No.4148/2007 preferred by the appellants, the High Court while confirming the death penalty imposed on appellant Sandeep held that the case of accused Shashi Bhushan was distinguishable and that the gravity of the offence did not warrant infliction of extreme punishment of death and consequently altered the same into one of imprisonment for life.

6. We heard Mr. Sushil Kumar, learned senior counsel for the appellant in Criminal Appeal No.1651/2009 assisted by Mr. Daya Krishan Sharma and Mr. D.P. Chaturvedi, learned counsel for the appellant in Criminal Appeal Nos.1425-26/2011 for appellant Shashi Bhushan. We also heard Mr. Ratnakar Dash, learned senior counsel assisted by Mr. Rajeev Dubey, for the State.

7. Mr. Sushil Kumar, learned senior counsel in his elaborate submissions after referring to the evidence of the prosecution witnesses and medical evidence as well as expert witnesses submitted that the so called dying declaration of the deceased Jyoti was not proved, that the confessional statement of the accused cannot be relied upon, that there were very many missing links in the chain of circumstances and therefore the guilt of the accused cannot be held to be made out. According to the learned senior counsel there were discrepancies in the timing of registration of the F.I.R., delay in sending of the report to the Magistrate apart from vital contradictions in the evidence of the police witnesses.

8. Learned senior counsel also contended that there were serious lacunae in the preservation of foetus samples and, therefore, the ultimate D.N.A. test result cannot be accepted.

9. Learned senior counsel further contended that non-examination of some of the cited witnesses caused prejudice to the accused and on that ground also the case of the prosecution should be faulted. He further contended that the case of the accused about the theft of the Indica car was not properly appreciated by the Courts below. It was also contended that there were infirmities in regard to the recoveries which were not properly examined by the Courts below. Lastly, it was contended that it was not a case for conviction and in any event not 'rarest of rare case' for imposition of capital punishment of death sentence.

10. Mr. D.P. Chaturvedi, learned counsel appearing for the accused –Shashi Bhushan apart from adopting the arguments of Mr. Sushil Kumar, learned senior counsel contended that out of 17 injuries alleged to have been sustained by the deceased Jyoti, at least 7 to 8 injuries were serious and in such circumstances there would not have been any scope for the deceased Jyoti to have made any statement as claimed by the prosecution. According to him there was absolutely no overt act attributed to the accused Shashi Bhushan in the matter of infliction of injuries on the body of the deceased Jyoti and consequently even the imposition of life sentence was not warranted.

11. As against the above submission, Shri Ratnakar Dash, learned senior counsel appearing for the State contended that evidence of the prosecution witnesses who were all police personnel was fair, impartial and natural and there was no reason to doubt their version. He would contend that when there was no independent witness present at the place of occurrence, there was no question of examining any such private witness. According to him, the deceased was alive at the time when the accused were apprehended by the police on 17.11.2004 at 21.30 hrs. and the injuries noted by the doctor would show that the deceased was capable of making a statement and, therefore, the recording of such statement by PW-1 in his

complaint was perfectly in order. He further contended that even in the statements of the accused such of those versions made by them which did not in any way implicate them in the offence was admissible under Section 8 of the Evidence Act while the rest of the statements which are likely to implicate them can be distinguished and eliminated from consideration.

12. Learned senior counsel relied upon the decision of this Court in *State of W.B. v. Mir Mohammad Omar & Ors.*- 2000 (8) SCC 382 and *Somappa Vamanappa Madar & Shankarappa Ravanappa Kaddi v. State of Mysore* – (1980) 1 SCC 479] in support of his submissions.

13. Learned counsel also contended that no prejudice was demonstratively shown by the non examination of the cited witnesses. Learned counsel contented that going by the version of the expert witnesses, the preservation of the foetus was according to the prescribed norms and the D.N.A. result having been proved in the manner known to law cannot be doubted. He also contended that when the registration of the F.I.R. was promptly made, simply because there was minor delay in the alteration of the offence from Section 307, IPC to Section 302, IPC and the subsequent forwarding of the express report to the Magistrate cannot be fatal to the case of the prosecution.

14. Learned counsel relied upon the decision in *Sunil Kumar and Anr. Vs. State of Rajasthan* - (2005) 9 SCC 283, *Ram Kumar v. State (NCT) of Delhi*- [(1999) 9 SCC 149, *Tej Prakash v. The State of Haryana* -(1995) 7 JT 561 in support of his submissions.

15. Having heard learned Senior counsel for the appellants and learned senior counsel for the State and having perused the material papers, original records and the judgments of the trial Court as well as the Division Bench of the High Court, we wish to note the broad spectrum of the appellants' challenge to the conviction and sentence which can be noted as under:

(I) The case of the prosecution which was mainly based on the so-called dying declaration of the deceased and the confessional statement of the accused cannot be accepted as the same was not proved.

(II) The accused were able to demonstrate that they were not present at the time of the commission of the alleged offence on 17.11.2004, as there were very many disruptions in the chain of circumstances to rope in the appellants.

16. When the submissions made on behalf of the appellants are analyzed, the following facts were claimed to support their stand:-

a) The entire case of the prosecution was dependent on the version of witnesses, majority of whom were police personnel and there was no independent witness to support the version of the police.

b) The source of the FIR was the alleged dying declaration of the deceased which was not proved and the so-called confession of the accused Sandeep was inadmissible under Section 25 of the Evidence Act.

c) If the confession is inadmissible, the whole case depended on circumstantial evidence.

d) The case which was originally registered under Section 307, IPC was altered into one under Section 302, IPC belatedly.

e) There were very many missing links in the chain of circumstances.

f) There were serious infirmities in the tests conducted in the samples of the foetus which seriously undermine the case of the prosecution.

g) Though the occurrence took place in a public place near a crusher unit where number of labourers were working, the absence of examination of independent witnesses was fatal to the case of the prosecution.

h) Non-examination of some of the key witnesses cited in the charge- sheet whose evidence would have otherwise supported the case of the accused caused serious prejudice and on that ground the case of the prosecution should fail.

i) The delay in sending the express report was a serious violation of Section 157, Cr.P.C. which would again vitiate the case of the prosecution.

j) The alleged seizure of materials from the car was highly doubtful, having regard to certain vitiating circumstances.

k) Accused Sandeep was roped in falsely by creating a link with his mother's car, which according to Sandeep, was stolen on the date of occurrence, which was omitted to be considered in the proper perspective.

l) When admittedly there was a pending rape case relating to the deceased in which certain persons were accused of having committed rape on the deceased on 17.04.2004 which was tacitly admittedly by Baljeet Singh (PW-8), father of the deceased, there was every scope for the aggrieved persons in the said criminal case to have involved in the crime against the deceased.

17. As against the above, when the stand of the learned counsel for the State is analyzed, the following points emerge for consideration:-

i) The relationship of Sandeep (A-1) with the deceased and the carrying of the foetus in the womb of the deceased was not in dispute.

ii) Merely because the key witnesses were police personnel, that by itself cannot be a ground to eschew that evidence from consideration.

iii) The case of the prosecution based on the statement of the deceased as spoken to by the witnesses cannot be doubted.

iv) The statement of the deceased to the police insofar as it related to the incident and such of those admissions of the accused not implicating them to the offence was admissible in evidence under Section 8 and not hit by Section 25 of the Evidence Act.

v) when there were no independent witnesses present at the place of occurrence, the grievance of the accused on that score does not merit consideration.

vi) The medical evidence, in particular, injuries noted in the post-mortem certificate show that the deceased was capable and did make the statement as demonstrated by the prosecution.

vii) The forensic report established the presence of blood on the weapons used as well as in the car which was one of the clinching circumstances to prove the guilt of the accused.

viii) The outcome of the DNA test established the link of the accused with the deceased to prove the motive for the crime.

ix) The claim of theft of the car was not established before the trial Court in the manner known to law.

x) The presence of the accused at the time and place of occurrence was proved beyond all reasonable doubts.

xi) The handling of the samples sent for chemical and forensic examination was carried out in accordance with the prescribed procedure.

xii) The accused failed to show that the non-examination of any of the cited witnesses caused prejudice to them before the trial Court and, therefore, the grievance now expressed will not vitiate the case of the prosecution.

xiii) The various other discrepancies alleged were all minor and the same do not in any way affect the case of the prosecution.

18. Keeping the above respective submissions in mind, when we analyze the case in hand the following facts are indisputable:-

a. The relationship of Sandeep with deceased, prior to the date of occurrence, namely, 17.11.2004 as his girlfriend;

b. The deceased was carrying the foetus of six months old in her womb;

c. The Indica car in which the deceased was found on the date and time of occurrence belonged to the mother of accused Sandeep;

d. At the time when the deceased was secured by the police on 17.11.2004 at 21.30 hours she was seriously injured but was alive;

e. The death of the deceased was ascertained by the Dr. B.S. Chaudhary (PW-6) at 10.55 p.m.

f. As per the post-mortem certificate, there were as

many as 17 injuries which were caused by blunt weapons like jack and pana (spanner), shaving blades and also chemical acid.

g. Police witnesses were all on patrol duty on the date of occurrence.

h. The DNA test disclosed that accused Sandeep was the biological father of the foetus found in the womb of the deceased.

i. The theory propounded by the accused i.e. the car was stolen on 17.11.2004 was not established before the trial Court in the manner known to law.

j. The statement of the accused as stated to have been made to PW-1 contained various facts unconnected to the crime and also the self incriminating facts which could be distinguished.

k. The absence of any independent witness at the place of occurrence.

19. Keeping the above factors, the existence of which is borne out by acceptable legal evidence, when we examine the submissions made on behalf of the appellants, in the foremost, it was contended that the deceased could not have made a statement as claimed by Inspector D.N. Verma (PW-1) since according to Constable Ramavatar Singh (PW-3), he noticed acid injuries in the inner mouth of the deceased. However forceful the above submissions may be, we find that such a submission merely based on the version of PW-3 alone cannot be accepted. Whatever injuries sustained by the deceased were borne out by medical record, namely, post-mortem certificate and the evidence of the doctor who issued the said certificate. As many as 17 injuries were noted in the post-mortem certificate. According to the version of PW-3, injury in the mouth was caused by acid. When we examine such of those

injuries caused by acid and as spoken to by PW-6, doctor, injury Nos. 4 and 17 alone were stated to have been caused by acid. Injury Nos.4 and 17 have been described as under:-

> "4. chemical burn injury from all over head, hair were charring and skin burnt chemically.
>
> 17. Chemical burn injury all over body ranging from 12cm x 8cm to 2cm x 4 cm except upper part of chest."

20. Going by the above description of the injuries, as noted by the doctor who conducted the post-mortem, it is difficult to accept the statement of learned senior counsel for the accused that the injury in the mouth was such as the deceased could not have made any oral statement at all to the witnesses. It is true that by the pouring of the acid, injury might have been caused on the head and other parts of the body of the deceased but by no stretch of imagination, those injuries appear to have caused any severe damage to the mouth of the deceased, much less to the extent of preventing her from making any statement to the witnesses. In this context, when we peruse the evidence of the Doctor (PW-6), he has specifically expressed an opinion that he was not in a position to state whether after receipt of injury on the body of the deceased she would have been in a position to speak or not. In other words, the doctor who had examined the injuries sustained by the deceased did not rule out the possibility of the deceased making any statement irrespective of injuries sustained by her. In this context, when we refer to the submission made on behalf of the appellants themselves before the Division Bench of the High Court, we find that it was specifically contended that the deceased sustained multiple injuries and except one injury, all other injuries were simple in nature and none of the injuries were sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, even going by the stand of the appellants, the condition of the deceased, even after sustaining multiple injuries, was such that she was alive, conscious and her death was not instantaneous.

21. Having regard to the above factors, we are convinced that the case of prosecution that the deceased made a statement about the sequence of the occurrence was really made as spelt out by the witnesses PW Nos. 1 to 5.

22. With this, we come to the next submission of learned counsel for the appellants, that in the absence of independent witnesses, no reliance can be placed upon PW Nos.1 to 5, who were all police personnel. To deface the evidence of PW Nos. 1 to 5, it was contended that near the place of occurrence, a crusher unit was existing, and at that point of time, the crusher unit was also working. It was suggested to PW-1 that the crusher unit was around 100 yards away from the place of occurrence. It was also suggested to PW-2 that the crusher unit was running at that point of time which was 100 yards away from the place of occurrence. In another place, it was stated by PW-3 that the crusher unit was around ½ KM away from the bridge and it was working. It was also stated by him that at that point of time, 3-4 persons were working in the crusher unit. From what has been stated by the above witnesses, what all that can be inferred was that a crusher unit was at least 100 yards away from the place of occurrence and that even at that point of time, namely, at 21.30 hours, the unit was working with at least 3-4 labourers. Beyond the above fact, it was not the case of the appellant that any worker from the crusher unit was present at the spot and yet he was neither shown as a witness nor examined and thereby any prejudice was caused to the appellants. It is also not the case of the appellants that apart from the labourers working in the crusher unit, any other independent witness was present at the spot who was not cited nor examined as a witness. Therefore, when the above facts are clear, we are at a loss to understand as to how the grievance of the appellants as regards non-examination of any independent witness can be taken as a factor to put the case against the prosecution and to hold that the whole case of the prosecution should be set at naught. Apart from the above, no other point was raised as regards the non-examination of any

independent witness as to the occurrence narrated by the prosecution.

23. One other submission made by the learned senior counsel was that after finding out the cause of the occurrence from the deceased and after noting that she was seriously injured, the police party arranged for shifting her to the hospital in the police jeep along with Rambir Singh and the driver of the jeep within 2-3 minutes and that there was no justifiable ground for not examining Rambir Singh who was also cited as a witness but yet not examined and also for the non-examination of the driver of the jeep. The contention of the learned senior counsel was that after shifting the deceased from the Indica car to the jeep in a serious condition, the jeep would have travelled for at least an hour or so to reach the hospital and Constable Rambir Singh who accompanied her would have been in a better position to state as to what transpired during that period and what was heard by him from the deceased which would have thrown much light on the occurrence. The learned senior counsel, therefore, contended that serious prejudice was caused to the accused by non-examination of the said Rambir Singh as well as the driver whose version would have otherwise been favourable to the appellants.

24. Learned senior counsel appearing for the State, however, contended that in every criminal case it is not a rule that all cited witnesses should be necessarily examined. He also contended that the non- examination of a witness can be put against the prosecution if non- examination would have caused any serious prejudice to the defence. He also relied upon the decision reported in *Tej Prakash* (supra) in support of his submission. As far as the said submission is concerned, when we examine the sequence of events, we find that after gathering whatever information from the deceased, as regards the occurrence implicating the accused, which were the required details for PW-1 to lodge the necessary complaint, his immediate priority was to attend on the injured person in order

to save her life. Such a course adopted by PW-1 and other police personnel at the place of occurrence was quite natural and appreciable. Visualizing what had happened at the place of occurrence as narrated by the prosecution witnesses, it was brought out that whatever basic information required to ascertain the cause of occurrence was gathered by the prosecution witnesses as disclosed in the complaint, which was registered as FIR and also as stated by the witnesses before the Court. The contention that the examination of Constable Rambir Singh and the driver of the jeep, who took the injured deceased to the hospital, would have disclosed very many other factors favourable to the accused was only a wishful thinking. In any case, what those persons would have deposed as a witnesses and to what extent it could have been advantageous to the appellants was not even highlighted before us. We ourselves wonder what other evidence, much less, favourble to the accused could have been spoken to by Constable Rambir Singh who was entrusted with the task of admitting the injured victim in the hospital in order to give necessary treatment for her injuries. Since PW-1 thought it fit to shift the injured to the hospital after noticing her serious condition, and the further fact that by the time they reached the hospital around 10.55 p.m., doctor found that the deceased was dead, it can be safely held that nothing worthwhile could have been drawn from the mouth of Constable Rambir Singh or the driver of the jeep except stating that they dutifully carried out the task of admitting the injured in the hospital as directed by their superiors. We, therefore, hold that the appellants could not demonstrate as to any prejudice that was caused by the non-examination of Constable Rambir Singh and the jeep driver in order to find fault with the case of the prosecution on that score. In this context, reliance placed upon by the learned senior counsel for the State in *Tej Prakash* (supra) can be usefully referred to. In para 18 of the said decision, this Court made it clear that all the witnesses of the prosecution need not be called and it is sufficient if witnesses who were essential to the unfolding of the narrative are examined. Applying the said principle to the case,

it can be safely held that the witnesses who were examined were able to unfold the narration of events in a cogent and convincing manner and the non-examination of Constable Rambir Singh and the jeep driver was, therefore, not fatal to the case of the prosecution.

25. Learned senior counsel for the appellants then contended that the appellants were not present at all at the time of occurrence, that the appellant Sandeep was called to the police station in furtherance of the complaint lodged by him as regards the theft of his mother's car on 17.11.2004 and that for that purpose when he went to the police station, he was falsely implicated into the offence. According to the appellants, the deceased was already involved in a case of rape committed by one Manoj on 17.04.2004. In that case, the complaint preferred by the deceased was at the stage of trial before the Court of Sessions Judge. It was contended that by misusing the stolen car of the appellant's (Sandeep) mother, the crime could have been committed by somebody else but unfortunately the appellants were implicated into the offence. In order to appreciate the said submission of the appellant-Sandeep, in the first place, when we examine the stand that his mother's car was stolen on 17.11.2004, we find that except the ipse dixit statement made in the written statement to the questioning made under Section 313 Cr.P.C. and reference to an alleged report as regards the theft of the car, there was no other fact placed before the trial Court. The trial Court while dealing with the said contention has noted as under:-

> "……the accused Sandeep filed a photo copy of the report which is neither proved nor it can be taken into consideration. No FIR has been filed nor the same is proved by any police officials. The accused has also not examined himself or any other person in support of his above contention. The contention of the accused Sandeep that the car was stolen on 17.11.2004 from Geeta Colony is totally false and frivolous. ADGC contended that father

> of accused Sandeep is in police department posted as Sub-Inspector and had tried to manipulate a false story. The recovery of Indica car, namely, DL 3CR 6666 on the spot along with accused persons by Inspector D.N. Verma (PW-1) of PS Ratanpuri with the injured Jyoti is a very important factor which proved the involvement of the accused person and strengthens the prosecution case."

26. We see no reason to differ from the above conclusion of the trial Court. If the theory of theft of Indica car is ruled out and the presence of the car on the spot was indisputable, it should automatically follow that the car could have been brought at that place along with the deceased, driven by accused Shashi Bhushan along with Sandeep only in the manner narrated by the prosecution. Apart from merely suggesting that the Indica car was stolen which was not fully supported by any legally admissible evidence, no other case was suggested by the appellants.

27. When the accused Sandeep took a positive stand that he was not present at the place of occurrence by relying upon a fact situation, namely, he was not responsible for bringing the Indica car belonging to his mother at the place of occurrence along with the deceased, the burden was heavily upon him to establish the plea that the car was stolen on that very date of occurrence, namely, 17.11.2004 and, therefore, he could not have brought the deceased in that car at that place. Unfortunately, by merely making a sketchy reference to the alleged theft of the car in the written statement and the so-called complaint said to have been filed with the Geeta Colony police station nothing was brought out in evidence to support that stand. In this situation, Section 106 of the Evidence Act gets attracted. When according to the accused, they were not present at the place of occurrence, the burden was on them to have established the said fact since it was within their special knowledge. In this context, the recent decision of this Court reported in – *Prithipal Singh and Ors. Vs. State of Punjab and*

Anr.-(2012) 1 SCC 10 can be usefully referred to where it has been held as under in para 53 :

> "In *State of W.B. v. Mir Mohammad Omar,* this Court held 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……"

The contention of accused Sandeep was, therefore, bound to fail and the said defence taken was not proved to the satisfaction of the Court. The failure of the accused Sandeep in not having taken any steps to prove the said fact strikes at the very root of the defence, namely, that he was not present at the place of occurrence. As a sequel to it, the case of the prosecution as demonstrated before the Court stood fully established.

28. Having regard to the above conclusion that the deceased did narrate the occurrence right from the invitation made by the accused Sandeep to her over phone at 6 p.m. under the guise of taking her to Haridwar to marry her, that after she responded to the said call and met him from where she was picked up by both the accused in the Indica car belonging to the mother of accused Sandeep, and the other sequence of

events, namely, the threat posed to the deceased to get the foetus aborted and her refusal ultimately enraged the appellants to cause the assault with the weapon, namely, jack and pana, shaving blades and chemical acid was quite convincing and there were no good grounds to dis- believe her statement. No other motive or any other basis was shown to disbelieve her statement. In that respect, when we consider the reliance placed upon the admissible portion of the statement of the accused, we are unable to reject outrightly the entirety of the statement by application of Section 25 of the Evidence Act. According to learned senior counsel for the appellants, the prosecution could not have relied upon the confessional statement of the accused implicating themselves in the offence alleged against them by virtue of Section 25 of the Evidence Act.

29. As against the said submission, Mr. Ratnakar Dash, learned senior counsel appearing for the State rightly pointed out that Section 25 of the Evidence Act can be pressed into service only insofar as it related to such of the statements that would implicate himself while the other part of the statement not relating to the crime would be covered by Section 8 of the Evidence Act and that a distinction can always be drawn in the statement of the accused by carefully sifting the said statement in order to identify the admission part of it as against the confession part of it. Learned senior counsel drew our attention to the evidence of PW-1 where the said witness narrated the statement made by accused Sandeep which consisted of mixture of admission as well as confession. In that learned senior counsel pointed out that the accused Sandeep made certain statements, namely; that Jyoti was working in a mobile shop in Mayur Vihar, Phase I where he used to visit; that during that period around six months before he developed physical relations with her; that the deceased Jyoti was applying pressure on him to marry her, and that around 6 p.m. on the date of occurrence, he called her over telephone to meet him at Laxmi Nagar red light. He further told the witness that the Indica car bearing registration NO.DL 3CR 6666 was owned

by his mother and that promising to marry her at Haridwar, he took the deceased Jyoti along with him. He also told the witness that while the car was moving he asked the deceased Jyoti to get the foetus aborted to which she did not agree. According to PW-1, Sandeep also told him that he purchased two bottles of acid and four blades at Modinagar, that when they reached Khatoli, he saw a road free from disturbance towards which the vehicle was driven and that in that place they were apprehended by the police. Learned senior counsel also referred to certain other statements made by Sandeep to PW-1, namely, that on that day he planned with his friend Shashi Bhushan to eliminate Jyoti from his life and that when Jyoti told him that she was going to reveal the fact of carrying his child in her womb to his family members and the police, he started beating her along with his friend. Learned senior counsel fairly stated that while the last part of the statement would fall under the category of confession, which would be hit by Section 25 of the Evidence Act, the former statements which do not in any way implicate the accused to the offence, would be protected by Section 8 of the Evidence Act and consequently the said part of the statement was fully admissible. We find force in the submission of learned senior counsel for the State. It is quite common that based on admissible portion of the statement of accused whenever and wherever recoveries are made, the same are admissible in evidence and it is for the accused in those situations to explain to the satisfaction of the Court as to the nature of recoveries and as to how they came into possession or for planting the same at the places from where they were recovered. Similarly this part of the statement which does not in any way implicate the accused but is mere statement of facts would only amount to mere admissions which can be relied upon for ascertaining the other facts which are intrinsically connected with the occurrence, while at the same time, the same would not in any way result in implicating the accused into the offence directly.

30. In that view, when we examine the statements referred

to by learned senior counsel for the State which were stated to have been uttered by the accused to PW-1, we find the first statement only reveals the fact of accused Sandeep's friendship developed with the deceased Jyoti six months prior to the occurrence and the physical relationship developed by him with her. Accepting the said statement cannot be held to straightway implicate the accused into the crime and consequently it cannot be construed as a confessional statement in order to reject the same by applying Section 25 of the evidence Act. In this context the reliance placed upon the decision of this Court reported in *Bheru Singh S/o Kalyan Singh v. State of Rajasthan* – (1994) 2 SCC 467 is quite apposite. In the said decision, this Court in paragraph 16 and 19 has held as under:-

> "16. A confession or an admission is evidence against the maker of it so long as its admissibility is not excluded by some provision of law. Provisions of Sections 24 to 30 of the Evidence Act and of Section 164 of the Cr.P.C deal with confessions. By virtue of the provisions of Section 25 of the Evidence Act, a confession made to a police officer under no circumstance is admissible in evidence against an accused. The section deals with confessions made not only when the accused was free and not in police custody but also with the one made by such a person before any investigation had begun. The expression "accused of any offence" in Section 25 would cover the case of an accused who has since been put on trial, whether or not at the time when he made the confessional statement, he was under arrest or in custody as an accused in that case or not inadmissibility of a confessional statement made to a police officer under Section 25 of the Evidence Act is based on the ground of public policy. Section 25 of the Evidence Act not only bars proof of admission of an offence by an accused to a police officer or made by him while in the custody of a police officer but also the admission contained in the confessional statement of all incriminating

facts relating to the commission of an offence. Section 26 of the Evidence Act deals with partial ban to the admissibility of confessions made to a person other than a police officer but we are not concerned with it in this case. *Section 27 of the Evidence Act is in the nature of a proviso or an exception, which partially lifts the ban imposed by Sections 25 and 26 of the Evidence Act and makes admissible so much of such information, whether it amounts to a confession or not, as relates to the fact thereby discovered, when made by a person accused of an offence while in police custody.* Under Section 164 Cr.P.C. a statement or confession made in the course of an investigation, may be recorded by a Magistrate, subject to the safeguards imposed by the section itself and can be relied upon at the trial.(emphasis supplied)

19. From a careful perusal of this first information report we find that it discloses the motive for the murder and the manner in which the appellant committed the six murders. The appellant produced the blood stained sword with which according to him he committed the murders. *In our opinion the first information report Ex. P-42, however is not a wholly confessional statement, but only that part of it is admissible in evidence which does not amount to a confession and is not hit by the provisions of Section 25 of the Evidence Act. The relationship of the appellant with the deceased; the motive for commission of the crime and the presence of his sister-in-law PW11 do not amount to the confession of committing any crime. Those statements are non-confessional in nature and can be used against the appellant as evidence under Section 8 of the Evidence Act.* The production and seizure of the sword by the appellant at the police station, which was blood stained, is also saved by the provisions of the Evidence Act. *However, the statement that the sword had been used to commit the murders as well as the manner of committing the crime is clearly inadmissible in*

evidence. Thus, to the limited extent as we have noticed above and save to the extent only the other portion of the first information report Ex. P-42 must be excluded from evidence as the rest of the statement amounts to confession of committing the crime and is not admissible in evidence. (Emphasis supplied)

31. Another submission made on behalf of the appellants was that there was inordinate delay in sending the express report as well as in altering the offence. The crime was initially registered as one under Section 307, IPC and subsequently altered as one under Section 302, IPC. It was pointed out that immediately after registration of the FIR based on the complaint of PW1 at 23.15 hours on 17.11.2004, the crime was registered under Section 307, etc., the same came to be altered only on 20.11.2004 even though the factum of the death of the deceased was intimated by PW-6 on 19.11.2004 itself by 1 p.m. It was further contended that the registration of the complaint after its alteration on 20.11.2004, the express report was forwarded to the Magistrate only on 25.11.2004 which was in derogation of the prescription contained in Section 157, Cr.P.C. Based on the above discrepancies, it was contended that the purported delay was only to antedate the FIR to suit the convenience of the prosecution. The submission is on the footing that the prosecution developed the case for implicating the accused while the accused were not really involved in the offence and, therefore, they took their own time to register the complaint. In order to support the said stand, learned counsel also went on to rely upon the statement of PW-1 as compared to Soubir Singh (PW-5), that while PW-1 stated in his evidence that they reached back the police station at around 23.45 hours, PW-5 in whose presence the complaint was stated to have been registered mentioned the time as 23.15 hours. We do not find any serious infirmity based on the said statement. When the preference of the complaint by PW-1 and its registration cannot be doubted in the absence of any flaw in its preference and registration, minor difference in the timing mentioned by

the witnesses cannot be taken so very seriously to hold that the very registration of the complaint was doubtful. In fact PW-1 in his chief examination in another place has also referred to the registration of the FIR at 23.15 hours though the appellants counsel wanted to rely on the statement of the said witness to the effect that they all reached back the police station at around 23.45 hours. Apparently, there appears to be some mistake in recording the timing as stated by PW-1. Therefore, nothing turns much on the said submission of learned counsel for the appellants. As far as the contention that there was considerable delay in altering the offence from Section 307, IPC to Section 302, IPC was concerned the said submission was made by referring to the evidence of the Doctor (PW-6) who conducted the post-mortem that by 10.55 p.m. on 17.11.2004 itself the death of the deceased was confirmed when the victim was admitted to the hospital which was also known to Constable Rambir Singh who accompanied the victim to the hospital. It was also pointed out that PW-6 sent the intimation about the death of the deceased to the police station at 23.10 hours while keeping the body in the mortuary. To the above submission, on behalf of the State, it was sought to be explained that even though the death intimation was dated 17.11.2004 itself, since the post-mortem was held only on 19.11.2004 and the post-mortem report was received on 20.11.2004 the offence came to be altered based on the post-mortem report on 20.11.2004. Though the said explanation cannot be said to be fully satisfactory, it will have to be stated that when there was no serious infirmity in the registration of the FIR based on the complaint on 17.11.2004 (i.e.) immediately after the occurrence and every follow-up action was being taken meticulously, we hold that such a minor discrepancy in the timing of alteration of the crime by itself cannot be held to be so very serious to suspect the registration of the crime or go to the extent of holding that there was any deliberate attempt on the part of the prosecution to ante date the FIR for that purpose. We have already held that the accused miserably failed to substantiate the stand that he was not present at the spot of occurrence

whereas he was really apprehended on the spot by the prosecution witnesses and was brought to the police station from whom other recoveries were made. The submission by referring to certain insignificant facts relating to the delay in the alteration of crime cannot be held to be so very fatal to the case of the prosecution.

32. It was also feebly contended on behalf of the appellants that the express report was not forwarded to the Magistrate as stipulated under Section 157, Cr.P.C. instantaneously. According to learned counsel FIR which was initially registered on 17.11.2004 was given a number on 19.11.2004 as FIR No.116 of 2004 and it was altered on 20.11.2004 and was forwarded only on 25.11.2004 to the Magistrate. As far as the said contention is concerned, we only wish to refer to the reported decision of this Court in *Pala Singh and Another v. State of Punjab* - AIR 1972 SC 2679 wherein this Court has clearly held that where the FIR was actually recorded without delay and the investigation started on the basis of that FIR and there is no other infirmity brought to the notice of the Court then, however improper or objectionable the delay in receipt of the report by the Magistrate concerned, in the absence of any prejudice to the accused it cannot by itself justify the conclusion that the investigation was tainted and prosecution insupportable. Applying the above ratio to the case on hand, while pointing out the delay in the forwarding of the FIR to the Magistrate, no prejudice was said to have been caused to the appellants by virtue of the said delay. As far as the commencement of the investigation is concerned, our earlier detailed discussion discloses that there was no dearth in that aspect. In such circumstances we do not find any infirmity in the case of prosecution on that score. In fact the above decision was subsequently followed in *Sarwan Singh & Ors. Vs. State of Punjab* - (AIR 1976 SC 2304), *Anil Rai Vs. State of Bihar* [2001] Supp. 1 SCR 298 and *Aqeel Ahmad Vs. State of U.P.* [2008] 17 SCR 1330.

33. Another submission made on behalf of the appellant was that there were serious infirmities in preserving and testing of the sample of the foetus and the consequent DNA report implicating the accused Sandeep to the destruction of the foetus whose biological father was found to be the accused himself. The infirmity pointed out was that the sample of the foetus of the child was taken as early as on 17.11.2004 while it was sent for forensic lab only on 25.01.2005 and that since there was a long gap in between, the prosecution ought to have disclosed as to how the samples were properly preserved in order to ensure proper test to be conducted for ascertaining the correctness of its outcome. Though such submission was made with some emphasis, it was not pointed out as to what was the nature of procedure to be followed in regard to the preservation of the samples taken apart from what was followed in taking the samples by the prosecution. It is not in dispute that at the time of post- mortem, when the foetus was discovered, the same was preserved by taking two samples one in the Formalin solution and the other one by ice preservation. It is borne out by record that there was an FSL report dated 5.1.2005 as per which the SSP of Muzaffarnagar was informed that the foetus which was preserved in Formalin solution was not accepted since laboratory had no standard protocol for extracting the amplifiable DNA of Formalin preserved tissues.

34. Therefore, in the evidence of PW-10 Junior Scientific Officer of Central Forensic Laboratory, Chandigarh, it was brought out that the blood samples of accused Sandeep and the foetus received by him on 27.01.2005 and that necessary test was conducted based on which a report on 13B/1, 13A/2 and 13C/3 were forwarded which confirmed that the accused Sandeep was the biological father of the foetus. He also confirmed in the cross examination that the earlier sample of foetus preserved in Formalin solution received on 05.01.2005 was returned back without opening the seal as the same was kept in Formalin solution and standard protocol analysis was not available in the laboratory. He further confirmed that when

the sample on second time was received along with the letter dated 25.1.2005, the same was preserved in ice separately which they were able to test in their laboratory for finding out the result. It has also come in his evidence that the collection of samples, preservation of samples and transportation of samples if not carefully done, it may affect the result, but in the case on hand the result reported by him was not based on wrong facts. In the light of the said expert evidence of the Junior Scientific Officer it is too late in the day for the appellant-Sandeep to contend that improper preservation of the foetus would have resulted in a wrong report to the effect that the accused Sandeep was found to be the biological father of the foetus received from the deceased Jyoti. As the said submission is not supported by any relevant material on record and as the appellant was not able to substantiate the said argument with any other supporting material, we do not find any substance in the said submission. The circumstance, namely, the report of the DNA in having concluded that accused Sandeep was the biological father of the recovered foetus of Jyoti was one other relevant circumstance to prove the guilt of the said accused.

35. There were certain other submissions made on behalf of the appellants, namely, the seizure of materials from the car were highly doubtful etc. We do not find any serious lacunae pointed out in support of the said submissions. As rightly submitted on behalf of the learned senior counsel for the State, the discrepancies were minor in character and we do not find any serious infirmity based on the said discrepancies argued on behalf of the accused/appellants. In the light of the above conclusion, we find that the chain of circumstances alleged against the appellants was conclusively proved without any missing link. We, therefore, do not find any scope to interfere with the conviction arrived at against the appellants by the trial Court as confirmed by the Division Bench of the High Court.

36. We, therefore, do not find any scope to interfere with the sentence of life and other sentences imposed against

accused Shashi Bhushan under Section 302, IPC read with Section 34, IPC by the High Court and the other sentences under Section 316 read with Section 34 IPC.

37. When we come to the question of sentence of death as imposed by learned Sessions Judge, which was also confirmed by the Division Bench as against the accused Sandeep, the same will have to be examined in the light of the principles laid down in the various decisions of this Court right from *Bachan Singh v. State of Punjab* [1980 (2) SCC 684], *Machhi Singh v. State of Punjab* [AIR 1983 SC 957], *Swamy Shraddananda v. State of Karnataka* [2008 (13) SCC 767], *Santosh Kumar Satishbushan Bariyar v. State of Maharashtra* [2009 (6) SCC 498], *Mohd. Farooq Abdul Gafur v. State of Maharashtra* [2010 (14) SCC 641], *Haresh Mohandas Rajput v. State of Maharashtra* [2011(12) SCC 56], *State of Maharashtra v. Goraksha Ambaji Adsul* [AIR 2011 SC 2689]. The principle of 'rarest of rare case' enunciated in *Bachan Singh*(supra) has been restated and emphasized time and again in the above referred to decisions. In order to appreciate the principle in a nutshell, what is stated in *Haresh Mohandas Rajput* (supra) can be usefully referred to which reads as under:-

"20. The rarest of 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 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 of political ambition or indulging in organized criminal activities, death sentence should be awarded." It is, therefore, well-settled that awarding of life sentence is the rule, death is an exception. The application of the 'rarest of rare case' principle is dependant upon and differs from case to case. However, the principles laid down earlier and restated in the various decisions of this Court referred to above can be broadly stated that in a deliberately planned crime, executed meticulously in a diabolic manner, exhibiting inhuman conduct in a ghastly manner touching the conscience of everyone and thereby disturb the moral fibre of the society would call for imposition of capital punishment in order to ensure that it acts as a deterrent. While we are convinced that the case of the prosecution based on the evidence displayed, confirmed the commission of offence by the appellants, without any iota of doubt, we are of the considered opinion, that still the case does not fall within the four corners of the principle of the 'rarest of the rare case'. However, considering the plight of the hapless young lady, who fell a victim to the avaricious conduct and lust of the appellant Sandeep, the manner in which the life of the deceased was snatched away by causing multiple injuries all over the body with all kinds of weapons, no leniency can be shown to the said appellant. In the decision reported in *Swamy Sharaddananda* (supra) even while setting aside the sentence of death penalty and awarding the life imprisonment, it was explained that in order to serve ends of justice, the appellant therein should not be released from the prison till the end of his life. Likewise, in *Ramraj v. State of Chhattisgarh* [AIR 2010

SC 420] this Court, while setting aside the death sentence, directed that the appellant therein should serve a minimum period of 20 years including the remissions and would not be released on completion of 14 years of imprisonment.

38. Taking note of the above decision and also taking into account the facts and circumstances of the case on hand, while holding that the imposition of death sentence to the accused Sandeep was not warranted and while awarding life imprisonment we hold that accused Sandeep must serve a minimum of 30 years in jail without remissions before consideration of his case for premature release.

39. Criminal Appeal No.1651/2009 and the Criminal Reference No.19 of 2007 thus stand disposed of modifying the punishments imposed on accused Sandeep as one for life and he should undergo the said sentence of life for a fixed period of 30 years without any remission to be allowed. The Criminal Appeal Nos.1425-26/2011 of accused Shashi Bhushan stand dismissed.

K.K.T. Appeals disposed of.

REGISTRAR GENERAL, PATNA HIGH COURT
v.
PANDEY GAJENDRA PRASAD & ORS.
(Civil Appeal No. 4553 of 2012)

MAY 11, 2012

[D.K. JAIN AND ANIL R. DAVE, JJ.]

Judiciary - Judicial Officer - Dismissed from service - On the allegation of misconduct - By Full Court of High Court on recommendation by Standing Committee - Writ petition - Allowed by Division Bench of High Court quashing dismissal order - On appeal, Held: Division Bench exceeded its jurisdiction by interfering with the decision of Full Court - The Court dealt with the matter as if it was exercising appellate powers over the decision of subordinate court - There is nothing on record to suggest that the evaluation made by Standing Committee and then by Full Court was so arbitrary, capricious or irrational so as to shock the conscience of the Division Bench to justify its interference - Dismissal is justified - Constitution of India, 1950 - Article 235 and 226.

Constitution of India, 1950:

Article 226 - Judicial review - Of an order of punishment passed in departmental proceedings - Scope of - Held: Scope of judicial review in such matters is very limited - Interference with such matters is permitted only when the proceedings are in violation of principles of natural justice or in violation of statutory regulations or when the decision is vitiated by consideration extraneous to the evidence or when the decision, on the face of it, is wholly arbitrary or capricious.

Article 235 - Control over Subordinate Courts - Scope of - It is constitutional mandate that every High Court ensures that the subordinate judiciary functions within its domain and

administers justice according to law, uninfluenced by any extraneous consideration - While it is imperative for the High Court to protect honest and upright judicial officer, it is equally necessary not to ignore or condone any dishonest deed of a judicial officer.

Respondent No. 1 was a judicial officer, functioning as Railway Judicial Magistrate at the relevant time. Sessions Judge conducted a preliminary inquiry against him on the basis of some reports alleging misconduct. Departmental proceedings were initiated. Four charges were framed against him. Two of the charges which pertained to grant of bail by respondent No. 1 were proved and the Standing Committee recommended imposition of punishment of dismissal. The recommendation was approved by the Full Court of High Court and accepted by the Governor. By a Notification, he was dismissed from service. Respondent No. 1 filed writ petition challenging the order of dismissal. Division Bench of the High Court allowed the petition quashing the dismissal order. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1 Article 235 of the Constitution of India not only vests total and absolute control over the subordinate courts in the High Courts but also enjoins a constitutional duty upon them to keep a constant vigil on the day to day functioning of these courts. There is no gainsaying that while it is imperative for the High Court to protect honest and upright judicial officers against motivated and concocted allegations, it is equally necessary for the High Court not to ignore or condone any dishonest deed on the part of any judicial officer. It needs little emphasis that the subordinate judiciary is the kingpin in the hierarchical system of administration of justice. It is the trial judge, who comes in contact with the litigant during the day to day proceedings in the court

and, therefore, a heavy responsibility lies on him to build a solemn unpolluted atmosphere in the dispensation of justice which is an essential and inevitable feature in a civilized democratic society. [Para 9] [1006-C-F]

B.C. Chaturvedi vs. Union of India and Ors. **(1995) 6 SCC 749: 1995(4) Suppl. SCR 644;** *High Court of Judicature at Bombay vs.Shashikant S. Patil and Anr.* **(2000) 1 SCC 416: 1999 (4) Suppl. SCR 205 - referred to.**

1.2 It is the constitutional mandate that every High Court must ensure that the subordinate judiciary functions within its domain and administers justice according to law, uninfluenced by any extraneous considerations. The members of the subordinate judiciary are not only under the control but also under the care and custody of the High Court. Undoubtedly, all the Judges of the High Court, collectively and individually, share that responsibility. [Para 9] [1007-B-C]

1.3 While it is true and relevant to note that 'grant of bail' is an exercise of judicial discretion vested in a judicial officer to be exercised depending on the facts and circumstances before him, yet it is equally important that exercise of that discretion must be judicious having regard to all relevant facts and circumstances and not as a matter of course. [Para 10] [1007-E-F]

1.4 The Division Bench while holding that both the orders by the first respondent being purely discretionary in terms of his statutory powers, did not warrant any disciplinary action on the ground of judicial indiscretion or misconduct, has failed to bear in mind the parameters laid down while dealing with the collective decision of the Full Court on the administrative side. It is evident that the Division Bench dealt with the matter as if it was exercising appellate powers over the decision of a subordinate court, granting or refusing bail, and in the

process, overstepped its jurisdiction under Article 226 of the Constitution. [Para 11] [1008-G-H; 1009-A-B]

1.5 The scope of judicial review, under Article 226 of the Constitution, of an order of punishment passed in departmental proceedings, is extremely limited. While exercising such jurisdiction, interference with the decision of the departmental authorities is permitted, if such authority has held the proceedings in violation of the principles of natural justice or in violation of statutory regulations prescribing the mode of such enquiry or if the decision of the authority is vitiated by consideration extraneous to the evidence on the merits of the case, or if the conclusion reached by the authority, on the face of it, is wholly arbitrary or capricious that no reasonable person could have arrived at such a conclusion. [Para 12] [1009-B-D]

High Court of Judicature at Bombay vs. Shashikant S. Patil andAnr. **(200) 1 SCC 416: 1999 (4) Suppl. SCR 205;** *State of AndhraPradesh vs. S. Sree Rama Rao* **(1964) 3 SCR 25; Syed T.A.***Naqshbandi and Ors. vs. State of Jammu and Kashmir and Ors.***(2003) 9 SCC 592: 2003 (1) Suppl. SCR 114;** *Rajendra Singh Verma(Dead) Through LRs. and Ors. vs. Lieuteant Governor (NCT of Delhi) and Ors.* **(2011) 10 SCC 1: 2011 (12) SCR 496 - relied on.**

1.6 In the present case, the recommendation of the Standing Committee to dismiss the first respondent from service was based on the findings in the enquiry report submitted by the enquiry officer pursuant to the departmental enquiry; his reply to the show cause notice; his ACR and other materials placed before it. The recommendation of the Standing Committee was approved and ratified by the Full Court. There is nothing on record to even remotely suggest that the evaluation made, firstly by the Standing Committee and then by the Full Court, was so arbitrary, capricious or so irrational so

as to shock the conscience of the Division Bench to justify its interference with the unanimous opinion of the Full Court. Apart from the fact that an ACR does not necessarily project the overall profile of a judicial officer, the entire personal file of the respondent was before the Full Court when a conscious unanimous decision was taken to award the punishment of his dismissal from service. In cases of such assessment, evaluation and formulation of opinion, a vast range of multiple factors play a vital and important role and no single factor should be allowed to be blown out of proportion either to decry or deify issues to be resolved or claims sought to be considered or asserted. In the very nature of such things, it would be difficult, rather almost impossible to subject such an exercise undertaken by the Full Court, to judicial review, save and except in an extra-ordinary case when the court is convinced that some exceptional thing which ought not to have taken place has really happened and not merely because there could be another possible view or there is some grievance with the exercise undertaken by the Committee/Full Court. [Para 16] [1011-D-H; 1012-A-C]

2.1 The court observed that the present system of recording the ACRs leaves much to be desired and needs to be revamped. It is deficient in several ways, being not comprehensive enough to truly reflect the level of work, conduct and performance of each individual on one hand and unable to check subjectivity on the other. This undoubtedly breeds discontent in a section of the judicial service besides eroding proper and effective superintendence and control of the High Court over subordinate judiciary. The process of evaluation of a judicial officer is intended to contain a balanced information about his performance during the entire evaluation period, but many a times, the ACRs are recorded casually in a hurry after a long lapse of time (in some cases even after the expiry of one year from the

period to which it relates), indicating only the grading in the final column. It needs no elaboration that such hurried assessment cannot but, be either on the basis of the assessment/grading of the preceding year(s) or on personal subjective views of the Inspecting Judge(s), which is unfair to the judicial officer. Undoubtedly, ACRs play a vital and significant role in the assessment, evaluation and formulation of opinion on the profile of a judicial officer, particularly, in matters relating to disciplinary action against a judicial officer. The ACRs of such officer hold supreme importance in ascertaining his conduct, and therefore, the same have to be reported carefully with due diligence and caution. There is an urgent need for reforms on this subject, not only to bring about uniformity but also to infuse objectivity and standardisation. [Para 18] [1012-E-H; 1013-A-C]

Bishwanath Prasad Singh vs. State of Bihar and Ors. **(2001) 2 SCC305: 2000 (5) Suppl. SCR 718;** *Punjab and Haryana, Through R.G. vs. Ishwar Chand Jain and Anr.* **(1999) 4 SCC 579 - referred to.**

2.2 The power to make such entries, which have the potential for shaping the future career of a subordinate officer, casts an obligation on the High Courts to keep a watch and vigil over the performance of the members of the subordinate judiciary. Supreme Court also stressed on the need for the assessment to be made as an ongoing process continued round the year and the record to be made in an objective manner. [Para 19] [1013-E-F]

Case Law Reference:

1995 (4) Suppl. SCR 644	**Referred to**	**Para 6**
1999 (4) Suppl. SCR 205	**Referred to**	**Para 9**
(1964) 3 SCR 25	**Relied on**	**Para 13**

2003 (1) Suppl. SCR 114	**Relied on**	**Para 14**
2011 (12) SCR 496	**Relied on**	**Para 15**
2000 (5) Suppl. SCR 718	**Referred to**	**Para 15**
(1999) 4 SCC 579	**Referred to**	**Para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4553 of 2012.

From the Judgment & Order dated 21.05.2010 of the High Court of Patna in C.W.J.C. No. 11793 of 2006.

Pravin H. Parikh, Ajay Kr. Jha, Subhashree Chatterjee, Utsav Trivedi (for Parekh & Co.) for the Appellant.

Subhro Sanyal for the Appellants.

The Judgment of the Court was delivered by

D.K. JAIN, J.: 1. Leave granted.

2. This appeal, by special leave, is preferred by the Patna High Court, through its Registrar General, against the judgment and order dated 21st May, 2010, rendered by a Division Bench of the High Court in the writ petition filed by respondent no.1. In the said writ petition the first respondent had challenged the decision of the Full Court recommending his removal from service as a Railway Judicial Magistrate. By the impugned judgment, the notification/communication dismissing him from service has been set aside with a consequential declaration that the said respondent shall be reinstated and paid 40% of his back wages as compensation. He has also been granted liberty to make representation to the High Court regarding the balance 60% of his back wages.

3. The first respondent in this appeal was appointed in Bihar Judicial Service on 29th March 1986, in the cadre of Munsif. In October, 1999, he was functioning as a Railway

Judicial Magistrate, Barauni Dist., Begusarai. On receipt of some reports, alleging misconduct on the part of the said respondent, the District and Sessions Judge conducted a preliminary inquiry. Upon consideration of his report, the Standing Committee, consisting of five Judges of the High Court, issued a show cause notice to respondent no. 1. Dissatisfied with his reply, the Standing Committee recommended initiation of departmental proceedings against him and to place him under suspension. The said recommendation was subsequently approved by the Full Court.

4. The Enquiry Officer, framed four charges against the respondent. However, in his final report, he found the following two charges as proved:

"Charge - II

You Sri Pandey Gajendra Prasad while functioning as Railway Judicial Magistrate, Barauni granted bail to accused Ajay Kumar Yadav on 26.11.99 in Rail P.S. Case No.64/99 (G.R. No.2400/99) initially registered under section 47(A) of the Excise Act for illegal possession of several packets of Ganja not-with-standing the fact that recovery of Ganja falls under N.D.P.S. Act and even before the release of Ajay Kumar Yadav a petition was filed on behalf of prosecution on 4.12.99, to add section 17, 18 and 22 of N.D.P.S. Act, but instead of passing any order on the said petition you entertained bail application of another accused namely Ram Kishore Kusbaha and on 9.12.99 allowed him bail and thereafter on 16.12.99 accepted bail bonds of both the accused persons and released them on bail.

The grant of bail in N.D.P.S. Act by a Judicial Magistrate is without jurisdiction raising the presumption of extraneous consideration.

Your aforesaid act of granting bail to accused under

N.D.P.S. Act indicates that the bail was granted for consideration other than Judicial which tantamount to Judicial indiscipline, gross misconduct, improper exercise of Judicial discretion and a conduct unbecoming of a Judicial Officer.

Charge – III

You Sri Pandey Gajendra Prasad while functioning as Railway Judicial Magistrate, Barauni granted bail to one Tara Devi alias Haseena Khatoon in Barauni Rail P.S. Case No.76/98 (G.R. No.2428/98) not-with- standing the fact that her anticipatory bail application bearing Cr. Misc. No.7301/99, which was preferred by her against rejection of her anticipatory bail by the Sessions Judge, Begusarai vide order dated 11.12.99 in A.B.A. No.224/98, was dismissed as withdrawn by this Hon'ble Court on 30.4.99.

The aforesaid act of your granting bail to the said accused being member of a gang of lifters engaged in railway thefts, who committed crime within Barauni Junction and adjoining station and was thus named accused in several cases indicates that the bail was granted for consideration other than judicial which tantamount to Judicial indiscipline, gross misconduct, improper exercise of Judicial discretion and a conduct unbecoming of a Judicial Officer."

5. The Standing Committee accepted the enquiry report and recommended imposition of punishment of dismissal from service on the first respondent. As aforesaid, the recommendation was approved by the Full Court and accepted by the Governor. Consequently, vide a Notification dated 19th June, 2006, issued by the Govt. of Bihar; which was communicated to him on 24th June, 2006; the first respondent was dismissed from service. Aggrieved thereby, he filed a writ petition in the High Court. Quashing the order of dismissal, the Division Bench of the High Court commented on the afore-extracted charges as follows:

In Re: Charge II:

"Undoubtedly, the investigating officer had filed an application on 04.12.1999 to add Sections 17, 18, 22 of the N.D.P.S. Act which the petitioner had directed to be kept on record. In a criminal trial various kinds of petitions are filed which are kept on record. Some are pressed, order passed, others simply remain on record and are never pressed. If the prosecution was so sanguine for the need to prosecute under the N.D.P.S. Act, it was for the Assistant Public Prosecutor to take steps in accordance with law by pressing that application. The petitioner as a Judge was not expected to become the prosecutor also as that was not his role. If no one pressed that application, he was under no compulsion to suo-motu treat it as a case under N.D.P.S. Act to deny liberty of the citizen. The aspect of the petitioner was dealing with the liberty of the citizen in custody based on prosecution materials laid before him when he exercised his judicial discretion, is a matter which has a foremost bearing in our mind. To us, it is primarily for the prosecution to answer that if the F.I.R. was lodged on 02.11.1999, why was it so lax in a matter as serious under the N.D.P.S. Act and why it acted so casually and took as long as 08.02.2000 to submit final form under N.D.P.S. Act. The departmental enquiry report proceeds on a wrong presumption at paragraph 22 that in the facts the petitioner granted bail without having jurisdiction to do so as a Magistrate under the N.D.P.S. Act. If he granted bail on 16.12.1999 and the N.D.P.S. Act came to be added on 08.02.2000, can it be simply logically concluded that it was a deliberate mistake in exercise of judicial discretion unbecoming of a judicial officer based on the records as they stood on the date when he was considering liberty of the citizen.

Paragraph 22 of the report itself states that his error lay in not keeping in mind that a petition was pending for conversion to the N.D.P.S. Act to conclude that he committed a grave error in law by granting bail in a case of allegation of recovery of Ganja and a case under the N.D.P.S. Act. It has to be kept in mind that even in the original allegation it was "Ganja like substance" and not that it was ganja"

In Re: Charge III:

"In so far as charge No.3 is concerned, we have absolutely no hesitation in holding that the petitioner acted in terms of his statutory powers under Section 437(1) proviso Cr.P.C. which makes an exception in favour of women. The women accused was granted bail after 15 days of custody. She was not named and there was no recovery from her in an allegation of luggage lifting on the platform. If the male co accused had been granted bail after seven months of custody, the distinction to us being too apparent, can it be said that the exercise of discretion to grant bail to a women in exercise of powers under the Code of Criminal Procedure amounted to conduct unbecoming of a judicial officer and a gross misconduct only because she had surrendered beyond time observed by the High Court."

On the first respondent's general reputation, the High Court thus observed:

"We have examined the judicial records of the officer. In a case of grant of bail for extraneous consideration, there may not be direct and tangible evidence available, therefore impressions have to be gathered from the surrounding circumstances. We find it difficult to arrive at any such conclusion against the petitioner. However, in order to fortify our thinking, we also proceed to examine his annual confidential report more particularly with regard to the column for judicial reputation for honesty and integrity. The consistent remarks are that "his reputation is good", "yes", "judicial reputation good", "yes"."

Hence the present appeal by the High Court. The State of Bihar and its twofunctionaries have been impleaded as respondent nos.2 to 4 respectively.

6. Mr. Pravin H. Parekh, learned senior counsel appearing for the appellant, submitted that the case of first respondent having been examined first by the Standing Committee, constituted by the Chief Justice and then approved by the Full Court after due deliberations, the Division Bench of the High Court ought to have refrained from interfering with the order of punishment, particularly when the question of malafides on the part of the Full Court was not raised by the first respondent. It was argued that the Division Bench has misdirected itself in examining the findings of the enquiry officer as if it was sitting in appeal and substituted its own findings and opinion thereon, which is beyond the purview of judicial review under Article 226 of the Constitution. In support, reliance was placed on the decision of this Court in *B.C. Chaturvedi Vs. Union of India & Ors.*[1], wherein it was held that where the findings of the disciplinary or appellate authority are based on some evidence, the court cannot re- appreciate the evidence and substitute them with its own findings. It was stressed that the judicial service not being a service in the sense of an employment, as it is commonly understood; as the judicial officers exercise sovereign judicial function; the standard principles of judicial review of an administrative action cannot be applied for examining the conduct of a judicial officer.

7. Per Contra, Mr. Subhro Sanyal, learned counsel appearing on behalf of the first respondent, supporting the impugned judgment submitted that the charges framed against the first respondent included those cases wherein the judicial discretion vested in a judicial officer had been exercised and the exercise of such power by the first respondent could not be said to be an act tantamounting to judicial indiscipline or misconduct. It was submitted that in the absence of any adverse

1. (1995) 6 SCC 749.

comments in the Annual Confidential Reports ("ACR"), the High Court was justified in setting aside the order of punishment of dismissal of the first respondent from service.

8. Having considered the matter in the light of the entire material placed before us by the learned counsel, including the personal file of the first respondent and the settled position of law on the point, we are of the opinion that the Division Bench exceeded its jurisdiction by interfering with the unanimous decision of the High Court on the administrative side.

9. Article 235 of the Constitution of India not only vests total and absolute control over the subordinate courts in the High Courts but also enjoins a constitutional duty upon them to keep a constant vigil on the day to day functioning of these courts. There is no gainsaying that while it is imperative for the High Court to protect honest and upright judicial officers against motivated and concocted allegations, it is equally necessary for the High Court not to ignore or condone any dishonest deed on the part of any judicial officer. It needs little emphasis that the subordinate judiciary is the kingpin in the hierarchical system of administration of justice. It is the trial judge, who comes in contact with the litigant during the day to day proceedings in the court and, therefore, a heavy responsibility lies on him to build a solemn unpolluted atmosphere in the dispensation of justice which is an essential and inevitable feature in a civilized democratic society. In High Court of Judicature at *Bombay Vs. Shashikant S. Patil & Anr.*[2], highlighting a marked and significant difference between a judicial service and other services, speaking for a bench of three Judges, K.T. Thomas, J. observed as follows:

> "23. The Judges, at whatever level they may be, represent the State and its authority, unlike the bureaucracy or the members of the other service. Judicial service is not merely an employment nor the Judges merely employees. They

2. (2000) 1 SCC 416.

exercise sovereign judicial power. They are holders of public offices of great trust and responsibility. If a judicial officer "tips the scales of justice its rippling effect would be disastrous and deleterious". A dishonest judicial personage is an oxymoron."

In short, it is the constitutional mandate that every High Court must ensure that the subordinate judiciary functions within its domain and administers justice according to law, uninfluenced by any extraneous considerations. The members of the subordinate judiciary are not only under the control but also under the care and custody of the High Court. Undoubtedly, all the Judges of the High Court, collectively and individually, share that responsibility.

10. Bearing in mind the scope of Article 235 of the Constitution, we may now advert to the facts at hand. As aforesaid, according to the report of the enquiry officer only charges nos.II and III, as extracted above, stood proved against respondent no.1. It is manifest that in both cases, the charge is related to the grant of bail by respondent no.1. While it is true and relevant to note that 'grant of bail' is an exercise of judicial discretion vested in a judicial officer to be exercised depending on the facts and circumstances before him, yet it is equally important that exercise of that discretion must be judicious having regard to all relevant facts and circumstances and not as a matter of course. In the instant case, the findings of the enquiry officer in respect of the two charges were:

i) In Re: Charge No. II - That respondent no.1 granted bail to the accused persons in a case falling under the ambit of the N.D.P.S. Act. The recovery of ganja of any quantity falls within the purview of the N.D.P.S. Act triable by a Special Court. As a result, no sooner than 4th December 1999, when an application was filed by the prosecution before respondent no.1 to add certain provisions of the N.D.P.S. Act in that particular case, he was divested of the jurisdiction to deal with the case and thus, ought to have transferred the same to a court of

competent jurisdiction, which was not done. It is pertinent to note here that in the reply to the show cause notice issued to him, the first respondent acquiesced that he was aware of the application filed to bring the case within the purview of the N.D.P.S. Act. However, he still chose to entertain the bail application of the second accused on 8th December, 1999, which clearly implies that he voluntarily exercised his discretion in granting bail in a case which was in the realm of the N.D.P.S. Act and wherein he lacked jurisdiction to deal with the matter.

ii) In Re : Charge No. III - That the first respondent granted bail to Tara Devi alias Haseena Khatoon, who was a member of a gang of lifters engaged in railway thefts. Admittedly, anticipatory bail application preferred by her was rejected by the Sessions Judge, Begusarai and was dismissed as withdrawn by the High Court vide order dated 30th April, 1999, with an observation that if the accused surrenders within four weeks, her bail application would be considered on its own merit. It is pertinent to note that on 6th March, 1999, she was declared an absconder and a permanent warrant of her arrest was also issued by respondent no.1 himself. However, when she was arrested by the police in connection with another case (being Barauni Rail P.S. Case No. 51/2000) she was granted bail by respondent no.1, on the ground that being a woman she was entitled to the benefit of the exception under Proviso to Section 437(1) of the Code of Criminal Procedure, 1973. It is therefore clear that respondent no.1, failed to take into consideration the fact that accused was a proclaimed absconder, had disobeyed the direction of the High Court and had failed to surrender herself within the time frame granted to her.

11. According to the Division Bench, both the orders by the first respondent being purely discretionary in terms of his statutory powers, did not warrant any disciplinary action against him on the ground of judicial indiscretion or misconduct. We are constrained to observe that the Division Bench has failed

to bear in mind the parameters laid down in a catena of decisions of this Court while dealing with the collective decision of the Full Court on the administrative side. It is evident that the Division Bench dealt with the matter as if it was exercising appellate powers over the decision of a subordinate court, granting or refusing bail, and in the process, overstepped its jurisdiction under Article 226 of the Constitution.

12. It is trite that the scope of judicial review, under Article 226 of the Constitution, of an order of punishment passed in departmental proceedings, is extremely limited. While exercising such jurisdiction, interference with the decision of the departmental authorities is permitted, if such authority has held the proceedings in violation of the principles of natural justice or in violation of statutory regulations prescribing the mode of such enquiry or if the decision of the authority is vitiated by consideration extraneous to the evidence on the merits of the case, or if the conclusion reached by the authority, on the face of it, is wholly arbitrary or capricious that no reasonable person could have arrived at such a conclusion, or grounds very similar to the above. (See: *Shashikant S. Patil & Anr.* (supra)).

13. Explaining the scope of jurisdiction under Article 226 of the Constitution, in *State of Andhra Pradesh Vs. S. Sree Rama Rao*[3], this Court made the following observations:

> "The High Court is not constituted in a proceeding under Article 226 of the Constitution a court of appeal over the decision of the authorities holding a departmental enquiry against a public servant: it is concerned to determine whether the enquiry is held by an authority competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Where there is some evidence, which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the

3. (1964) 3 SCR 25.

> conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court in a petition for a writ under Article 226 to review the evidence and to arrive at an independent finding on the evidence."

14. Elaborating on the scope of judicial review of an assessment of the conduct of a judicial officer by a Committee, approved by the Full Court, in *Syed T.A. Naqshbandi & Ors. Vs. State of Jammu & Kashmir & Ors.*[4] this Court noted as follows:

> "As has often been reiterated by this Court, judicial review is permissible only to the extent of finding whether the process in reaching the decision has been observed correctly and not the decision itself, as such. Critical or independent analysis or appraisal of the materials by the courts exercising powers of judicial review unlike the case of an appellate court, would neither be permissible nor conducive to the interests of either the officers concerned or the system and institutions of administration of justice with which we are concerned in this case, by going into the correctness as such of ACRs or the assessment made by the Committee and approval accorded by the Full Court of the High Court."

15. In *Rajendra Singh Verma (Dead) Through LRs. & Ors. Vs. LieutenantGovernor (NCT of Delhi) & Ors.*[5], reiterating the principle laid down in *Shashikant S. Patil & Anr.* (supra), this Court observed as follows:

> "In case where the Full Court of the High Court recommends compulsory retirement of an officer, the High Court on the judicial side has to exercise great caution and circumspection in setting aside that order because it is a complement of all the Judges of the High Court who go into the question and it is possible that in all cases

4. (2003) 9 SCC 592.

5. (2011) 10 SCC 1.

evidence would not be forthcoming about integrity doubtful of a judicial officer."

It was further observed that:

"If that authority bona fide forms an opinion that the integrity of a particular officer is doubtful, the correctness of that opinion cannot be challenged before courts. When such a constitutional function is exercised on the administrative side of the High Court, any [pic]judicial review thereon should be made only with great care and circumspection and it must be confined strictly to the parameters set by this Court in several reported decisions. When the appropriate authority forms bona fide opinion that compulsory retirement of a judicial officer is in public interest, the writ court under Article 226 or this Court under Article 32 would not interfere with the order."

16. In the present case, the recommendation of the Standing Committee to dismiss the first respondent from service was based on the findings in the enquiry report submitted by the enquiry officer pursuant to the departmental enquiry; his reply to the show cause notice; his ACR and other materials placed before it. The recommendation of the Standing Committee was approved and ratified by the Full Court. There is nothing on record to even remotely suggest that the evaluation made, firstly by the Standing Committee and then by the Full Court, was so arbitrary, capricious or so irrational so as to shock the conscience of the Division Bench to justify its interference with the unanimous opinion of the Full Court. As regards the observation of the Division Bench on the reputation of the first respondent based on his ACRs, it would suffice to note that apart from the fact that an ACR does not necessarily project the overall profile of a judicial officer, the entire personal file of the respondent was before the Full Court when a conscious unanimous decision was taken to award the punishment of his dismissal from service. It is also well settled

that in cases of such assessment, evaluation and formulation of opinion, a vast range of multiple factors play a vital and important role and no single factor should be allowed to be blown out of proportion either to decry or deify issues to be resolved or claims sought to be considered or asserted. In the very nature of such things, it would be difficult, rather almost impossible to subject such an exercise undertaken by the Full Court, to judicial review, save and except in an extra-ordinary case when the court is convinced that some exceptional thing which ought not to have taken place has really happened and not merely because there could be another possible view or there is some grievance with the exercise undertaken by the Committee/Full Court. [(See: *Syed T.A. Naqshbandi* (supra)].

17. Having regard to the material on record, it cannot be said that the evaluation of the conduct of the first respondent by the Standing Committee and the Full Court was so arbitrary, capricious or irrational that it warranted interference by the Division Bench. Thus, the inevitable conclusion is that the Division Bench clearly exceeded its jurisdiction by interfering with the decision of the Full Court.

18. However, before parting with the judgment, we deem it necessary to make a mention about the recording of the ACRs of judicial officers. We feel that the present system of recording the ACRs leaves much to be desired and needs to be revamped. Experience has shown that it is deficient in several ways, being not comprehensive enough to truly reflect the level of work, conduct and performance of each individual on one hand and unable to check subjectivity on the other. This undoubtedly breeds discontent in a section of the judicial service besides eroding proper and effective superintendence and control of the High Court over subordinate judiciary. The process of evaluation of a judicial officer is intended to contain a balanced information about his performance during the entire evaluation period, but it has been noticed that many a times, the ACRs are recorded casually in a hurry after a long lapse of

time (in some cases even after the expiry of one year from the period to which it relates), indicating only the grading in the final column. It needs no elaboration that such hurried assessment cannot but, be either on the basis of the assessment/grading of the preceding year(s) or on personal subjective views of the Inspecting Judge(s), which is unfair to the judicial officer. Undoubtedly, ACRs play a vital and significant role in the assessment, evaluation and formulation of opinion on the profile of a judicial officer, particularly, in matters relating to disciplinary action against a judicial officer. The ACRs of such officer hold supreme importance in ascertaining his conduct, and therefore, the same have to be reported carefully with due diligence and caution. We feel that there is an urgent need for reforms on this subject, not only to bring about uniformity but also to infuse objectivity and standardisation.

19. In *Bishwanath Prasad Singh Vs. State of Bihar & Ors.*[6] and High Court of *Punjab & Haryana, Through R.G. Vs. Ishwar Chand Jain & Anr.*[7], highlighting the importance of ACRs, this Court had observed that the power to make such entries, which have the potential for shaping the future career of a subordinate officer, casts an obligation on the High Courts to keep a watch and vigil over the performance of the members of the subordinate judiciary. This Court also stressed on the need for the assessment to be made as an ongoing process continued round the year and the record to be made in an objective manner. We are constrained to note that these observations have not yet engaged the attention of most of the High Courts in the country.

20. In the final analysis, for the aforesaid reasons, we allow the appeal, set aside the impugned judgment of the Division Bench and uphold the validity of Notification dated 19th June 2006, dismissing the first respondent from judicial service. There will however, be no order as to costs.

K.K.T. Appeal allowed.

6. (2001) 2 SCC 305.

7. (1999) 4 SCC 579.

MAHARASHTRA STATE BOARD OF WAKFS

v.

SHAIKH YUSUF BHAI CHAWLA & ORS.

(Special Leave Petition (C) Nos.31288-31290 of 2011)

MAY 11, 2012

[ALTAMAS KABIR, J. CHELAMESWAR AND RANJAN GOGOI, JJ.]

WAKF ACT, 1995: s.112 - Writ petitions before High Court challenging formation of Maharashtra State Board of Wakfs and notification issued by Board publishing list of Wakfs in the State of Maharashtra - High Court allowed the writ petitions with direction that until a new Board is incorporated under the 1995 Act and the Board started functioning in accordance with the 1995 Act, the provisions of the Bombay Public Trusts Act would apply to such Muslim Public Trusts as are registered under the Bombay Public Trusts Act and the Charity Commissioner would continue to administer the Muslim Wakf properties - Further, State Government was given liberty to take steps to make such interim arrangements to monitor and supervise the Wakf properties and other related aspects under the 1995 Act - Special leave petitions - Whether High Court has jurisdiction to make such orders in the writ jurisdiction and particularly to vest the management of all Wakf properties in the Charity Commissioner in view of the provisions of s.112 and in particular sub-section (3) thereof of the 1995 Act - Held: The Wakf Board was constituted under the provisions of the 1995 Act, but not at full strength as envisaged in ss.13 and 14 of the said Act - Whatever may be the reason, the factual position is that there is no properly constituted Board of Wakfs functioning in the State of Maharashtra - At the same time, the administration of Wakfs in Maharashtra cannot be kept in vacuum - Although, it cannot be said that the Bombay Public Trusts Act was a corresponding law and, therefore,

stood repealed, it cannot also be said that the same would be applicable to Wakf properties which were not in the nature of public charities - There is a vast difference between Muslim Wakfs and Trusts created by Muslims which was overlooked by High Court and orders were passed by High Court without taking into consideration the fact that the Charity Commissioner would not ordinarily have any jurisdiction to manage the Wakf properties - In these circumstances, it would be in the interest of all concerned to maintain the status quo and to restrain all those in management of the Wakf properties from alienating and/or encumbering the Wakf properties during the pendency of the proceedings before this Court - Directions passed that in relation to Wakf properties, as distinct from Trusts created by Muslims, all concerned, including the Charity Commissioner shall not permit any of the persons in management of such Wakf properties to either encumber or alienate any of the properties under their management, till a decision is rendered in the pending special leave petitions - Bombay Public Trusts Act, 1950.

CIVIL APPELLATE JURISDICTION : SLP (C) No. 31288-31290 of 2011 etc.

From the Judgment & Order dated 21.09.2011 of the High Court of Judicature at Bomaby in Writ Petition No. 2906 of 2004, 899 and 357 of 2011.

WITH

SLP (C) Nos. 32129-32131, 32636, 35196 and 35198 of 2011.

R.F. Nariman, S.G., Ranjit Kumar, K.K. Venugopal, Vinod A. Bobde, P.P. Rao, Yusuf Hatim Muchhala, Dr. Rajeev Dhawan, Sudhanshu S. Choudhari, Javed Shaikh, Sunil Upadhyaya, Sanjay V. Kharde, Shivaji M. Jadhav, Sachin J. Patil, Asha Gopalan Nair, Javed R. Shaikh, Mohd. Irshad Hanif, Mohd. Adeel Siddiqui, Shakil Ahmed Syed, Shuaib-uddin, Mohd. Parvez Dabas, Moonis Abbasi, Huzefa A. Ahmadi, Ejaz

Maqbool, Sakshi Banga, Mrigank Prabhakar, Apeksha Sharan, Garima Kapoor, Sagheer A. Khan, Husnain Kazi, Kavin Gulati, Rashmi Singh, Anupam Mishra, T. Mahipal, Aman Vachhler, Ashutosh Dubey, Dhiraj, Love K. Sharma, Vriti Anand, P.N. Puri, Praveen Kumar, Vinay Navare, Abha R. Sharma, Sana Yusuf Baugwala, Chinmoy Khaladkar, V.P. Dube, D.P. Sali, Vimal Chandra S. Dave for the appearing parties.

The order of the Court was delivered by

ALTAMAS KABIR, J. 1. These several Special Leave Petitions have been filed by the State of Maharashtra and other parties. While Special Leave Petition (C) Nos.31288-31290, Special Leave Petition (C) Nos.32129-32131 and Special Leave Petition (C) No.32636, all of 2011, have been fled by the Maharashtra State Board of Wakfs, Special Leave Petition (C) Nos.35196 and 35198 of 2011 have been filed by the Jamait Educational and Welfare Muslim Minority Education Society and Maharashtra Muslim Lawyers' Forum.

2. The Special Leave Petitions are directed against the judgment and final order dated 21st September, 2011, passed by the Bombay High Court in Writ Petition No.2906 of 2004, Writ Petition No.357 of 2011 and Writ Petition (L) No.899 of 2011. The impugned judgment of the High Court in the aforesaid Writ Petitions is the outcome of the challenge to the formation of the Maharashtra State Board of Wakfs. As noticed by the High Court, the subject matter of all the Writ Petitions, and thereby of the Special Leave Petitions, relates to the challenge to the incorporation of the Maharashtra State Board of Wakfs and its impact upon the Wakfs created by persons professing Islam, but belonging to different sects.

3. The Petitioners in Writ Petition No.2906 of 2004 are Muslims belonging to the Shia Fatemi Ismaili Tyebia Sect of Islam and are Shia Muslims. The Petitioner Nos.1 to 3 in the said Writ Petition are trustees of "Sir Adamji Peerbhoy Sanatorium" established by a Scheme settled by the Bombay

High Court by an order dated 16th June, 1931 in Suit No.1560 of 1927. The said Trust is registered as a Public Trust under the Bombay Public Trusts Act. The Petitioner Nos.4 and 5 are trustees of the "Anjuman-i-Null-Bazaar Chhabdi Bazar Niaz Hussein Charitable Trust", which is also registered as a Public Trust under the Bombay Trusts Act. The Petitioners in Writ Petition No.899 of 2011 are Dawoodi Bohra Muslims and claim to be Trustees of Noorbhoy Jeewanji Morishwalla Charity Trusts registered under the Bombay Public Trusts Act. The Petitioners in Writ Petition (L) No.357 of 2011 are Muslims belonging to the Shia Fatemi Ismaili Tyebia sect and are also trustees of Sir Adamji Peerbhoy Sanatorium, referred to hereinabove. The Petitioner in SLP (C) No.35196 of 2011 is a society registered under the Societies Registration Act, 1860. All the members of the Trust profess Islam and are persons interested in the affairs of the Wakf set in question by virtue of the provisions of Section 3(k) of the Wakf Act, 1995. Similarly, the Petitioners in SLP(C) No.35198 of 2011 are a group of Muslim lawyers who have formed a Forum and are also persons interested in the management of Wakf properties in terms of Section 3(k) of the Wakf Act, 1995.

4. The grievance of the Writ Petitioners in these five Writ Petitions is the same. The Petitioners in Writ Petition No.2906 of 2004 have challenged the notification dated 4th January, 2002, issued by the Government of Maharashtra and have also sought for a direction to the State Government to conduct a fresh survey of Wakfs in the State of Maharashtra. Their further challenge is to notification dated 13th November, 2003, issued by the Maharashtra State Board of Wakfs publishing the list of Wakfs in the State of Maharashtra.

5. In Writ Petition No.899 of 2001, the Petitioners have challenged the Circular dated 24th July, 2002, issued by the Charity Commissioner of the State of Maharashtra stating therein that in view of the provisions of Section 43 of the Wakf Act, 1995, the Wakfs which were registered as Public Trusts

would cease to be governed by the provisions of the Public Trust Act. It is the case of the Writ Petitioners that because the establishment of the Maharashtra State Board of Wakfs by the notification dated 4th January, 2002, was itself invalid, they continued to be governed by the provisions of the Bombay Public Trusts Act.

6. The Petitioners in Writ Petition No.357 of 2011, have challenged the notification issued by the State of Maharashtra on 20th October, 2010, for re-survey of the Wakfs in the State of Maharashtra. They also sought a direction that the Charity Commissioner should continue to supervise the working of the Trusts of which they are trustees.

7. After the Wakf Act, 1995, which came into force on 1st January, 1996, was enacted, the State Government issued a notification on 1st December, 1997, in exercise of its powers under Sub-Section (1) of Section 4 of the Wakf Act, 1995, whereby the State Government appointed :-

(a) Settlement Commissioner and Director of Land Records, Maharashtra State, Pune, to be Survey Commissioner of Wakfs; and

(b) Additional Commissioners of Konkan, Nashik, Pune, Nagpur, Amravati and Aurangabad Revenue Divisions to be Additional Survey Commissioners, for the purpose of making a survey of Wakfs existing on the 1st day of January, 1996 in the State of Maharashtra.

8. On 4th January, 2002, the Government of Maharashtra, by a notification of even date, in exercise of powers conferred by Section 14 of the Wakf Act, 1995, established a Board by the name of "The Maharashtra State Board of Wakfs" with its headquarters at Aurangabad. The Government nominated four persons to be members of the State Board, namely :-

(a) Shri Khan Yusuf Sarwar, Member of Parliament

(Rajya Sabha);

(b) Smt. Shabana Azmi, Member of Parliament (Rajya Sabha);

(c) Shri Harun Aadam Solkar, Muslim Ex-member of the Bar Council of the State; and

(d) Shri Chand Pasha Inamdar, Member of Muslim Organisation;

Thus, by the aforesaid Notification, a Wakf Board was established for the entire State of Maharashtra with its headquarters at Aurangabad and four persons were named in the Notification as members of the said Board.

9. Pursuant to the notification dated 1st December, 1997, the officers appointed to conduct the survey, submitted a report to the State Government on 31st January, 2002. Thereafter, other members were appointed to the Wakf Board by different notifications. On 24th July, 2003, the Charity Commissioner of the State of Maharashtra issued a circular directing his office not to exercise powers under the Bombay Public Trusts Act or to deal with any of the Muslim Public Trusts. The said circular mentioned that according to Section 43 of the Wakf Act, 1995, a Wakf registered as a Public Trust should not be administered or governed under the Bombay Public Trusts Act. Several Writ Petitions were filed challenging the establishment of the Board and also challenging its constitution and appointment of various persons as its members. Objections were also filed in Court challenging the circular issued by the Charity Commissioner. On 13th November, 2003, the Wakf Board published a list of Wakfs treating Muslim Public Trusts in Maharashtra and Suburban districts of Maharashtra as Wakfs.

10. Several Writ Petitions were filed challenging the list of Wakfs prepared by the Wakf Board which came to be heard by the Bombay High Court, which set aside the notification

dated 4th January, 2002, as also the list of Wakfs prepared and published by the Maharashtra State Wakf Board on 13th November, 2003. The Survey Officers appointed by notification dated 20th October, 2010, were directed to take into consideration representations, if any, made by the Petitioners and other similarly situated persons connected with the Muslim Wakfs, including the list prepared by the Committee constituted by the State Government under the chairmanship of the Charity Commissioner. The Survey Officers were also given the option to take into consideration any list of Wakfs, if prepared under the Act of 1954. The crucial direction which appears to have adversely affected the special leave petitioners is the direction that until a new Board or Boards was incorporated under the Wakf Act, 1995, and the Board started functioning in accordance with the provisions of the Wakf Act, the provisions of the Bombay Public Trusts Act would apply to such Muslim Public Trusts as are registered under the Bombay Public Trusts Act. The High Court made it clear that although the notification dated 4th January, 2002, had been set aside, none of the actions taken or orders passed by the Wakf Board constituted by the notification dated 4th January, 2002, had been challenged or set aside by virtue of the said order. By the impugned order, the State of Maharashtra was given the liberty to take steps to make such interim arrangements, as may be advised, to monitor and supervise the Wakf properties and other related aspects under the Wakf Act. It was also stipulated that the decision and/or action already taken, including the pending disputes and litigations would be governed by the Wakf Act, 1995.

11. As far as Writ Petition (L) No.357 of 2011 is concerned, the Division Bench clarified that by the judgment in question it had not considered the reliefs claimed with regard to the list of Wakfs dated 13th December, 2004. Accordingly, the Petitioners were given the liberty either to file a fresh petition claiming such relief, or to claim the said relief in other pending

matters.

12. It is these directions issued by the Division Bench of the Bombay High Court which have led to the filing of the present Special Leave Petitions.

13. One of the facets of the dispute, which was thrown up during the hearing regarding continuance of the interim order in a modified form is the creation of Wakfs under the Muslim law and the creation of Trusts by persons professing the Muslim faith, which were not in the nature of Wakfs, but in the nature of English Trusts.

14. Prior to the enactment of the Wakf Act, 1995, the Central Wakf Act, 1954, was in force, but did not apply to some of the States which had Special Acts of their own, such as Uttar Pradesh, West Bengal, parts of Gujarat and Maharashtra and some of the North-Eastern States. The said States continued to be governed by their own Special statutes, which provided for the administration of Wakfs in their respective States. To do away with the disparity of the law relating to Wakfs in different States, the Central Government enacted a uniform law to govern all Wakfs in the country, which led to the enactment of the Wakf Act, 1995, whereby all other laws in force in any stage corresponding to the said Act, stood repealed.

15. The judgment and order of the High Court having been challenged in these various Special Leave Petitions, on 29th November, 2011, when the matters were taken up, we had directed notices to issue in the different Special Leave Petitions and in the meantime directed that the stay granted by the High Court on 21st September, 2011, in respect of its judgment, would remain operative.

16. Thereafter, these matters have been taken up to consider whether such interim order of stay should be allowed to continue, but in a modified manner on account of the fact that by staying the operation of the final judgment, the interim orders

passed by the High Court were revived, thereby rendering the stay order meaningless.

17. While considering the three sets of Special Leave Petitions, Special Leave Petition (Civil) Nos.32129-32131 of 2011, filed by the State of Maharashtra, were taken up for consideration first.

18. Appearing for the Petitioner State of Maharashtra, Mr. Rohington Nariman, learned Solicitor General for India, submitted that the only thing which was required to be considered for a decision as to whether the interim order shall continue, was whether a prima facie case had been made out for grant of interim injunction to preserve the status quo ante which prevailed before the coming into operation of the Wakf Act, 1995. Mr. Nariman urged that the provisions of the Wakf Act, 1954, and the Bombay Public Trusts Act, in relation to Wakf properties, stood repealed by virtue of Section 112 of the 1995 Act. Mr. Nariman submitted that Section 112 of the 1995 Act, which dealt with repeal and savings, clearly indicated that if immediately before the commencement of the Act in any State, there was in force in that State any law which corresponded with the 1995 Act, that corresponding law would stand repealed. The learned A.S.G. submitted that in the instant case, the corresponding law to the Wakf Act, 1995, when it came into force, was the Maharashtra Wakf Act and the provisions of the Bombay Public Trusts Act which became ineffective on account of the provisions of Section 112(3) of the 1995 Act. With the repeal of the said two provisions, it was for the Board of Wakfs established under the 1995 Act to continue in management of the Wakf properties and the judgment of the High Court setting aside the establishment of Board could not resurrect the authority of the Charity Commissioner over such properties. In fact, after the promulgation of the Wakf Act, 1995, the Charity Commissioner ceased to have any control over Muslim Wakfs, even if they had been registered with the Charity Commissioner as Public Trusts. Mr. Nariman submitted that at

this interim stage only a prima facie view has to be taken as to whether the interim order passed by this Court was to be continued, pending the hearing of the Special Leave Petitions.

19. On the other hand, Dr. Rajiv Dhawan, Senior Advocate, and other learned counsel who appeared for some of the Respondents, urged that the learned Solicitor General had not made any submission with regard to the balance of convenience and inconvenience and only confined himself to the question of whether a prima facie case has been made out for continuance of such interim injunction. Learned counsel submitted that the matter had already been dealt with earlier and the order which was passed on 30th November, 2011, continuing the stay granted by the Bombay High Court on 21st September, 2011, was based on consent. Furthermore, only three of the parties had appeared before this Court. It was further submitted that although there were several sales transactions involved which were to be considered by the Charity Commissioner, only three of the parties were before the Court and the parties which were also likely to be affected by any order passed in these matters should also be given an opportunity of hearing, particularly because the prayer which had been asked for by way of interim relief was in fact the main relief itself. It was urged that till 4th January, 2002, when the Board came into existence under the 1995 Act, there was no Wakf Board and even the Board created at a later stage was wholly illegal.

20. The main thrust of the submissions made on behalf of the respondents was that the circular issued by the Charity Commissioner relinquishing its authority over the Trusts created by Muslims, did not attract the provisions of the Wakf Act, 1995, which dealt with Wakf properties only and was not, therefore, entrusted with the jurisdiction over such Wakfs. It was also submitted that the Bifurcation Committee which had been created for the purpose of separating Wakfs from Trusts and Shia and Sunni Wakfs, was an extra-legal Committee which

was not contemplated under the provisions of the Wakf Act. According to Dr. Dhawan, the classification of Wakfs as "Shia" or "Sunni" or any dispute regarding whether a Wakf is existing or not, could only be decided by the Wakf Tribunal under Sections 6 and 7 or by the Wakf Board under Section 40 of the Wakf Act, 1995.

21. On 4th September, 2008, the State of Maharashtra issued a notice appointing 7 members to the Board, but the said notification was struck down by the Bombay High Court and the strength of the Board of Wakfs was reduced to four members. This was followed by a notification issued by the Wakf Board on 23rd February, 2008, cancelling its corrigendum notification dated 5th May, 2005, seeking to amend the list of Wakfs dated 13th November, 2003, thereby retaining its control over the said Wakf estates indicated in the first list published earlier. Dr. Dhawan urged that once the order passed was agreed to by the parties, there could be no further question of passing any interim order to stay the effect of the order of the High Court passed on 21st September, 2011.

22. Dr. Dhawan urged that since the survey of the Wakfs and the various denominations in respect thereof, was yet to be completed, and even the Board of Wakfs had not been properly constituted in accordance with Sections 13 and 14 of the 1995 Act, the provisions of Section 22 of the Act, which provides that no act or proceeding of the Board shall be invalid by reason only of the existence of any vacancy amongst its members or any defect in the constitution thereof, would not be attracted. Learned counsel submitted that Section 22 of the Act would come into operation only after the Board had been duly constituted but not when the Board was yet to be constituted. It was submitted that since the Wakf Board had not been constituted fully, the list of Wakfs published by it cannot be accepted or relied upon. It was submitted that the interim order passed by the High Court did not require any interference in these proceedings even at the interim stage.

23. Mr. Salve, learned senior counsel appearing for the Respondents Nos. 1,2 and 3 in SLP (C) No. 31288 of 2011, submitted that during the pendency of the Special Leave Petition in this Court, Wakf properties should not be permitted to be alienated by either the Board of Wakfs or the Charity Commissioner, though, as far as Public Trusts are concerned, they should not be treated as Wakfs, since the genesis of their existence was not under the law relating to Wakfs, but as English Trusts which are governed by the Indian Trusts Act.

24. Referring to paragraph 13 of the Special Leave Petition in SLP(C)Nos.31288-31290 of 2011, Mr. Salve submitted that the power to establish a Board of Wakfs was vested in the State Government under Section 13 of the Wakf Act, 1995 and Sub-Section (2) thereof lays down the manner in which the power is to be exercised by the State Government. Mr. Salve pointed out that this provision provided for the appointment of two Boards, one, a Sunni Board and the other, a Shia Board, depending on the number of Wakfs belonging to the two denominations. Accordingly, one would have to wait till a survey, as contemplated under Section 4 of the Wakf Act, 1995, was completed. Mr. Salve submitted that it would, therefore, be best to preserve the status quo until a final decision was taken in the Special Leave proceedings.

25. Mr. Y.H. Muchhala, learned Senior Advocate, who appeared for Anjuman-i-Islam, adopted the submissions made by Mr. P.P. Rao, Dr. Dhawan and Mr. Salve, but submitted that in the absence of a validly constituted Board of Wakfs, the Wakf Act, 1995, could not be said to have come into force in Maharashtra which continued to be governed by the State Government. Mr. Muchhala urged that for the purpose of management of the Wakfs within the State of Maharashtra, the system of management prevailing prior to the enactment of the 1995 Act would continue to remain in operation.

26. Having considered the submissions made on behalf of the respective parties, we are restricting ourselves at this

interim stage to the broad outlines of the case made out by the respective parties and whether, in the background of the facts disclosed, the stay granted by the Bombay High Court on 21st September, 2011 should continue in a modified form.

27. Broadly speaking, the grievance of the Petitioners in these Special Leave Petitions is with regard to the vesting of powers of management and supervision of Muslim Wakf estates in Maharashtra in the Charity Commissioner by virtue of the impugned order of the High Court. Undoubtedly, the Wakf Board was constituted under the provisions of the Wakf Act, 1995, but not at full strength as envisaged in Sections 13 and 14 of the aforesaid Act. Whatever may be the reason, the factual position is that today there is no properly constituted Board of Wakfs functioning in the State of Maharashtra. At the same time, the administration of Wakfs in Maharashtra cannot be kept in vacuum. The Bombay High Court did what it thought best to ensure that there was no vacuum in the administration of Wakf properties in Maharashtra by directing that till such time the Board was properly constituted, the Charity Commissioner would continue to administer the Muslim Wakf properties, including English Trust properties, which had already been registered as Trust properties with the Charity Commissioner under the Bombay Public Trusts Act. As a corollary, the list of Wakfs published by the truncated Board of Wakfs was also set aside by the Bombay High Court. The question is whether the Bombay High Court had the jurisdiction to make such orders in the writ jurisdiction and particularly to vest the management of all Wakf properties in the Charity Commissioner in view of the provisions of Section 112 and in particular Sub-Section (3) thereof of the Wakf Act, 1995.

28. Section 112 concerns repeal and savings. By virtue of the said provision, the 1954 Wakf Act and the 1984 Wakf (Amendment) Act were repealed. Sub-Section (3) specifically provides as follows :-

"112. Repeal and Savings. .....

(1) xxx xxx xxx

(2) xxx xxx xxx

(3) If immediately before the commencement of this Act, in any State, there is in force in that State, any law which corresponds to this Act, that corresponding law shall stand repealed."

Although, it cannot be said that the Bombay Public Trusts Act was a corresponding law and, therefore, stood repealed, it cannot also be said that the same would be applicable to Wakf properties which were not in the nature of public charities. There is a vast difference between Muslim Wakfs and Trusts created by Muslims. The basic difference is that Wakf properties are dedicated to God and the "Wakif" or dedicator, does not retain any title over the Wakf properties. As far as Trusts are concerned, the properties are not vested in God. Some of the objects of such Trusts are for running charitable organisations such as hospitals, shelter homes, orphanages and charitable dispensaries, which acts, though recognized as pious, do not divest the author of the Trust from the title of the properties in the Trust, unless he relinquishes such title in favour of the Trust or the Trustees. At times, the dividing line between Public Trusts and Wakfs may be thin, but the main factor always is that while Wakf properties vest in God Almighty, the Trust properties do not vest in God and the trustees in terms of Deed of Trust are entitled to deal with the same for the benefit of the Trust and its beneficiaries.

29. In the present case, the difference between Trusts and Wakfs appear to have been overlooked and the High Court has passed orders without taking into consideration the fact that the Charity Commissioner would not ordinarily have any jurisdiction to manage the Wakf properties.

30. In these circumstances, in our view, it would be in the interest of all concerned to maintain the status quo and to restrain all those in management of the Wakf properties from alienating and/or encumbering the Wakf properties during the pendency of the proceedings before this Court. The order of the High Court staying the operation of its judgment has led to the revival of interim orders which have rendered such stay otiose. The said order of stay cannot also be continued during the pendency of these proceedings in its present form.

31. Accordingly, at this stage, we direct that in relation to Wakf properties, as distinct from Trusts created by Muslims, all concerned, including the Charity Commissioner, Mumbai, shall not permit any of the persons in management of such Wakf properties to either encumber or alienate any of the properties under their management, till a decision is rendered in the pending Special Leave Petitions.

D.G. Matter pending.

CHANDRA KUMAR CHOPRA
v.
UNION OF INDIA AND OTHERS
(Criminal Appeal No. 665 of 2002)

MAY 11, 2012

[P. SATHASIVAM AND DIPAK MISRA, JJ.]

Army Act, 1950: Court Martial - Various charges levelled against the appellant, Major in Indian Army - Objection by appellant against the composition of court martial, repelled - Trial - Charges found proved and sentence of cashiering and rigorous imprisonment of five years passed against him - Confirming authority passed order of confirmation as regards the sentence of cashiering but reduced the rigorous imprisonment from five years to six months - Writ petition dismissed - Appeal on the ground that the court martial proceeding was vitiated as the ultimate decision was result of biased forum, that the rules of natural justice were violated as proper defending officer was not provided to appellant and all the charges were not proved against him - On appeal, held: Nothing was brought on record that there was anything personal against any of the members who constituted Court Martial - Thus, it cannot be held that there was real likelihood of bias because the prudence of a reasonable man cannot so conceive and a right minded man would discard it without any hesitation - It was not a case where the appellant was not provided with the assistance of a defending officer - A close scrutiny of Court Martial proceeding showed that the defending officer had acted with due sincerity and put forth the case of the appellant in proper perspective, therefore, there was compliance of the principle of natural justice and no prejudice was caused to the appellant - Perusal of records showed that appellant was guilty of all the charges - All the charges levelled against the appellant fundamentally

pertained to commission of illegal acts in fiscal sphere to gain pecuniary advantage - The primary obligation of a member of Armed Forces is to maintain discipline in all aspects - Discipline in fiscal matters has to be given top priority as that mirrors the image of any institution - The charges luminously projected that the said aspects were given a total go by - Thus, the punishment was not harsh or arbitrary - Regard being had to the nature of rank held by the appellant and the disciplined conduct expected of him, the doctrine of proportionality was uninvocable.

The appellant was Major in the Indian Army. A General Court Martial proceeding was convened against him on the charges of committing offence with an intent to defraud and commit act prejudicial to good order and military discipline. At the commencement of trial in Court Martial, the appellant objected to some of the officers being members of the composition of Court Martial on the foundation that he had lodged a statutory complaint under Section 27 of the Army Act, 1950 before the Central Government regarding certain irregularities against the Commander of the Sub-Area and as all the presiding officers had worked under the Convening Officer 'P', the composition of Court Martial was vitiated. The objection was repelled. The Court Martial proceeded with the trial and found that all the charges levelled against the appellant were proved and passed sentence of cashiering and rigorous imprisonment for five years. The confirming authority passed an order of confirmation as regards the sentence of cashiering but reduced the rigorous imprisonment from five years to six months. The appellant filed a writ petition which was dismissed.

In the instant appeal, it was contended for the appellant that since lack of faith and confidence was expressed in the convening officer and the composition of Court Martial in view of the statutory complaint filed by

the appellant, the whole proceeding was vitiated as the ultimate conclusion was the result of a biased forum; that there was violation of the principles of natural justice as the appellant was not provided with a proper defending officer and an officer was imposed on him who was reluctant to canvass his case; that the first charge levelled against the appellant was not proved inasmuch as no officer from the Corporation was examined to deny the receipts given by it to the appellant pertaining to transportation of goods from Bangalore to Udhampur and that the bill that was submitted for transportation was interpolated to show that goods were transported in truck Nos. JKQ 3285 and JKR 9587 by a different transporter; that as far as the second charge was concerned, it was imperative on the part of Court Martial to examine an official from the railways to prove that he had availed the warrant and exchanged the same for a ticket; and that as regards the third charge, the same was absolutely unsustainable inasmuch as after the misconception was cleared, the amount was recovered which amounted to condonation of the act; and lastly it was contended that the appellant had served with dedication and devotion in the war field and at difficult stations for a period of 21 years and had an unblemished career and, therefore, the punishment imposed was totally disproportionate and it was a fit case which undoubtedly invited the invocation of the doctrine of proportionality.

Dismissing the appeal, the Court

HELD: 1. Perusal of record showed that it was 'P' who had convened Court Martial under Section 109 of the Army Act, 1950. The statutory complaint submitted by the appellant pertained to certain irregularities committed by Commander 71, Sub Area. In Court Martial, as soon as the court assembled, it read over the names of the presiding officer and other members to the accused and enquired

if he had any objection to any of the members being party to the tribunal. The appellant objected to the composition of the tribunal basically on the ground of lodging of the statutory complaint. Mere suspicion or apprehension is not good enough to entertain a plea of bias. It cannot be a facet of one's imagination. It must be in accord with the prudence of a reasonable man. It is not to be forgotten that in a democratic polity, justice in its conceptual eventuality and inherent quintessentiality forms the bedrock of good governance. In a democratic system that is governed by Rule of Law, fairness of action, propriety, reasonability, institutional impeccability and non-biased justice delivery system constitute the pillars on which its survival remains in continuum. Despite the sanctity attached to non-biased attitude of a member of a tribunal or a court and in spite of the principle that justice must not only be done but must seen to have been done, it is to be scrutinized on the basis of material brought on record whether someone makes wild, irrelevant and imaginary allegations to frustrate a trial or it is in consonance with the thinking of a reasonable man which can meet the test of real likelihood of bias. The principle cannot be attracted in vacuum. In the case at hand, the convening officer had ceased to be the Commander. There was a general complaint against the irregularities about the Commander, the convening officer. The objection that was put forth by the appellant in Court Martial was that his complaint was pending with the Central Government. Nothing was brought on record that there was anything personal against any of the members who constituted Court Martial. Thus, in the obtaining factual matrix, it is extremely difficult to hold that there was real likelihood of bias because the prudence of a reasonable man cannot so conceive and a right minded man would discard it without any hesitation. [Paras 13, 22, 23] [1043-D-F; 1047-A-H; 1048-A]

Manak Lal v. Dr. Prem Chand **AIR 1957 SC 425: 1957 SCR 575;** *Gullapalli Nageswara Rao and others v. Andhra Pradesh State Road Transport Corporation and Another* **(1959) Supp.1 SCR.319;** *A.K. Kraipak and others v. Union of India and others* **AIR 1970 SC 150: 1970 (1) SCR 457;** *Dr. S.P. Kapoor v. State of Himachal Pradesh and others* **(1981) 4 SCC 716: 1982 (1) SCR 1043;** *Ranjit Thakur v. Union of India and others* **(1987) 4 SCC 611: 1988 (1) SCR 512;** *M/s. Crawford Bayley & Co. & Ors. v. Union of India & Ors.* **AIR 2006 SC 2544: 2006 (3) Suppl. SCR 240;** *S. Parthasarathi v. State of Andhra Pradesh* **(1974) 3 SCC 459: 1974 (1) SCR 697 - relied on.**

2. It was not a case where the appellant was not provided with the assistance of a defending officer. A close scrutiny of Court Martial proceeding showed that the defending officer had acted with due sincerity and put forth the case of the appellant in proper perspective. There can be no shadow of doubt that there has been compliance of the principle of natural justice and no prejudice was caused to the appellant because of any kind of non assistance. That apart, there is nothing in the Act or the Rules which lay down that an accused shall be given a defending officer of his own choice. Thus, there was no violation of any mandatory provision and, therefore, it cannot be said that the proceeding is vitiated because of violation of the principle of natural justice. [Para 24] [1048-A-D]

3. The bill submitted by the appellant clearly reflected that the truck Nos. JKQ 3285 and JKR 9587 were alleged to have carried the goods of the appellant. Nothing was mentioned therein that the transportation was made by the Corporation. To substantiate the claim in respect of the said bill, the receipts of the Corporation were filed. On a perusal of the receipts, it is perceptible that they neither reflect the name of the truck owner nor do they mention

the truck numbers. What is ultimately argued is that there had been interpolation in the bill. On a bare look at the bill, it is luculent that there is no interpolation. That apart, DW-6 who was cited as defence witness to substantiate that he had transported the goods specifically stated that only a receipt for transporting the goods was given but no goods were, in fact, transported. Apart from that, PW-13, the toll in-charge categorically asserted that the trucks namely, JKQ 3285 and JKR 9587, alleged to have carried the goods of the appellant did not cross the check-post barrier. The cumulative effect of all this clearly established the first charge beyond any trace of doubt. Thus, the first charge was proved. The second charge related to availing of LTC. No doubt, the LTC was availed of twice to which the appellant was not entitled to. Recovery of excess amount stands in a different compartment altogether and Court Martial pertains to good order and military discipline. That apart, recovery ipso facto does not create a bar for the matter to be tried in Court Martial. On a bare reading of the Rule 53, it is vivid that recovery of the amount does not come under any of the clauses mentioned in the Rule because there has neither been any previous conviction or acquittal nor has there been any kind of pardon or condonation by any competent military authority. The third charge related to improper utilisation of the railway warrant from Jammu to New Delhi. On perusal of the record, it is perceivable that the appellant put up a requisition for obtaining the railway warrant and the same was collected by the representative on his instructions. He forwarded a letter for reservation and thereafter necessary reservation was made. Exchange of warrant for tickets was duly proved. Under these circumstances, the plea that he had not collected the railway warrant and there should have been an examination of a competent witness from railway administration is rejected. [Paras 25-27] [1048-G-H; 1049-A-E; 1050-F-H; 1051-A-C]

Ex-Naik Sardar Singh v. Union of India and others **(1991) 3 SCC 213: 1991 (2) SCR 676;** *Council of Civil Service Unions v. Minister for the Civil Service* **(1984) 3 ALL ER 935;** *Bhagat Ram v. State ofH.P.* **(1983) 2 SCC 442;** *Chairman-cum-Managing Director, Coal India Ltd. & Anr. v. Mukul Kumar Choudhury & Ors.* **AIR 2010 SC 75: 2009 (13) SCR 487 - relied on.**

Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon **(1969) 1 QB 577, 599 - referred to.**

4. The appellant was initially cashiered from the Army and was sentenced to undergo rigorous imprisonment for five years. The period of sentence was reduced by the confirming authority. The appellant was a Major in the Army and all the charges levelled against him fundamentally pertained to commission of illegal acts in fiscal sphere. The acts done by him were intended to gain pecuniary advantage. The primary obligation of a member of Armed Forces is to maintain discipline in all aspects. Discipline in fiscal matters has to be given top priority as that mirrors the image of any institution. That apart, the appellant was a Major in the Army. Irreproachable conduct, restrained attitude, understanding of responsibility and adherence to discipline in an apple pie order were expected of him. The proven charges luminously projected that the said aspects were given a total go by. Thus, it is well nigh impossible to hold that the punishment was harsh or arbitrary. Regard being had to the nature of rank held by the appellant and the disciplined conduct expected of him, the doctrine of proportionality is uninvocable. [Para 32] [1053-D-H; 1054-A]

Case Law Reference:

1957 SCR 575	**referred to**	**Para 14**
(1959) Supp.1 SCR.319	**referred to**	**Para 15**

1970 (1) SCR 457	**referred to**	**Para 16**
1982 (1) SCR 1043	**referred to**	**Para 17**
1988 (1) SCR 512	**referred to**	**Paras 18, 29**
2006 (3) Suppl. SCR 240	**referred to**	**Para 19**
1974 (1) SCR 697	**referred to**	**Para 20**
(1969) 1 QB 577, 599	**referred to**	**Para 21**
1991 (2) SCR 676	**referred to**	**Para 30**
(1984) 3 ALL ER 935	**referred to**	**Para 30**
(1983) 2 SCC 442	**referred to**	**Para 31**
2009 (13) SCR 487	**referred to**	**Para 32**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 665 of 2002.

From the Judgment & Order dated 23.07.2001 of the High Court of Delhi at New Delhi in Criminal Writ Petition No. 590 of 1991.

Indu Malhotra, Kush Chaturvedi, Vansh Deep Dalmia, Madhu Moolchandani for the Appellant.

R. Balasubramanian, S. Wasim A. Qadri, Santosh Kumar, B.V. Balaram Das for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. The present appeal by special leave is directed against the order dated July 23, 1991 passed by the High Court of Judicature of Delhi in Writ Petition (Criminal) No. 590 of 1991 wherein the learned Single Judge has declined to interfere with the order dated July 20, 1990 whereby the confirming authority under Section 164 of the Army Act, 1950 (for short 'the Act') had passed an order of confirmation as

regards the sentence of cashiering but reduced the rigorous imprisonment from five years to six months as imposed by the Competent Authority of General Court Martial vide order dated June 4, 1990.

2. The appellant after joining the Army was confirmed in the rank of Second Lieutenant and eventually became a Major in due course of time. In the month of August, 1988 while serving at Bangalore he was transferred to Udhampur at Jammu. While he was functioning at Udhampur in the rank of Major a General Court Martial proceeding was convened against him on the following charges: -

"First Charge Army Act Section 52(f) SUCH AN OFFENCE AS IS MENTIONED IN CLAUSE (f) OF SECTION 52 OF THE ARMY ACT WITH INTENT TO DEFRAUD,

In that he,

at field, on 30th Jan. 89, with intent to defraud submitted a claim of Rs.35,270/- in respect of transportation of his household luggage and car in civil truck No. JKQ 3285 and JKR 0587 respectively on permanent posting from Bangalore to Udhampur well knowing that his such luggage and car had not been so transported.

Second Charge Army Act Section 52(D) SUCH AN OFFENCE AS IS MENTIONED IN CLAUSE (D) OF SECTION 52 OF THE ARMY ACT WITH INTENT TO DEFRAUD,

In that he,

at field, on 18th Jan. 89, with intent to defraud submitted Leave Travel Concession (LTC) claim for year 1988 to CDA (O) Pune, well knowing that he had already availed the LTC for the year 1988.

Third Charge Army Act Section 63 " AN ACT PREJUDICIAL TO GOOD ORDER AND MILITARY DISCIPLINE.

In that he,

at field, on 17th Nov. 1988, improperly utilised for himself IAFT-1752-PA/53-869651 dated 15th Nov. 1988, single/ return journey railway warrant from Jammu to New Delhi and back."

3. In pursuance of the charge-sheet, General Court Martial commenced on March 12, 1990 which consisted of five Members, namely, Co. Choudhary Sohan Lal, Lt. Col. Harpal Singh, Lt. Col. Shiv Kumar Singh, Maj. Saigal Rajinder Nath and Maj. Manhas Rajender Singh.

4. At the commencement of trial in Court Martial, the appellant objected to some of the officers being members of the composition of Court Martial on the foundation that he had lodged a statutory complaint under Section 27 of the Act before the Central Government regarding certain irregularities against the Commander of the Sub Area and as all the presiding officers had worked under the Convening Officer, namely, Brig. Phoolka, the composition of Court Martial was vitiated. The Presiding Officer and other Members of Court Martial adverted to Section 130 of the Act and Rule 44 of the Army Rules, 1954 (for short 'the Rules') and eventually repelled the objections and proceeded with the trial.

5. After a full length trial, Court Martial found that all the charges levelled against the appellant had been proved and accordingly sentenced him as has been indicated hereinbefore.

6. After recording of guilt and imposition of sentence, the appellant submitted an application under Section 164(1) of the Act stating, inter alia, that the Members of Court Martial were disqualified as there was a statutory complaint against the Convening Officer under whom the Members of Court Martial were functioning; that he was not afforded adequate opportunity to prepare his defence inasmuch as the officer whose name

had been given by him to defend his case was not provided; and that the principles of natural justice had been flagrantly violated. As far as the first charge was concerned, it was stated that the household luggage and car were transported from Bangalore to Udhampur in the hired vehicle of Karnataka Transport Corporation (for short 'the Corporation') and documents were produced to that effect but the same were not taken into consideration; that no officer from the Corporation was examined to find out the veracity of the said receipts; that the bill alleged to have been submitted by the appellant had been interpolated; that the evidence brought on record was inadmissible as evidence being hearsay; that he had handed over his personal luggage and car to the Corporation for transportation and, therefore, the reliance on the evidence of DW-6 was totally misconceived; and that there was no material on record to disprove the factum that the Corporation had transported the luggage from Bangalore to Udhampur as claimed by the appellant. In this backdrop, it was contended that the first charge was not proved against the appellant.

7. As far as the second charge was concerned, it was put forth that the appellant had not obtained Leave Travel Concession twice as he had availed LTC once while he was posted at Bangalore and again at Udhampur; that as per Regulation 177(A) and other provisions relating to availing of LTC while serving in field area as defined in Travel Regulation 177(C), he had availed two LTCs one while being posted at Bangalore and the other at Udhampur and, therefore, his claim for the LTC twice in a year was reasonable and acceptable though it may suggest an erroneous interpretation of Travel Regulations 177(A) and 177(C) but there was no intention to defraud. That apart, after the said mistake was detected, the appellant on 18.2.1989 had explained his perception in his reply and at the instance of the Commanding Officer of the Unit, recovery for the excess amount was effectuated in the month of February, 1989 itself; and that once the matter was closed by taking recourse to recovery, it is to be presumed that the

charge levelled against the appellant stood closed and condoned by the competent authority and hence, there was no justification or warrant to proceed again in that regard in Court Martial.

8. As regards the third charge, it was urged that the appellant had neither collected the alleged railway warrant nor did he exchange it for the ticket. As a matter of fact, he had purchased the ticket for AC-2 Tier on cash payment for the journey from Jammu to Delhi and back. It was also propounded that there was no evidence on record to prove that the relevant railway warrant was utilized as no witness from the railways was examined during the course of Court Martial.

9. The confirming authority, as stated earlier, only reduced the rigorous imprisonment from five years to six months.

10. Being dissatisfied with the aforesaid orders, the appellant assailed the same before the High Court. Before the High Court, it was contended that when the appellant had expressed lack of confidence in the composition of Court Martial, it was incumbent upon the convening officer to have attached him to another unit; that there was inherent bias in the functioning of Court Martial and the same got manifested by denial of any engagement of proper officer; that the finding recorded as regards the claim of transportation charges without transporting the goods was contrary to the material on record and, in fact, perverse since no officer from the Corporation was examined; and that when the amount of LTC was recovered, a charge of similar nature could not have been framed as the same did amount to double jeopardy. The learned single Judge negatived all the contentions and dismissed the writ petition.

11. Ms. Indu Malhotra, learned senior counsel appearing on behalf of the appellant, questioning the pregnability of the order passed by the authorities under the Act and the writ court, has raised the following contentions: -

(i) When lack of faith and confidence was expressed in the competent authority who had convened the proceeding and the composition of Court Martial in view of the statutory complaint filed by the appellant, the whole proceeding is vitiated as the ultimate conclusion is the result of a biased forum. The fundamental principle that 'justice should not be done but should appear to have been done' has been guillotined by rejecting the objection raised by the appellant in Court Martial and the concurrence thereof by the confirming authority and the eventual affirmance of the same by the High Court.

(ii) There has been violation of the principles of natural justice as the appellant was not provided with a proper defending officer and an officer was imposed on him who was reluctant to canvass his case.

(iii) The first charge levelled against the appellant cannot be said to have been proven inasmuch as no officer from the Corporation was examined to deny the receipts given by it to the appellant pertaining to transportation of goods from Bangalore to Udhampur. That apart, the stand and stance put forth by the appellant is that the bill that has been submitted for transportation was interpolated to show that goods had been transported in truck Nos. JKQ 3285 and JKR 9587 by a different transporter. Undue emphasis has been placed on the evidence of DW-6 who had stated that goods were, in fact, not transported. As far as the second charge is concerned, it was imperative on the part of Court Martial to examine an official from the railways to prove that he had availed the warrant and exchanged the same for a ticket. As regards the third charge, the same is

absolutely unsustainable inasmuch as after the misconception was cleared, the amount was recovered which amounts to condonation of the act.

(iv) The appellant had served with dedication and devotion in the war field and at difficult stations for a period of 21 years and had an unblemished career and hence, the punishment imposed is totally disproportionate and it is a fit case which undoubtedly invites the invocation of the doctrine of proportionality.

12. Mr. R. Balasubramanian, learned counsel appearing on behalf of the respondents, per contra, has submitted as follows: -

(i) The statutory complaint alleged to have been made by the appellant was against Commander 71, Sub Area and at the time of lodging of the complaint, the concerned authority was one Brig. I.S. Sahni whereas the convening officer of Court Martial was Brig. J.S. Phoolka and, therefore, the convening of the proceeding cannot be flawed. The objections raised with regard to certain officers who had formed Court Martial were absolutely vague and, in fact, the plea of bias was a figment of imagination of the appellant and the authorities as well as the High Court have appositely repelled the said stand.

(ii) The appellant was duly defended by the officer concerned who was engaged to defend him and, therefore, there had been no violation of the doctrine of audi alteram partem and, in any case, no prejudice was caused to him.

(iii) The allegation of interpolation of the bill is farthest from the truth inasmuch as the document to the naked eye would clearly reveal the signature of the

appellant and he was holding the post of Major in the Army and the person in his position very well knew what was written over there and there is no interpolation. The plea of interpolation is an afterthought and the same does not merit any consideration. The charges have been duly proven and the findings are based on evidence, both oral and documentary, brought on record.

(iv) Keeping in view the post that was held by the appellant, the submission that the principle of proportionality should be invoked and a lesser punishment be imposed, does not stand to reason since the charges are grave in the backdrop of a disciplined force like Army.

13. First, we shall deal with the issue of bias. On a perusal of the record, it is graphically clear that it was Brig. J.S. Phoolka who had convened Court Martial under Section 109 of the Act. The statutory complaint submitted by the appellant pertained to certain irregularities committed by Commander 71, Sub Area. Be it noted, in Court Martial, as soon as the court assembled, it read over the names of the presiding officer and other members to the accused and enquired if he had any objection to any of the members being party to the tribunal. The appellant objected to the composition of the tribunal basically on the ground of lodging of the statutory complaint. The question that arises for consideration is whether a complaint made pertaining to irregularities by the commanding officer of the relevant Sub Area would tantamount to composition of the tribunal as a biased forum solely on the foundation that all members worked in the said Sub Area.

14. In this regard, we may profitably refer to the decision in *Manak Lal v. Dr. Prem Chand*[1] where it has been opined that every member of a tribunal who proceeds to try issues in

1. AIR 1957 SC 425.

judicial or quasi-judicial proceeding must be able to act judicially. It is the essence of judicial administration that judges should be able to act impartially, objectively and without any bias. In such cases, the test is not whether, in fact, a bias has affected the judgment, the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal.

15. In *Gullapalli Nageswara Rao and others v. Andhra Pradesh State Road Transport Corporation and Another*[2], it has been held that the principles governing the "doctrine of bias" vis-à-vis judicial tribunals are well-settled and they are: (i) no man shall be a judge in his own cause; (ii) justice should not only be done but manifestly and undoubtedly seem to be done. The two maxims yield the result that if a member of a judicial body is subject to a bias (whether financial or other) in favour of, or against, any party to a dispute, or is in such a position that a bias must be assumed to exist, he ought not take part in the decision or sit on the tribunal.

16. In *A.K. Kraipak and others v. Union of India and others*[3], this Court was dealing with the constitution of a Selection Board. One of the members was to be considered for selection. In that context, it was observed that it was against all canons of justice to make a man judge in his own cause. It was further observed that the real question is not whether he was biased, for it is difficult to prove the state of mind of a person. What is required to be seen is whether there is reasonable ground for believing that a person is likely to have been biased. A mere suspicion of bias is not sufficient. There has to be reasonable likelihood of bias. It was emphasised that while deciding the question of bias, the Court is required to take into consideration human probabilities and ordinary course of human conduct.

2. (1959) Supp.1 SCR 319.
3. AIR 1970 SC 150.

17. In *Dr. S.P. Kapoor v. State of Himachal Pradesh and others*[4], a two-Judge Bench did not appreciate the Annual Confidential Reports which were initiated by an officer junior to the appellant and also an aspirant for promotion to the higher post along with other candidates, should have been taken into consideration. It was observed therein that it was not fair on the part of the Departmental Promotion Committee to take into consideration the Annual Confidential Reports made by junior officer though they might have been revised by the higher authorities. Emphasis was laid on the fairness of action.

18. In *Ranjit Thakur v. Union of India and others*[5], this Court was dealing with Court Martial proceeding. Venkatachaliah, J. (as his Lordship then was) emphasised on the procedural safeguards contemplated in the Act regard being had to the plenitude of summary jurisdiction of Court Martial and the severity of the consequences that visit the person subject to that jurisdiction. It was observed that the procedural safeguards should be commensurate with the sweep of the power. A contention was canvassed in the said case that the proceedings of Court Martial were vitiated as the fourth respondent who was biased against the appellant was member of the tribunal. In that regard, it was held that the test of real likelihood of bias is whether a reasonable man, in possession of relevant information, would have thought that bias was likely and whether the concerned respondent was likely to be disposed to decide the matter only in a particular way. The appellant in that case had sent a written complaint complaining of ill-treatment at the hands of respondent No. 4 directly to the higher officers as a result of which he was punished with 28 days' rigorous imprisonment by the said respondent. Keeping the said fact in view, the Bench held that the participation of the respondent No. 4 in Court Martial rendered the proceeding coram non-judice.

4. (1981) 4 SCC 716.

5. (1987) 4 SCC 611.

19. In *M/s. Crawford Bayley & Co. & Ors. v. Union of India & Ors.*[6], this Court referred to the circumstances under which the doctrine of bias, i.e., no man can be judge in his own cause, can be applied. It has been held therein that for the said doctrine to come into play, it must be shown that the officer concerned has a personal bias or connection or a personal interest or was personally connected in the matter concerned or has already taken a decision one way or the other which he may be interested in supporting.

20. In *S. Parthasarathi v. State of Andhra Pradesh*[7], while dealing with the test of likelihood of bias, it has been opined that if right minded persons would think there is a real likelihood of bias on the part of an officer, he must not conduct the inquiry. It has been observed that surmises or conjectures would not be enough, there must exist circumstances from which reasonable man would think that it is probable or likely that the inquiring officer will be prejudiced against the delinquent officer. Be it noted, the issue before the Court was enquiry by an inquiry officer against whom bias was pleaded and established.

21. At this juncture, we may usefully reproduce a passage from *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon*[8] wherein Lord Denning M.R. observed thus: -

> "……in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the

6. AIR 2006 SC 2544.

7. (1974) 3 SCC 459.

8. (1969) 1 QB 577, 599

circumstances, there was a real likelihood of bias on his part, then he should not sit."

22. From the aforesaid pronouncement of law, it is discernible that mere suspicion or apprehension is not good enough to entertain a plea of bias. It cannot be a facet of one's imagination. It must be in accord with the prudence of a reasonable man. The circumstances brought on record would show that it can create an impression in the mind of a reasonable man that there is real likelihood of bias. It is not to be forgotten that in a democratic polity, justice in its conceptual eventuality and inherent quintessentiality forms the bedrock of good governance. In a democratic system that is governed by Rule of Law, fairness of action, propriety, reasonability, institutional impeccability and non-biased justice delivery system constitute the pillars on which its survival remains in continuum.

23. It is worth noting that despite the sanctity attached to non-biased attitude of a member of a tribunal or a court and in spite of the principle that justice must not only be done but must seen to have been done, it is to be scrutinized on the basis of material brought on record whether someone makes wild, irrelevant and imaginary allegations to frustrate a trial or it is in consonance with the thinking of a reasonable man which can meet the test of real likelihood of bias. The principle cannot be attracted in vacuum. In the case at hand, the convening officer had ceased to be the Commander. There was a general complaint against the irregularities about the Commander, the convening officer. The objection that was put forth by the appellant in Court Martial was that his complaint was pending with the Central Government. Nothing was brought on record that there was anything personal against any of the members who constituted Court Martial. Thus, in the obtaining factual matrix, it is extremely difficult to hold that there was real likelihood of bias because the prudence of a reasonable man cannot so conceive and a right minded man would discard it

without any hesitation. Hence, we repel the said submission raised by the learned senior counsel for the appellant.

24. The next contention pertains to compliance of the principles of natural justice. The only ground raised is that the appellant was not provided a defending officer of his choice. It is not a case where he was not provided with the assistance of a defending officer. On a close scrutiny of Court Martial proceeding, we find that the defending officer had acted with due sincerity and put forth the case of the appellant in proper perspective. There can be no shadow of doubt that there has been compliance of the principle of natural justice and no prejudice has been caused to the appellant because of any kind of non assistance. That apart, there is nothing in the Act or the Rules which lay down that an accused shall be given a defending officer of his own choice. Thus, there is no violation of any mandatory provision and, therefore, it cannot be said that the proceeding is vitiated because of violation of the principle of natural justice.

25. The third plank of submission of both the learned counsel for the parties relates to the issue whether the charges levelled against the appellant have been really proven or not. We have enumerated the submissions relating to charges and it is apposite to deal with them together. Ms. Indu Malhotra, learned senior counsel, would submit that the first charge has not been proven at all as the appellant had given the responsibility to the Corporation to transport the goods from Bangalore to Udhampur. There is no dispute over the factum that the appellant had produced the receipts from the Corporation. To satisfy ourselves, we have carefully perused the original file which was produced before us. The bill submitted by the appellant clearly reflects that the truck Nos. JKQ 3285 and JKR 9587 are alleged to have carried the goods of the appellant. Nothing has been mentioned therein that the transportation was made by the Corporation. To substantiate the claim in respect of the said bill, the receipts of the

Corporation were filed. On a perusal of the receipts, it is perceptible that they neither reflect the name of the truck owner nor do they mention the truck numbers. What is ultimately argued is that there had been interpolation in the bill. On a bare look at the bill, it is luculent that there is no interpolation. That apart, DW-6 Satinder Pal Singh s/o Janak Singh, who has been cited as defence witness to substantiate that he had transported the goods, has specifically stated that only a receipt for transporting the goods was given but no goods were, in fact, transported. Apart from that, PW-13, the toll incharge, has categorically asserted that the trucks namely, JKQ 3285 and JKR 9587, alleged to have carried the goods of the appellant did not cross the check-post barrier. The cumulative effect of all this clearly establishes the first charge beyond any trace of doubt. Thus, the first charge is proved.

26. As far as the second charge is concerned, it relates to availing of LTC. There is no doubt that the LTC was availed of twice to which the appellant was not entitled to. What is contended is that once the recovery was done, it could not have been the subject matter of Court Martial. Needless to say, recovery of excess amount stands in a different compartment altogether and Court Martial pertains to good order and military discipline. That apart, recovery ipso facto does not create a bar for the matter to be tried in Court Martial. In this context, we may refer with profit to Rule 53 of the Rules that deals with plea in bar. The said Rule is reproduced hereinbelow: -

> **"53. Plea in bar.** - (1) The accused, at the time of his general plea of "Guilty" or "Not Guilty" to a charge for an offence, may offer a plea in bar of trial on the ground that -
>
> (a) he has been previously convicted or acquitted of the offence by a competent criminal court or by a court-martial, or has been dealt with summarily under sections 80, 83, 84 and 85, as the case may be, for the offence, or that a charge in respect of the offence has been dismissed as provided in sub-rule (2) of rule 22; or
>
> (b) the offence has been pardoned or condoned by competent military authority;
>
> (c) the period of limitation for trial as laid down in section 122 has expired.
>
> (2) If he offers such plea in bar, the court shall record it as well as his general plea, and if it considers that any fact or facts stated by him are sufficient to support the plea in bar, it shall receive any evidence offered, and hear any address made by or on behalf of the accused and the prosecutor in reference to the plea.
>
> (3) If the court finds that the plea in bar is proved, it shall record its finding and notify it to the confirming authority, and shall either adjourn, or if there is any other charge against the accused, whether in the same or in a different charge-sheet, which is not affected by the plea in bar, may proceed to the trial of the accused on that charge.
>
> (4) If the finding that the plea in bar is proved is not confirmed, the court may be re-assembled by the confirming authority, and proceed as if the plea has been found not proved.
>
> (5) If the court finds that the plea in bar is not proved, it shall proceed with the trial, and the said findings shall be subject to confirmation like any other finding or the court."

On a bare reading of the aforesaid Rule, it is vivid that recovery of the amount does not come under any of the clauses mentioned in the Rule because there has neither been any previous conviction or acquittal nor has there been any kind of pardon or condonation by any competent military authority. Thus, the submission leaves us unimpressed and we unhesitatingly decline to accept the same.

27. As far as the third charge is concerned, it relates to improper utilisation of the railway warrant from Jammu to New Delhi. The only point urged is that an officer from the railway should have been examined. On perusal of the record, it is perceivable that the appellant put up a requisition for obtaining the railway warrant and the same was collected by the representative on his instructions. He forwarded a letter for reservation and thereafter necessary reservation was made. Exchange of warrant for tickets has been duly proven. Under these circumstances, the plea that he had not collected the railway warrant and there should have been an examination of a competent witness from railway administration is bound to collapse and, accordingly, we reject the said submission.

28. The last submission of Ms. Indu Malhotra, learned senior counsel, pertains to the proportionality of punishment. It is submitted by her that the appellant has rendered dedicated and disciplined service for a span of 21 years and fought in the front and regard being had to the nature of charges, the punishment defies logic and totally buries the concept of proportionality.

29. To appreciate the submission, we may advert to certain authorities in the field. In the case of *Ranjit Thakur* (supra), it has been held thus:-

> "The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court-martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount if itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the court-martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review."

30. In *Ex-Naik Sardar Singh v. Union of India and others*[9], a two-Judge Bench of this Court adverted to Sections 71, 72 and 73 which deal with punishment awardable by Court Martial, alternative punishment awardable by court-martial and combination of punishments respectively. The Bench also referred to Section 63 which deals with violation of good order and discipline. In the said case, the appellant had purchased 11 bottles of sealed rum and one bottle of brandy from his Unit Canteen as he required the same to celebrate the marriage of one of his close relations at his home town. He was entitled to carry four bottles of rum and one bottle of brandy as per the Unit Regulations/leave certificate while he was proceeding on leave. There was confiscation of bottles of liquor by the police while he was proceeding to his home town. He was handed over to the Unit authorities and eventually, in a summary court martial, he was sentenced to three months rigorous imprisonment and dismissed from service. The plea of the appellant before the court martial was that he had purchased the liquor for the marriage of his brother-in-law on the basis of permit that was issued to him. The said plea was not accepted. This Court, after referring to the language used in Section 72, which states that any punishment lower in the scale set out in Section 71 can be imposed regard being had to the nature and degree of the offence, and the decision in *Council of Civil Service Unions v. Minister for the Civil Service*[10] and other authorities in the field, expressed the view that there was an element of arbitrariness in awarding the severe punishment to the appellant. The Bench opined that the punishment was excessively severe and violative of the language employed in Section 72 of the Act.

31. In *Bhagat Ram v. State of H.P.*[11], it has been held that

9. (1991) 3 SCC 213.
10. (1984) 3 ALL ER 935.
11. (1983) 2 SCC 442.

penalty imposed must be commensurate with the gravity of the misconduct and any penalty disproportionate to the gravity of the misconduct would be violative of Article 14 of the Constitution.

32. In *Chairman-cum-Managing Director, Coal India Ltd. & Anr. v. Mukul Kumar Choudhury & Ors.*[12], this Court adverted to the concept of doctrine of proportionality and eventually opined that the imposition of punishment is subject to judicial intervention if the same is exercised in a manner which is out of proportion to the fault. If the award of punishment is grossly in excess of the allegations made, it cannot claim immunity and makes itself amenable for interference under the limited scope of judicial review. The test to be applied while dealing with the question is whether a reasonable employer would have imposed such punishment in like circumstances. The question that has to be studiedly addressed is whether the punishment imposed is really arbitrary or an outrageous defiance of logic so as to be called irrational and perverse warranting interference in exercise of the power of judicial review. The appellant was initially cashiered from the Army and was sentenced to undergo rigorous imprisonment for five years. The period of sentence was reduced by the confirming authority. The appellant was a Major in the Army and all the charges levelled against him fundamentally pertain to commission of illegal acts in fiscal sphere. The acts done by him were intended to gain pecuniary advantage. The primary obligation of a member of Armed Forces is to maintain discipline in all aspects. Discipline in fiscal matters has to be given top priority as that mirrors the image of any institution. That apart, the appellant was a Major in the Army. Irreproachable conduct, restrained attitude, understanding of responsibility and adherence to discipline in an apple pie order were expected of him. The proven charges luminously project that the said aspects have been given a total go by. In this backdrop, it is well nigh impossible to hold that the punishment

12. AIR 2010 SC 75.

was harsh or arbitrary. Regard being had to the nature of rank held by the appellant and the disciplined conduct expected of him, we find that the doctrine of proportionality is uninvocable and, accordingly, we are compelled to repel the said preponement advanced by the learned senior counsel without any hesitation and we do so.

33. Consequently, the appeal, being devoid of merit, stands dismissed.

D.G. Appeal dismissed.

CESC LTD.

v.

CHIEF POST MASTER GENERAL & ORS.

(Civil Appeal No. 2606 of 2006 etc.)

MAY 11, 2012

[R.M. LODHA AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

POST OFFICE ACT, 1898:

ss. 11 and 12 - Demand for deficit amount of postage from sender of postal articles - Held: In the absence of any breach of the conditions of licence, the provisions of clauses 11(10)(xv) and 34 of Post Office Guide are not attracted - It is apparent that due to a wrong intimation given by the Postal Authority, the Company affixed the postal stamp of Rs.1/- per bill, treating it as 'book post' and the staff of the Postal Department without any objection cleared and delivered it to the respective addressees - The mistake having been committed by the Postal Authority and there being failure on the part of office of the Postal Authority to check the postal articles and postage for recovering the amount from the addressee, it is not open for the Postal Authority to pass on such liability on the sender-company or to recover the same from the company - The demand notice being not proper, is set aside - Post Office Guide - Clauses 11(10)(xv) and 34.

The appellant-company, engaged in the supply of electricity, installed 'franking machines' and provided space to the Post Office to set up a sub-office for the purpose of receiving 'franked' monthly electricity consumption bills addressed to the consumers. By letter dated 29.5.1997, the Director of Postal Service informed the appellant-company that as per revised postal tariff w.e.f. 1.6.1997, charges for monthly consumption bill, if

it was posted as 'Book', 'Pattern' and 'Sample packets' would be Rs. 1/- for first 50 gms or fraction thereof. Based on the said communication, the appellant-company made the payment for the period from 1.6.1997 to 29.10.1998 treating the posts as 'book post', and affixing Rs. 1/- per postal article. On 29.10.1998, the appellant received another letter informing that the letter dated 29.5.1997 was treated as cancelled and the 'monthly consumption Bill' did not come under the category of 'book post' / 'book packets' and such type of bills could be posted by affixing postage stamps as applicable to 'letter mail' with immediate effect. Thereafter, the company started posting the consumption bills affixing Rs. 3/- stamps. The Vigilance Officer, Department of Post, by letter dated 18.6.1999 made an additional claim for Rs. 1,83,89,410/- from the company for the period from 1.6.1997 to 29.10.1998, on the ground that postage rate from 1.6.1997 was Rs. 2/- per 'Book post' and Rs. 3/- from 30.8.1998. The writ petition filed by the company was allowed by the Single Judge of the High Court holding that the demand notice was contrary to s. 11(2) of the Postal Act, 1898. However, it was held that refund of Rs. 50 lacs deposited by the company pursuant to the interim order would be subject to the decision of the respondent authorities. On the appeals filed by both the company as also by the Postal Authorities, the Division Bench of the High Court upheld the demand notice and further held that the Post Master General was completely empowered by Clause 11.5 (xv) and Clause 34 of the Post Office Guide read with s. 12 of the Act to recover the amount specified under the demand notice.

In the instant appeals filed by the company the question for consideration before the Court was: "whether the respondents have the authority and power under the Indian Post Office Act, 1898 or the Post Office Guide or any other Rule/guidelines to demand the alleged

deficit amount of postage from the "sender" of the postal articles, after receiving the same from the "sender" without any objection to the deficit amount and after delivering the postage articles to the addressee without claiming any deficit amount from the "addressee".

Allowing the appeals, the Court

HELD: 1.1 In the instant case, it has not been alleged by the Postal Authority that the Company has breached any of the conditions of licence. In the absence of any such allegation relating to a breach, the provisions of Clause 11(10) (xv) or Clause 34 of the Post Office Guide are not attracted. The Division Bench of the High Court erred in holding that the provisions of Clause 11(10) (xv) and Clause 34 are attracted in the case. [para 26-27] [1068-B-D]

1.2 Section 11 of the Post Office Act, 1898 makes it clear that the 'addressee' will be liable to pay the deficit postal charges, if any, once the addressee accepts the postal article or opens it. On the other hand, the 'sender' will be liable to be charged for the deficit postage, if it is detected at the time of postage or if the addressee refuses or return the postage or if the addressee is dead or cannot be found. If such amount is found due from the sender, the Postal Authority is empowered to recover the sum dues from the sender u/s 12 of the Act. [para 30] [1069-E-F]

1.3 It is not the case of the Postal Authority that any of the postage has been refused or returned by any of the addressee or any addressee is dead or could not be found. In absence of any such allegation no charge can be made from the sender-company u/s 11 and it cannot be made liable to pay the postage or sum due thereon for franking Rs.1/- per bill for postage and for that there was no occasion for the authority to exercise power u/s 12 to recover such due from the sender-company. [para

31] [1069-G-H; 1070-A]

1.4 Admittedly, the Director of Postal Services by his letter dated 29.5.1997 informed the Company that as per the revision of postal tariff w.e.f. 1.6.1997, the electricity bills can be posted by paying Rs.1/- w.e.f. 1.6.1997, where the post is sent either as 'Book' or 'Pattern' or 'Sample Packet'. Accordingly, the Company charged Rs. 1/- per Bill for the period from 1.6.1997 till by letter dated 29.10.1998, the Company was informed of cancellation of letter dated 29.5.1997. [para 32] [1070-B; 1071-C]

1.5 Thus it is apparent that due to a wrong intimation given by the Postal Authority, the Company affixed the postal stamp of Rs.1/- per bill, treating it as 'book post' and the staff of the Postal Department without any objection cleared and delivered to the respective addressees. Though under Clause 30(iv) of the Post Office Guide, the office which accepts the posting is required to check the bundles franked for correct postage and also to tally the total value of the articles, before dispatch of the article, there is failure on the part of the office of the Postal Authority as noticed by the Division Bench of the High Court and for that the sender company cannot be made liable. [para 33and 35] [1072-C; G-H; 1073-A]

1.6 The demand notice and the order passed by the Division Bench of the High Court are set aside; the last portion of the direction given by the Single Judge authorizing the Postal Authority to decide the issue afresh and allowing them to retain the amount of Rs. 50 lakhs till such decision is also set aside. The respondents are directed to refund the amount of Rs.50 lakhs deposited by the Company pursuant to the interim order passed by the High Court along with 6% interest. [para 37] [1073-E-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No.

2606 of 2006 etc.

From the Judgment & Order dated 20.01.2004 of the Calcutta High Court in A.P.O. No. 62 of 2001 in W.P. No. 2282 of 1999.

WITH

C.A. No. 2607 of 2006.

K.V. Vishwanathan, Khaitan & Co. for the Appellant.

Ashok Bhan, Shalender Saini (for B.K. Parasad) for the Respondents.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. These appeals have been preferred by the appellant- CESC Limited (hereinafter referred to as the "Company") against the common order and judgment dated 20.1.2004 whereby the Division Bench of the Calcutta High Court allowed the appeal preferred by the first respondent- the Chief Post Master General, West Bengal Circle and others (hereinafter referred to as the "Postal Authority") and dismissed the appeal preferred by the Company.

2. The order impugned before the Division Bench was passed in the Writ Petition No. 2282 of 1999 preferred by the Company against a demand notice dated 10.9.1999 issued by Postal Authority asking the Company to deposit a sum of Rs.1,83,89,410/-. The learned Single Judge by order dated 7.11.2000 had allowed the writ petition and held that the demand notice dated 10.9.1999 is contrary to Section 11(2) of the Indian Post Office Act, 1898 (hereinafter referred to as "the Act") and remitted the matter with a direction to the Postal Authority to consider the representation of the Company after giving it a hearing and with a further direction that, till the matter is decided, the entire deposit of Rs.50 lacs as was made by the Company in terms of the interim direction be kept with the Postal Authority. In case, it was decided that the amount was

not payable by the Company, the Postal Authority would refund the same, but in the event it is found that the amount was due and payable by the Company, the Postal Authority shall adjust the same against the dues.

3. Against the said order, an appeal was preferred by the Company as the learned Single Judge allowed the Postal Authority to retain the amount of Rs. 50 lakhs deposited by the Company in terms of the interim order while another was preferred by the Postal Authority against the said order of the learned Single Judge since the notice of demand was quashed and the learned Single Judge held that the Postal Authority had no power to demand such amount.

4. The case of the appellant is that it is a 'company' incorporated under the provisions of the Companies Act and is conducting the business of supplying electricity. The Company has about 26 lakh of registered consumers which is increasing continuously. The consumption bills are sent by the Company to its consumers, every month through the Post Office. For the purpose of sending monthly consumption bills by post, a specific area has been allotted to the Post Office in the South-west Regional Office of the Company at Taratola for carrying out the necessary operations, commonly known as the "Taratola Sorting Office" of the Postal Department. This practice is being followed by the company for a considerable period of time. The Officials of the Postal Department are posted at the said Taratola Sorting Office and a sub-office has been set up in a space provided by the appellant company exclusively for the purpose of receiving 'franked' monthly electricity consumption bills as is made by the officials posted there. The appellant company had installed the requisite 'franking machines' for this purpose which are operated by the appellant company's staff.

5. The dispute relates to the period between 1.6.1997 to 29.10.1998, during which, the monthly consumption bills, upon being folded, were marked with the requisite postal stamp of Rs.1/- per bill using franking machines. The monthly

consumption bills thus franked, were made over to the counter of the Postal Department located in the said premises. Upon being satisfied with the franking marks and the value thereof, the Postal Officials accepted and took the postal articles, namely, the monthly consumption bills for being dispatched to the addressee consumers. Till then there were no disputes that the appellant had ever breached the franking conditions as enshrined under the license. The monthly consumption bills are printed on a sheet of paper which are then merely folded for convenience. The consumption bills are not sealed at either end and when posted, are not enclosed in any envelop or wrapper. The consumption bills are also not stitched or stapled anywhere. Under the prescribed postal tariff as prevailing with effect from June 1, 1997, a charge of Rs.1/- per letter was prescribed for 'letter cards' under 'Serial No. 3' and for 'Book', 'Pattern' and 'Sample Packets' under 'Serial No. 5' thereof. The monthly consumption bills of the appellant company weighs much less than 50 grams.

6. By letter dated 29.5.1997, the Director of Postal Service informed the Company that as per revised postal tariff w.e.f 1st June, 1997, charges for 'Book', 'Pattern' and 'Sample packets' for first 50 gms. or fraction thereof is Rs.1/-. For every additional 50 gms. or fraction thereof in excess of 50 gms. is Rs.2/-. Monthly consumption bill, if it is posted as 'Book', 'Pattern' and 'Sample packets' the revised postal tariff w.e.f. 1st June, 1997, as mentioned above will be applicable.

7. Accordingly, from June 1997 to October 29, 1998, the appellant sent a total of 1,63,60,121 Bills, based on the aforesaid communication dated 29.5.1997, treating the posts as 'book post', affixing Rs.1/-, per postal articles. The posts were cleared by the postal department without any objection and were also delivered to the respective addressee consumers.

8. All of a sudden on 29.10.1998, the appellant, by another letter was informed that the letter dated 29th May, 1997 was

treated as cancelled by the Postal Authority with further intimation that the 'Monthly Consumption Bill' does not come under the category of 'book post'/ 'book packets' and that such type of 'bills' could be posted by affixing postage stamps as applicable to the 'letter mail' with immediate effect. The appellant objected to the cancellation and requested the postal authorities for a review of the decision and to restore the status quo. However, in compliance with the aforementioned letter the Company started posting the consumption bills affixing Rs.3/- stamps under protest and without prejudice.

9. Suddenly the Vigilance Officer, Department of Post by letter dated 18.6.1999 made additional claim for Rs. 1,83,89,410/- for the period from 1st June, 1997 to 29th October, 1998 during which a total of 1,69,60,121 bills were despatched by the company affixing franking stamp of Rs.1/- per bill. Such claim was made on the ground of postage rate from 1st June, 1997 was Rs.2/- per Book Post and from 30th August, 1998 the rate was Rs.3/- per Book Post.

10. The Company replied on 30.10.98, that under Section 11, the liability is not of the Company to pay but that of the addressee consumers as the posts have already been delivered by the Postal Authority without any objection and hence no such objection can be raised at this stage. It was informed that neither was there any objection taken by the Postal Authority at the time of entrustment of the posts nor at the time of delivery, when they were actually delivered to the addressee. This demand was raised long after the posts had been delivered to the respective addressees and hence it requested to review the decision.

11. Pursuant to the said letter the Postal Authority informed the company by letter dated 26.7.1999 that the case was reviewed by the appropriate authority and reiterated the demand for Rs.1,83,89,410/- thereby rejected the prayer for review as is evident from the said letter. The relevant portion of which is quoted hereunder:

"The case was reviewed by the appropriate authority. Though the approval of the Department was given confirming the rates for sending electricity bills by Book Post as Rs.1/-, the same was given by mistake. The question remains that the electricity bills were posted at Book post rate i.e. @ Rs.1/- bill during the period from June 1997 to 29.8.1998 and @ Rs.3/- during the period from 30.8.1998 to 29.10.1998.

It is once again requested kindly to deposit the deficit amount of postage of Rs. 1,83,89,410/- in respect of posting of electric bills during the period from June 1997 to 29.10.98 at any Post Office and intimate the particulars of deposit to this office.

If the deficient amount of postage of Rs. 1,83,89,410/- is not deposited, the same will be treated as due to the Govt. of India from C.E.S.C. Limited."

12. As the Postal Authority continued to make the demand, the Company preferred the Writ Petition No. 2282 of 1999 mainly on the ground that the demand notice dated 10.9.1999 asking the appellant to deposit Rs.1,83,89,410/-, is contrary to Section 11(2) of the Indian Postal Act, 1898. The learned Single Judge by order dated 7.11.2000 allowed the writ petition affirming that the demand notice is contrary to Section 11(2) of the Indian Postal Act, 1898. The learned Single Judge found that the pre- requisite of fastening liability on the sender of the post under Section 11 is not permissible. Therefore, the Company cannot be saddled with the responsibility to pay. Furthermore, it was also found that the person issuing the demand notice did not have the authority to issue such a notice. However, the learned Single Judge of the Writ Court did not order the refund of Rs. 50 lacs, which was deposited by the Company pursuant to the interim order, and held that the said refund would be subject to the decision of the respondent authorities.

13. The Division Bench by the impugned judgment held that the Postal Authority through the Post Master General, West Bengal Circle was completely empowered by Clause 11.5 (xv) and 34 of the Post Office Guide read with Section 12 of the Act to recover the outstanding sum remaining, due by the licensee Company to the Postal Authority. At the same time the Post Master General was also competent enough to direct the denial of acceptance of postal articles from the Company, unless and until the outstanding is paid and the finding of the learned Single Judge to the contrary on that score is wrong and was thereby set aside. The demand notice was upheld, but the direction of the learned Single Judge, directing the authorities to decide the representation of the Company by giving personal hearing was upheld. The Division Bench upheld the order passed by learned Single Judge, while directing the continuance of deposit of the above sum of Rs.50 lacs as and by way of an interim measure. Therefore, the Division Bench refused to interfere with that part of the order of the learned Single Judge.

14. The learned counsel appearing on behalf of the Company submitted that the Company was guided by the Postal Department for franking and their office staff were present at the site of the Company where franking were made. The manner of posting the bills was as per the instructions issued by the Postal Authorities. In this regard, there is no difference between a 'normal post' and 'franked' one and the breach of the franking license conditions was not even alleged.

15. It was also contended that liability under Section 11 is only upon the addressee while the liability of the sender is contingent on the pre- requisites which had not happened. The demand was raised without adjudicating or ascertaining the dues. This apart, the authority issuing the demand was not competent to issue the same. It was further submitted that the letter dated 18.6.1999 issued by the Vigilance Officer shows that not only were the authorities making a demand from the wrong person, the right person under Section 11 being the

addressee, but were also asking the Company to pay for the "mistake" which was committed by them. Till that date, the Postal Authority had not produced the so called notification dated 27.8.1997. Therefore, the appellant was seriously prejudiced by non- production of that document.

16. It was further contended that the postal charges for despatch of the electricity bill is recovered by the sender along with the electricity tariff, which could only be done while preparing the bill. Since the Company had no means of recovering any amount and subsequently it cannot pass-on this liability on the addressees, the claim of the postal authority was denied. It was also contended that there is no provision whatsoever for levying arrears on postal charges and without complying with the terms and mandate of Section 12 of the Act, the Vigilance Officer issued a demand notice for Rs. 1,83,89,410/- with a threat that unless the aforesaid amount is deposited within 30 days, a direction would be given that all postal services conveying articles, except the government services despatched by the Company, be withheld. Therefore, the demand was ex- facie illegal.

17. The learned counsel appearing on behalf of the Postal Authority contended that the postal tariff was revised with effect from 1.6.1997 and again from 1st August 1998. On 29.10.1998, the mistake committed by the department was detected and, therefore, the Postal Authority immediately cancelled their letter dated 29.5.1997 whereby the authorities informed the Company that for the monthly consumption bills, if posted as 'book post' and 'sample packets' the revised tariff of Rs.1/- will be applicable.

18. On 30.10.1998, the Company made a request to review the decision and thereafter, the Postal Authority made their demand on 18.6.1999 and a further demand was made on 18.8.1999 and finally on 10.9.1999, the threat of panel action was also conveyed through the said letter. Attention was also drawn to a letter dated 5.11.1998 wherein the Company

themselves agreed to bear the cost as may be required, on demand. On 18.6.1999, the demand for deficit postage was asked for, by the Postal Authority. On 26.7.1999 a demand for deficit postage and a threat was made to recover the same as Government duty followed by another demand dated 18.8.1999 and a threat of penal action under the Act. It was contended that those letters are not under challenge and in the writ petition, only the letter of demand dated 10.9.1999 has been challenged and is the subject matter of the writ petition.

19. The learned counsel for the Postal Authority referred to Rule 17 of the Indian Post Office Rules, 1933 which defines "Book Packets". While Rule 19 stipulates the articles which cannot be posted as "book packets". According to him, the monthly consumption bills satisfied Rule 17 and are not covered under Rule 19.

20. Further according to the counsel for the Postal Authority, 'the Post Office Guide' is an administrative instruction issued to fill up gaps if any, in the Indian Post Office Rules and therefore it has a binding force. The Company having accepted the classification, and by affixing the postal stamps of Rs.3/- per bill by franking since 29.10.1998, cannot object to pay the prescribed rate which was due since 1st June,1997.

21. We have heard the learned counsel for the parties and have carefully perused the Indian Post Office Act, 1898 and the Post Office Guide as relied by them.

22. The present dispute pertains to the period between 1.6.1997 and 29.10.1998, and as the Company has been affixing the postal franking stamps as per the demanded rate since 30.10.1998, there is no dispute regarding the subsequent period.

23. The only question arising for consideration is whether the respondents have the authority and power under the Indian Post Office Act, 1898 or the Post Office Guide or any other Rule/ guidelines to demand the alleged deficit amount of postage

from the "sender" of the postal articles, after receiving the same from the "sender" without any objection to the deficit amount and after delivering the postage articles to the addressee without claiming any deficit amount from the "addressee".

24. Clause 11(10) (xv) of the Post Office Guide, relates to recovery of an amount in the event of a breach of the conditions of the license and reads as under:-

> "11.**Franking Machine.**- A postal franking machine is a stamping machine intended to stamp impressions of dies of approved design on private and official postal articles in payment of postage and postal fees. A commission of 1-1/2 per cent is permitted on the value of franks used.
>
> 2. x x x x x x x x x
>
> x x x x x x x x x
>
> (10) The licence is granted to the following conditions.
>
> (xv) In the event of a breach of any condition of the licence, the licence will be forthwith cancelled by the head of the Postal Circle who will not be responsible for any loss which the licensee incurs thereby. Any sum that may be due to the licensee on account of postage advanced will, however, be refunded to him and any sum that may be due to the Department on account of postage will be recovered from him."

25. Clause 34 of the said Guide stipulates cancellation of a license in the event of a breach of any prescribed condition, as quoted hereunder:-

> "34. In the event of breach of any of the prescribed conditions the license will be forthwith cancelled by the licensing authority who will not be responsible for any loss which the licensee may incur thereby. Any sum that be due to the licensee on account of postage advance will, however, be refunded to him and any sum that may be due to the Department on account of postage will be recovered from him."

26. In this case, it has not been alleged by the Postal Authority that the Company has breached any of the conditions of license. In the absence of any such allegation relating to a breach, the provisions of Clause 11(10) (xv) or Clause 34 of the Post Office Guide are not attracted.

27. The applicability of Clause 34 is conditions precedent such as (a) breach of any of the conditions of license to use the franking machine (b) cancellation of the license to use the franking machine (c) a sum due to the department on account of postage. Such conditions have not been fulfilled in this case nor any averment has been made and no such stand has been taken by the Postal Authority. Therefore, Clause 11(10)(xv) or Clause 34 is not applicable in the present case. The Division Bench of the High Court erred in holding that the provisions of Clause 11(10) (xv) and Clause 34 are attracted in the present case.

28. Section 11 of the Act, 1898 stipulates "liability for payment of postage" and reads as under:-

> **"11. Liability for payment of postage.**-(1) The addressee of a postal article on which postage or any other sum chargeable under this Act is due shall be bound to pay the postage or sum so chargeable on his accepting delivery of the postal article, unless he forthwith returns it unopened:
>
> Provided that, if any such postal article appears to the satisfaction of the Post Master General to have been maliciously sent for the purpose of annoying the addressee, he may remit the postage.
>
> 2) If any postal article on which postage or any other sum chargeable under this act is due, is refused or returned as aforesaid, or if the addressee is dead

or cannot be found, then the sender shall be bound to pay the postage or sum due thereon under this Act."

29. Section 12 of the said Act, 1898 empowers the Postal Authority to recover the postage and other sums due, in respect of postal articles which reads as under:-

"12. Recovery of postage and other sums due in respect of postal articles.- If any person refuses to pay any postage or other sum due from him under this Act in respect of any postal article, the sum so due may, on application made by an officer of the Post Officer authorised in this behalf by the written order of the Post Master General, be recovered for the use of the Post Office from the person so refusing, as if it were a fine imposed under this Act, by any Magistrate having jurisdiction where that person may for the time being be resident, and the Post Master General may further direct that any other postal article, not being on (Government) Service, addressed to that person shall be withheld from him until the sum so due is paid or recovered as aforesaid."

30. Thus from Section 11 it is clear that the 'addressee' will be liable to pay the deficit postal charges, if any, once the addressee accepts the postal article or opens it. On the other hand, the 'sender' will be liable to be charged for the deficit postage, if it is detected at the time of postage or if the addressee refuse or return the postage or if the addressee is dead or cannot be found. If such amount is found due from the sender, the Postal Authority is empowered to recover the sum dues from the sender under Section 12 of the Act.

31. It is not the case of the Postal Authority that any of the postage has been refused or returned by any of the addressee or any addressee is dead or could not be found. In absence of any such allegation no charge can be made from the sender-company under Section 11 and the Company cannot be made

liable to pay the postage or sum due thereon for franking Rs.1/- per bill for postage and for that there was no occasion for the authority to exercise power under Section 12 to recover such due from the sender- company.

32. Admittedly, the Director of Postal Services by his letter dated 29.5.1997 informed the Company that as per the revision of postal tariff w.e.f. 1.6.1997, the electricity bills can be posted by paying Rs.1/- w.e.f. 1.6.1997, whether the post sent either as 'Book' or 'Pattern' or 'Sample Packet'. The said letter reads as follows:-

"DEPARTMENT OF POST, INDIA

OFFICE OF THE CHIEF POST MASTER GENERAL,
W.B. CIRCLE, YOGAYOG BHAWAN,
CALCUTTA – 700 012

To

The Deputy Manager(Com)
C.E.S.C. House,
Chowrighee Square
Calcutta 700 001

No. Tech/Z-27/9/90

Dated the 29.5.1997

SUB: Revision of Tariffs in respect of certain Inland Postal Services with effect from 01.6.1997.

REF: Your letter No. Nil dated 28.9.1997

Sir,

As per revised Postal Tariff w.e.f. 01.6.1997 charges for Book, pattern and sample packets for first 50 Gms or fraction thereof is Re.1/-. For every additional 50 Gms or fraction thereof in excess of 50 Gms. is Rs.2/. Monthly consumption bill, if it is posted as Book, pattern and

sample packets the revised Postal Tariffs w.e.f. 01.6.1997, as mentioned above, will be applicable.

Thanking you,

Yours faithfully

Sd/-

(MRS. A. GHOSH)
Director of Postal Services
Calcutta Region/Cal-12"

In view of the letter dated 29.5.1997, the Company charged Rs. 1/- per Bill for the period from 1.6.1997 till by letter dated 29.10.1998, the Company was informed of cancellation of such letter as evident and quoted hereunder:

"DEPARTMENT OF POST, INDIA

OFFICE OF THE CHIEF POST MASTER GENERAL,
W.B. CIRCLE, YOGAYOG BHAWAN,
CALCUTTA – 700 012

From O/O the Chief P.M.G.	To The Deputy Manager
West Bengal Circle	(Commercial) ,
Yogayog Bhawan	Victoria House
Calcutta 700 012	Chowrighee Square
	Calcutta 700 001
No. Tech/Z-27/9/90	Dated at Calcutta-700012 the 29.10.1998

Subject

Sir,

I am directed to inform you that this office earlier letter of even no. dtd. 29.5.97 is hereby treated as cancelled. Monthly consumption bill is not under the category of Book Post/Book Packets as per this office rule.

This type of bill can be posted affixing the postage stamp as applicable on the letter mail with immediate effect.

Yours faithfully

Sd/-

(S.C. Sahu)
A.D.P.S. (Technical)
For Chief Postmaster-General, Cal-12"

33. Thus it is apparent that due to a wrong intimation given by the Postal Authority, the Company affixed the postal stamp of Rs.1/- per bill, treating it as 'book post' and the staff of the Postal Department without any objection cleared and delivered to the respective addressees.

34. Clause 30(iv) of Post Office Guide reminds the office of the Postal Authority to check the bundles to ensure proper check of franking articles and reads as under:-

"30. The following procedure must be insisted upon and should be strictly endorsed in all the offices:

(iv) Office which accepts the posting should check the bundles to see if various articles have been franked for correct postage and also the total value of the articles tallies with the details given in the dispatch slip and that entries in col.1 to 3 of the Franking Machines register of posting have correctly been made. A separate dispatch slip should be there for articles franked with different machines. He will then put his initials, date and date stamp in the Franking Machine Register of postings and return the same to the licensee or his agent."

35. Though under Clause 30(iv) the office which accepts the posting is required to check the bundles franked for correct postage and also to tally the total value of the articles, before dispatch of the article, there is failure on the part of the office of the Postal Authority as noticed by the Division Bench of the

High Court and for that the sender company cannot be made liable.

36. The Postal Authority mislead the sender company which caused charging of lesser amount for the bills is evident from the letters written by the Director, as quoted in the preceding paragraphs. The failure on the part of the Postal Authority to ensure correct postage as per Clause 30(iv) is also not in dispute. The mistake having been committed by the Postal Authority and there being failure on the part of office of the Postal Authority to check the postal articles and postage for recovering the amount from the addressee, it is not open for the Postal Authority to pass on such liability on the sender-company or to recover the same from the Company. The demand notice being not proper was rightly held to be illegal by the learned Single Judge. The question thus raised in this case is answered in negative and against the respondents.

37. In the result, the appeals are allowed. The demand notice and the order passed by the Division Bench of the High Court is set aside; the last portion of the direction given by the learned Single Judge authorizing the Postal Authority to decide the issue afresh and allowing them to retain the amount of Rs. 50 lakhs till such decision is also set aside. The respondents are directed to refund the amount of Rs.50 lakhs deposited by the Company pursuant to the interim order passed by the High Court along with 6% interest within three months from today. There will be no order as to costs.

R.P. Appeals allowed.

SAMAJ PARIVARTAN SAMUDAYA & ORS.
v.
STATE OF KARNATAKA &ORS.
IA NO. OF 2012
in
(Writ Petition (Civil) No. 562 of 2009)

MAY 11, 2012

[S.H. KAPADIA, CJI, AFTAB ALAM AND SWATANTER KUMAR, JJ.]

Mines and Minerals:

Minerals - Pilferage and illegal mining of - Case registered by CBI against erring company - Charge-sheet filed in court - Petition filed before Supreme Court regarding illegal mining still going on - Central Empowered Committee (CEC) constituted by Supreme Court - CEC submitted reports dated 20.4.2012 and 27.4.2012 to Supreme Court pointing out large illegalities and irregularities coupled with criminality - Held: In the instant case, all the acts and transactions may be so inter-connected that they would ultimately form one composite transaction making it imperative for the Court to direct complete and comprehensive investigation by a single investigating agency - Directions given to CBI to investigate into the issues specified in CEC Report dated 20.4.2012 - Meanwhile proceedings in relation to the items concerned as mentioned in the judgment, if pending before any court, to remain stayed - Matter adjourned to 3.8.2012 for consideration of report dated 27.4.2012 - Environmental law.

Code of Criminal Procedure, 1973:

s.173(8), 202 and 210 - Held: Further investigation by the investigating agency, after presentation of a challan (charge sheet in terms of s.173) is permissible in any case impliedly

but in no event is impermissible - Even assuming that the illegalities, irregularities and offences alleged to have been committed by the affected parties are the subject matter, even in their entirety, of previous investigation cases, sub-judice before various courts including the writ jurisdiction of the High Court, an investigating agency is empowered to conduct further investigation after institution of a charge-sheet before the court of competent jurisdiction - A Magistrate is competent to direct further investigation in terms of s. 173(8) in the case instituted on a police report - Similarly, the Magistrate has powers u/s 202 to direct police investigation while keeping the trial pending before him instituted on the basis of a private complaint in terms of that Section - The provisions of s. 210 use the expression 'shall' requiring the Magistrate to stay the proceedings of inquiry and trial before him in the event in a similar subject matter, an investigation is found to be in progress - All these provisions clearly indicate the legislative scheme under the Cr.P.C. that initiation of an investigation and filing of a chargesheet do not completely debar further or wide investigation by the investigating agency or police, or even by a specialized investigation agency - There does not seem to be any element of prejudice being caused to the affected parties if the CBI is permitted to investigate the entire matter - There does not seem to be any prejudice to parties if further or wider investigation is directed by the Court - The direction of further investigation is based upon documents and facts brought to light by the CEC as a result of examination conducted in the course of its primary function relating to inquiry into environmental violations and illegal mining activity - The criminal offences are primarily offences against the State and secondarily against the victim - In the instant case, if the investigation by specialized agency finds that the suspects have committed offences with or without involvement of persons in power, still such violation undoubtedly would have been a great loss to the environmental and natural resources and would hurt both the State and national economy

- An ordinary complainant cannot be expected to carry the burden of proving such complex offences before the court of competent jurisdiction by himself and at his own cost - Doing so would be a travesty of the criminal justice system.

Constitution of India, 1950:

Arts. 32 and 136 read with Art. 21 - Pilferage and illegal mining of minerals - Investigation by CBI - Charge-sheet submitted before court - Petitions filed before Supreme Court regarding illegal mining still continuing - Supreme Court constituting Central Empowered Committee (CEC) to report on the matter - Status of CEC - Held: The CEC is not discharging quasi-judicial or even administrative functions, with a view to determine any rights of the parties - It had made different recommendations with regard to prevention and prosecution of environmentally harmful and illegal activities carried on in collusion with government officers or otherwise - No prejudice has been caused to the intervenor/affected parties by non-grant of opportunity of hearing by the CEC - In any case, the Court has heard them and is considering the issues independently - As far as the challenge to the enlargement of jurisdiction by the CEC beyond the reference made by the Court, is concerned, the ambit and scope of proceedings before the Court, pending in the writ petition and civil appeal, clearly show that the Court is exercising a very wide jurisdiction in the national interest, to ensure that there is no further degradation of the environment or damage to the forests and the illegal mining and exports are stopped - The orders are comprehensive enough not only to give leverage to the CEC to examine any ancillary matters, but in fact, place an obligation on the CEC to report to the Court without exception and correctly, all matters that can have a bearing on the issues involved in all these petitions in both the States of Karnataka and Andhra Pradesh - The facts of the case reveal an unfortunate state of affairs which has prevailed for a considerable time in particular districts of both the States

of Andhra Pradesh and Karnataka - The CEC has recommended, and the complainant and petitioners have also highlighted, a complete failure of the State machinery in relation to controlling and protecting the environment, forests and minerals from being illegally mined and exploited - Wherever and whenever the State fails to perform its duties, the Court shall step in to ensure that Rule of Law prevails over the abuse of process of law - Such abuse may result from inaction or even arbitrary action of protecting the true offenders or failure by different authorities in discharging statutory or legal obligations in consonance with the procedural and penal statutes - The Court expressed its concern about the rampant pilferage and illegal extraction of natural wealth and resources, particularly, iron ore, as also the environmental degradation and disaster that may result from unchecked intrusion into the forest areas.

Investigation:

Duty of State - Opportunity of hearing - Held: A suspect has no indefeasible right of being heard prior to initiation of the investigation, particularly, by the investigating agency - Even the scheme of the Code of Criminal Procedure does not admit of grant of any such opportunity - There is no provision in the CrPC where an investigating agency must provide a hearing to the affected party before registering an FIR or even before carrying on investigation prior to registration of case against the suspect - The CBI may even conduct pre-registration inquiry for which notice is not contemplated under the provisions of the Code, the Police Manual or even as per the precedents laid down by the Court - It was ever and shall always remain the statutory obligation of State to prove offences against the violators of law - If a private citizen has initiated the proceedings before the competent court, it will not absolve the State of discharging its obligation under the provisions of the CrPC and the obligations of Rule of Law - The Court cannot countenance

an approach of this kind where the State can be permitted to escape its liability only on the ground that multifarious complaints or investigations have been initiated by private persons or bodies other than the State - In the considered view of the Court, it enhances the primary and legal duty of the State to ensure proper, fair and unbiased investigation.

T.N. Godavarman Thirumalpad v. Union of India & Ors. **2009 (17) SCC 755;** *Gopal Das Sindhi & Ors. v. State of Assam & Anr.* **AIR 1961 SC 986;** *Mohd. Yusuf v. Smt. Afaq Jahan & Anr.* **2006 (1) SCR 1 = AIR 2006 SC 705; and** *Mona Panwar v. High Court of Judicature of Allahabad Through its Registrar & Ors.* **2011 (2) SCR 413 = (2011) 3 SCC 496;** *Hemant Dhasmana v. Central Bureau of Investigation & Anr.* **2001 (1) Suppl. SCR 646 = (2001) 7 SCC 536;** *Shri Bhagwan Samardha Sreepada Vallabha Venkata Vishwandha Maharaj v. State of Andhra Pradesh and Ors.* **1999 (3) SCR 870 = JT 1999 (4) SC 537;** *Sasi Thomas v. State & Ors.* **2006 (9) Suppl. SCR 450 = (2006) 12 SCC 421; Sakiri Vasu v. State of Uttar Pradesh & Ors. 2007 (12) SCR 1100 = (2008) 2 SCC 409;** *Nirmal Singh Kahlon v. State of Punjab & Ors.* **2008 (14) SCR 1049 = (2009) 1 SCC 441 ;** *Narmada Bai v. State of Gujarat & Ors.* **2011 (5) SCR 729 = (2011) 5 SCC 79;** *Rubabbudin Sheikh vs. State of Gujarat* **2010 (1) SCR 991 = (2010) 2 SCC 200;** *Rama Chaudhary v. State of Bihar* **2009 (5) SCR 482 = (2009) 6 SCC 346;** *M.C. Mehta v. Union of India* **(2009) 6 SCC 142 - referred to**

Case Law Reference:

2009 (17) SCC 755	**referred to**	**para 3**
1961 AIR 986	**referred to**	**para 17**
2006 (1) SCR 1	**referred to**	**para 17**
2011 (2) SCR 413	**referred to**	**para 17**
2001 (1) Suppl. SCR 646	**referred to**	**para 18**

1999 (3) SCR 870	**referred to**	**para18**
2006 (9) Suppl. SCR 450	**referred to**	**para 19**
2007 (12) SCR 1100	**referred to**	**para 19**
2008 (14) SCR 1049	**referred to**	**para 26**
2011 (5) SCR 729	**referred to**	**para 33**
2010 (1) SCR 991	**referred to**	**para 33**
2009 (5) SCR 482	**referred to**	**para 37**
2009 (6) SCC 142	**referred to**	**para 38**

CIVIL ORIGINAL JURISDICTION : I.A of 2012.

IN

Writ Petition (Civil) No. 562 of 2009.

Under Article 32 of the Constitution of India.

Shyam Divan, (A.C.), A.D.N. Rao (A.C.), Siddharth Chaudhary (A.C.), Prashant Bhushan, Anitha Shenoy, G.N. Reddy, Ankur S. Kulkarni, S.N. Terdal, Kiran Suri, Gopal Jain, Rajat Jariwal (for Khaitan & Co.), Dr. Sushil Balwada, Anil Kumar Mishra-I, Dinesh Kumar Garg, Meera Mathur, AP & J Chambers, Balaji Srinivasan, Lawyer's Knit & Co., Rajesh Mahale, Munawwar Naseem, Rakesh K. Sharma, S. Narain & Co. Bhargava V. Desai, Avijit Bhushan, Aniruddha P. Mayee, E.C. Agrawala, Naveen R. Nath (for Parekh & Co.), Shailesh Madiyal, Uttara Babbar, Snehasish Mukherjee for the appearing parties.

The order of the Court was delivered by

SWATANTER KUMAR, J. 1. By this order we will deal with and dispose of, the recommendations made by the Central Empowered Committee (for short, 'CEC') in its report dated 20th April, 2012. Since we have heard the affected parties, the petitioners and the learned Amicus Curiae, we shall summarize

the contentions of the learned counsel for the respective parties. The learned counsel appearing for the affected parties contended:

a. CEC has submitted its report without providing them an opportunity of being heard.

b. CEC has exceeded its jurisdiction and enlarged the scope of the enquiry beyond the reference made by the Court. Thus, the Court should not accept any of the recommendations made by the CEC.

c. In relation to the alleged irregularities and illegalities pointed out in the report of the CEC, even where criminality is involved or criminal offences are suspected, the matters are sub judice before the Court of competent jurisdiction. Thus, this Court should not pass any orders for transferring the investigation of such offences to the Central Bureau of Investigation (for short 'CBI') as it would seriously prejudice their interests.

2. In order to deal with these contentions, it is necessary for this Court to briefly refer to the background of these cases, which has resulted in the filing of the unnumbered IA in Writ Petition No. 562/2009 and the peculiar facts and circumstances in which the CEC has made its recommendations.

3. Concerned with the rampant pilferage and illegal extraction of natural wealth and resources, particularly iron ore, and the environmental degradation and disaster that may result from unchecked intrusion into the forest areas, this Court felt compelled to intervene. Vide its order dated 9th September, 2002 in T.N. Godavarman Thirumalpad v. Union of India & Ors. [W.P.(C) No. 202 of 1995], this Court constituted the CEC to examine and monitor the various activities infringing the laws protecting the environment and also the preventive or punitive steps that may be required to be taken to protect the

environment. In addition to this general concern for the environment, the order of this Court dated 9th September, 2002, this Court noted violations of its Orders and directed that the CEC shall monitor implementation of all orders of the Court and shall place before it any unresolved cases of non-compliance, including in respect of the encroachments, removals, implementations of working plans, compensatory afforestation, plantations and other conservation issues. In furtherance to the said order, the Government framed a notification in terms of Section 33 of the Environment Protection Act, 1996. The CEC constituted by this Court was proposed to be converted into a Statutory Committee. The draft notification for the same was also placed before this Court on 9th September, 2002. After approval, the Court directed that a formal notification will be issued within a week and the functions and responsibilities given to the CEC were to be exercised by the said Statutory Committee. In fact, this Notification was issued on 17th September, 2002.

4. It may be noticed here that, it was in furtherance to the order of the Government of Andhra Pradesh vide G.O.M No. 467, Home (SCA) Dept. dated 17th November, 2009, supplemented by Notification No. 228/61/2009-AVD-11 dated 1st December, 2009 issued by the Central Government, that the CBI was directed to register a case against the Obulapuram Mining Company (OMC). Earlier the CBI had registered a case against the OMC on 7th December, 2009 and started the probe. This probably came to be stayed by the High Court vide its order dated 12th December, 2009 which stay was vacated by another order of that Court on 16th December, 2010 paving the way for a full-fledged probe. As a result of vacation of the stay, the CBI continued its investigation.

5. The CBI also filed a charge-sheet in a special court against the OMC, in an illegal mining case falling within the State of Karnataka, charging the accused under Sections 120B, 409, 420, 468 and Section 471 of the Indian Penal Code,

1860 (for short 'IPC') read with the provisions of the Prevention of Corruption Act, 1988. The case against the OMC for illegal mining was under investigation in respect of the areas of Obulapuram and Malangapudi villages of Anantpur district in the State of Andhra Pradesh and in the rest of the State of Andhra Pradesh.

6. Further, the State of Andhra Pradesh vide its G.O. Rt. No. 723 dated 25th November, 2009, issued by the Industrial and Commercial Department, suspended the mining operations and also the transportation of mineral material by OMC and even other implicated companies, on the basis of the findings of a High Level Committee, headed by the Principal Chief Conservator of Forests, Hyderabad and the Report of the CEC submitted to this Court in I.A. No. 2/2009 in Writ Petition (Civil) No. 201 of 2009, a copy of which was forwarded to the State Government. This was challenged before the High Court of Andhra Pradesh which, vide judgment dated 26th February, 2010, set aside the notification and allowed the writ petitions, while holding that the G.O. issued by the Government suffered from a jurisdictional error and was in violation of the principles of natural justice. Against the said judgment of the High Court, the Government of Andhra Pradesh filed a Special Leave Petition, SLP(C) No. 7366-7367 of 2010 on different grounds.

7. Samaj Parivartan Samuday, a registered society, filed petition under Article 32 of the Constitution of India stating that the illegal mining in the States of Andhra Pradesh and Karnataka was still going on in full swing. Such illegal mining and transportation of illegally mined minerals were being done in connivance with the officials, politicians and even Ministers of State. There was a complete lack of action on the part of the Ministry of Environment and Forests on the one hand and the States of Andhra Pradesh and Karnataka, on the other. It was averred that there was complete breakdown of the official machinery, thereby allowing such blatant illegalities to take place. This inaction and callousness on the part of the Central

and the State Governments and failure on their part to control the illegal mining has allowed large-scale destruction, both of forest and non-forest lands and has adversely affected the livelihood of the people. It thus, has filed WP (C) 562 of 2009 and has prayed for issuance of a writ of mandamus or any other appropriate writ, order or direction to the respective State Governments and to the Union of India, to stop all mining and related activities in the forest areas of these two States. It further sought that the orders passed by this Court in the W.P.(C) No. 202 of 1995 be carried out and the provisions of the Forest Conservation Act, 1980 be implemented. It also prayed for cancelling of the 'raising contracts' or sub-lease executed by the Government of Karnataka in favour of the various private individuals and allowing back-door entry into the mining activity in those areas. The most significant prayer in this petition was that after stopping of the mining activity, a systematic survey of both the inter-state border between the States of Andhra Pradesh and Karnataka and mine lease areas along the border be conducted and proper Relief and Rehabilitation Programmes (for short 'RR Programmes') be implemented.

8. All the above cases, i.e., W.P.(C) No. 202/1995, 562/2009 and SLP(C) No. 7366-7367/2010, relate to protection of environment, forest areas, stoppage of illegal mining and cancellation of illegal sub-leasing and contracts executed by any State Government in favour of the third parties, to the extent such contracts are invalid and improper. The latter cases, Writ Petition (Civil) No. 562 of 2009 and SLP(C) Nos. 7366-7367 of 2010 concern the Bellary Forest Reserve. Further, there were serious allegations raised in these petitions as to how and the manner in which the leases were executed and mining permits were granted or renewed for carrying out the mining activities stated in the petition.

9. The CEC was required to submit quarterly reports, which it has been submitting and with the passage of time, large

irregularities and illegalities coupled with criminality were brought to the notice of this Court. The CEC, in discharge of its functions and responsibilities, was examining the matters, in both the States of Andhra Pradesh and Karnataka. These violations have come to the surface as a result of enquiries conducted by the CEC, regarding illegal mining and mining beyond their leased areas by these companies. It was pointed by the CEC with specific reference to these companies that there was not only illegal extraction of iron ore but the minerals was being also extracted beyond the leased area specified in the lease deeds. Further, there was unchecked export of iron ore from the border areas of the two States, Andhra Pradesh and Karnataka. This related to the quantum, quality and transportation of ore as well.

10. While passing an order of complete ban on mining activity in these areas vide order dated 29th July, 2011 this Court sought submissions on the market requirement for mined ore and vide order dated 5th August, 2011 permitted only M/s. National Minerals Development Corporation Ltd. (for short "NMDC") to carry out very limited mining activity, so that the economic interest of the country and of the states does not suffer irretrievably. This Court has also directed the CEC to examine all aspects of the mining activity and report on various measures that are required to be taken for RR Programmes. Limited mining activity, thus, was permitted to be carried on in the area with the clear direction that the RR Programmes shall be simultaneously commenced and it is only after such RR Programmes are satisfactorily put into motion and the CEC makes a suggestion in this regard, that the mining activity would be permitted. Vide order dated 23rd September, 2011, this Court accepted various recommendations of the CEC and noticed that prima facie it appears that at the relevant time, there existed linkage between the alleged illegal mining in the Bellary Reserve Forest, falling in the District Anantpur in Andhra Pradesh and the illegalities in respect of grant/renewal of mining leases and deviations from sanctioned mine sketch in

the Bellary District in Karnataka. The Court also noted that illegally extracted iron ore belonging to one M/s. Associated Mining Company (for short "AMC") was apparently routed through the nearest Port in Vishakhapatnam, through district Anantpur in Andhra Pradesh. Thus, the Court felt that the CBI should examine the alleged illegalities. Vide the same order, this Court required the CBI to additionally present a status report of investigations which the CBI had undertaken in respect of OMC in Andhra Pradesh under FIR No. 17A/2009-CBI(Hyderabad). It was also reported that there was massive illegal mining by third parties in the mining lease No. 1111 of one M/s. National Minerals Development Corporation (NMDC). It was suspected that one M/s. Deccan Mining Syndicate (for short "DMS") was involved in such activities and no action had been taken on the complaints of NMDC. Some other directions were also issued including directions for further inquiry by the CEC and the CEC was required to put up a comprehensive report before this Court.

11. In the meanwhile, an application was filed by the petitioners of writ petition No.562 of 2009 which remained un-numbered. The prayer in this application was to extend the scope of investigation by the CBI relating to illegal mining and other allied activities which the politicians and major corporate groups including M/s. Jindal Group and M/s. Adanis were indulging in, within the State of Karnataka. They also prayed that both the States should also be directed demarcate the inter-state boundaries, particularly, in the mining area.

12. After examining the issues raised in the IA, the earlier orders of this Court and based on the meetings held by the CEC on 20th March, 2012 and 11th April, 2012, respectively, the CEC identified the issues as follows:-

i) The alleged serious illegalities/ irregularities and undue favour in respect of (a) the land purchased by the close relatives of the then Chief Minister, Karnataka for 0.40 crore in the year 2006 and

subsequently sold to M/s South West Mining Limited in the year 2010 for Rs.20.00 crores and (b) donation of Rs.20.00 crore received by Prerna Education Society from M/s South West Mining Limited.

ii) the alleged illegal export of iron ore from Belekeri Port and associated issues;

iii) alleged export from Krishapatnam and Chennai Port after exports were banned by the State of Karnataka; and

iv) transfer of senior police officers on deputation to Lokayukta, Karnataka."

13. The CEC filed two comprehensive reports before this Court, one dated 20th April, 2012 and other dated 27th April, 2012, both in Writ Petition (Civil) No. 562 of 2009.

14. Out of the above issues indicated, the CEC dealt with issue No. 1 in the Report dated 20th April, 2012, while issue Nos. 2 to 4 were dealt with in the Report dated 27th April, 2012. On issue No. 1, after summarizing the facts and its observations during its enquiry, the CEC pointed out illegalities, irregularities and instances of misuse of public office committed for the benefit of the close relatives of the then Chief Minister, State of Karnataka. It made the following recommendations :-

"15. Keeping in view the above facts and circumstances the CEC is of the considered view that the purchase of the above said land notified for acquisition for public purpose, its de-notification from acquisition, permission granted for conversion from agriculture to non-agricultural (residential) purpose and subsequent sale to M/s South West Mining Limited prima facie involves serious violations of the relevant Acts and procedural lapses and prima facie misuse of office by the then Chief Minister, Karnataka thereby enabling his close relatives to make windfall profits

and raises grave issues relating to undue favour, ethics and morality. Considering the above and taking into consideration the massive illegalities and illegal mining which have been found to have taken place in Karnataka and the allegations made against the Jindal Group as being receipient of large quantities of illegally mined material and undue favour being shown to them in respect of the mining lease of M/s MML it is *RECOMMENDED* that a detailed investigation may be directed to be carried out in the matter by an independent investigating agency such as the Central Bureau of Investigation (CBI) and to take follow up action. This agency may be asked to delve into the matter in depth and in a time bound manner. This agency may also be directed to investigate into other similar cases, if any, of lands de-notified from acquisition by the Bangalore Development Authority and the illegalities / irregularities / procedural lapses, if any, and to take follow up action.

16. The Prerna Education Society set up by the close relatives of the then Chief Minister, Karnataka has during March, 2010 vide two cheques of Rs.5.0 crores each received a donation of Rs.10 crores from M/s South West Mining Limited, a Jindal Group Company. In this context, it is of interest to note that during the year 2009-2010 the net profit (after tax) of the said Company was only Rs.5,73 crores. Looking into the details of the other donations made by the said Company or by the other Jindal Group Companies to any other Trust / Society not owned, managed or controlled by the Jindal Group. After considering that a number of allegations, with supporting documents, have been made in the Report dated 27th July, 2011 of Karnataka Lokayukta regarding the M/s. JSW Steel Limited having received large quantities of illegal mineral and alleged undue favour shown to it in respect of the extraction / supply of iron ore by / to it from the mining lease of M/s MML, it is *RECOMMENDED* that this Hon'ble

Court may consider directing the investigating agency such as CBI to also look into the linkages, if any, between the above said donation of Rs.10 crores made by M/s South West Mining Limited and the alleged receipt of illegal mineral by M/s JSW Steel Limited and the alleged undue favour shown to it in respect of the mining lease of M/s MML.

17. The CEC has filed its Report dated 28th March, 2012 wherein the representation filed by the petitioner against Mr. R. Parveen Chandra (ML 2661) has been dealt with (refer para 6(ii), page 11-13 of the CEC Report dated 28th March, 2012). In the said representation it has been alleged that Mr. Parveen Chandra the lessee of ML No.2661 has made two payments, one of Rs.2.50 crores to M/s Bhagat Homes Private Limited and the other of Rs.3.5 crores to M/s Dhavalagir Property Developers Private Limited as a quid pro quo for allotment of the said mining lease. It is *RECOMMENDED* that this Hon'ble Court may consider directing the investigating agency such as CBI to investigate the payments made by the above said lessee to these two companies whose Directions / shareholders are the close relatives of the then Chief Minister, Karnataka and whether there was any link between such payments and grant of mining lease to Mr. Parveen Chandra."

15. When we heard the parties to the lis and even permitted the affected parties as interveners, the hearing had been restricted to the Report of the CEC dated 20th April, 2012. Therefore, presently, we are passing directions only in relation to that Report, while postponing the hearing of the second Report which is dated 27th April, 2012.

16. In the backdrop of the above events of the case, reference to certain relevant provisions of the Criminal Procedure Code, 1973 (Cr.P.C.) can now be appropriately made, before we proceed to deal with the above noticed

contentions.

17. The machinery of criminal investigation is set into motion by the registration of a First Information Report (FIR), by the specified police officer of a jurisdictional police station or otherwise. The CBI, in terms of its manual has adopted a procedure of conducting limited pre-investigation inquiry as well. In both the cases, the registration of the FIR is essential. A police investigation may start with the registration of the FIR while in other cases (CBI, etc.), an inquiry may lead to the registration of an FIR and thereafter regular investigation may begin in accordance with the provisions of the CrPC. Section 154 of the CrPC places an obligation upon the authorities to register the FIR of the information received, relating to commission of a cognizable offence, whether such information is received orally or in writing by the officer in-charge of a police station. A police officer is authorised to investigate such cases without order of a Magistrate, though, in terms of Section 156(3) Cr.P.C. the Magistrate empowered under Section 190 may direct the registration of a case and order the police authorities to conduct investigation, in accordance with the provisions of the CrPC. Such an order of the Magistrate under Section 156(3) CrPC is in the nature of a pre-emptory reminder or intimation to police, to exercise their plenary power of investigation under that Section. This would result in a police report under Section 173, whereafter the Magistrate may or may not take cognizance of the offence and proceed under Chapter XVI CrPC. The Magistrate has judicial discretion, upon receipt of a complaint to take cognizance directly under Section 200 CrPC, or to adopt the above procedure. [Ref. *Gopal Das Sindhi & Ors. v. State of Assam & Anr.* [AIR 1961 SC 986]; *Mohd. Yusuf v. Smt. Afaq Jahan & Anr.* [AIR 2006 SC 705]; and *Mona Panwar v. High Court of Judicature of Allahabad Through its Registrar & Ors.* [(2011) 3 SCC 496].

18. Once the investigation is conducted in accordance with the provisions of the CrPC, a police officer is bound to file a

report before the Court of competent jurisdiction, as contemplated under Section 173 CrPC, upon which the Magistrate can proceed to try the offence, if the same were triable by such Court or commit the case to the Court of Sessions. It is significant to note that the provisions of Section 173(8) CrPC open with non-obstante language that nothing in the provisions of Section 173(1) to 173(7) shall be deemed to preclude further investigation in respect of an offence after a report under sub-Section (2) has been forwarded to the Magistrate. Thus, under Section 173(8), where charge-sheet has been filed, that Court also enjoys the jurisdiction to direct further investigation into the offence. {Ref., *Hemant Dhasmana v. Central Bureau of Investigation & Anr.* [(2001) 7 SCC 536]}. This power cannot have any inhibition including such requirement as being obliged to hear the accused before any such direction is made. It has been held in *Shri Bhagwan Samardha Sreepada Vallabha Venkata Vishwandha Maharaj v. State of Andhra Pradesh and Ors.* [JT 1999 (4) SC 537] that the casting of any such obligation on the Court would only result in encumbering the Court with the burden of searching for all potential accused to be afforded with the opportunity of being heard.

19. While the trial Court does not have inherent powers like those of the High Court under Section 482 of the CrPC or the Supreme Court under Article 136 of the Constitution of India, such that it may order for complete reinvestigation or fresh investigation of a case before it, however, it has substantial powers in exercise of discretionary jurisdiction under Sections 311 and 391 of CrPC. In cases where cognizance has been taken and where a substantial portion of investigation/trial have already been completed and where a direction for further examination would have the effect of delaying the trial, if the trial court is of the opinion that the case has been made out for alteration of charge etc., it may exercise such powers without directing further investigation. {Ref. *Sasi Thomas v. State & Ors.* [(2006) 12 SCC 421]}. Still in another case, taking the aid

of the doctrine of implied power, this Court has also stated that an express grant of statutory power carries with it, by necessary implication, the authority to use all reasonable means to make such statutory power effective. Therefore, absence of statutory provision empowering Magistrate to direct registration of an FIR would not be of any consequence and the Magistrate would nevertheless be competent to direct registration of an FIR. {Ref. *Sakiri Vasu v. State of Uttar Pradesh & Ors.* [(2008) 2 SCC 409]}.

20. Thus, the CrPC leaves clear scope for conducting of further inquiry and filing of a supplementary charge sheet, if necessary, with such additional facts and evidence as may be collected by the investigating officer in terms of sub-Sections (2) to (6) of Section 173 CrPC to the Court.

21. To put it aptly, further investigation by the investigating agency, after presentation of a challan (charge sheet in terms of Section 173 CrPC) is permissible in any case impliedly but in no event is impermissible.

22. A person who complains of commission of a cognizable offence has been provided with two options under Indian Criminal jurisprudence. Firstly, he can lodge the police report which would be proceeded upon as afore-noticed and secondly, he could file a complaint under Section 200 CrPC, whereupon the Magistrate shall follow the procedure provided under Sections 200 to 203 or 204 to 210 under Chapter XV and XVI of the CrPC.

23. In the former case, it is upon the police report that the entire investigation is conducted by the investigating agency and the onus to establish commission of the alleged offence beyond reasonable doubt is entirely on the prosecution. In a complaint case, the complainant is burdened with the onus of establishing the offence and he has to lead evidence before the Court to establish the guilt of the accused. The rule of establishing the charges beyond reasonable doubt is

applicable to a complaint case as well.

24. The important feature that we must notice for the purpose of the present case is that even on a complaint case, in terms of Section 202, the Magistrate can refer the complaint to investigation by the police and call for the report first, deferring the hearing of the complaint till then. Section 210 CrPC is another significant provision with regard to the powers of the Court where investigation on the same subject matter is pending. It provides that in a complaint case where any enquiry or trial is pending before the Court and in relation to same offence and investigation by the Police is in progress which is the subject matter of the enquiry or trial before the Court, the Magistrate shall stay the proceedings and await the report of the investigating agency. Upon presentation of the report, both the cases on a Police report and case instituted on a complaint shall be tried as if both were instituted on a Police report and if the report relates to none of the accused in the complaint it shall proceed with the enquiry/trial which had been stayed by it. The section proceeds on the basis that a complaint case and case instituted on a police report for the commission of the same offence can proceed simultaneously and the Court would await the Police report before it proceeds with the complaint in such cases. The purpose again is to try these cases together, if they are in relation to the same offence with the intent to provide a fair and effective trial. The powers of the trial court are very wide and the legislative intent of providing a fair trial and presumption of innocence in favour of the accused is the essence of the criminal justice system.

25. The Court is vested with very wide powers in order to equip it adequately to be able to do complete justice. Where the investigating agency has submitted the charge sheet before the court of competent jurisdiction, but it has failed to bring all the culprits to book, the Court is empowered under Section 319 Cr.P.C. to proceed against other persons who are not arrayed as accused in the chargesheet itself. The Court can summon

such suspected persons and try them as accused in the case, provided the Court is satisfied of involvement of such persons in commission of the crime from the record and evidence before it.

26. We have referred to these provisions and the scope of the power of the criminal court, in view of the argument extended that there are certain complaints filed by private persons or that the matters are pending before the court and resultantly this Court would be not competent in law to direct the CBI to conduct investigation of those aspects. We may notice that the investigation of a case or filing chargesheet in a case does not by itself bring the absolute end to exercise of power by the investigating agency or by the Court. Sometimes and particularly in the matters of the present kind, the investigating agency has to keep its options open to continue with the investigation, as certain other relevant facts, incriminating materials and even persons, other than the persons stated in the FIR as accused, might be involved in the commission of the crime. The basic purpose of an investigation is to bring out the truth by conducting fair and proper investigation, in accordance with law and ensure that the guilty are punished. At this stage, we may appropriately refer to the judgment of this Court in the case of *Nirmal Singh Kahlon v. State of Punjab & Ors.* [(2009) 1 SCC 441] wherein an investigation was being conducted into wrongful appointments to Panchayat and other posts by the Police Department of the State. However, later on, these were converted into a public interest litigation regarding larger corruption charges. The matter was sought to be referred for investigation to a specialised agency like CBI. The plea taken was that the Special Judge was already seized of the case as charge sheet had been filed before that Court, and the question of referring the matter for investigation did not arise. The High Court in directing investigation by the CBI had exceeded its jurisdiction and assumed the jurisdiction of the Special Judge. The plea of prejudice was also raised. While rejecting these arguments,

the appeals were dismissed and this Court issued a direction to the CBI to investigate and file the charge sheet before the Court having appropriate jurisdiction over the investigation. The reasoning of the Court can be examined from paragraph 63 to 65 of the said judgment, which reads as under:-

> "63. The High Court in this case was not monitoring any investigation. It only desired that the investigation should be carried out by an independent agency. Its anxiety, as is evident from the order dated 3-4-2002, was to see that the officers of the State do not get away. If that be so, the submission of Mr Rao that the monitoring of an investigation comes to an end after the charge-sheet is filed, as has been held by this Court in *Vineet Narain and M.C. Mehta (Taj Corridor Scam) v. Union of India,* loses all significance.
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> 64. Moreover, it was not a case where the High Court had assumed a jurisdiction in regard to the same offence in respect whereof the Special Judge had taken cognizance pursuant to the charge-sheet filed. The charge-sheet was not filed in the FIR which was lodged on the intervention of the High Court.
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> 65. As the offences were distinct and different, the High Court never assumed the jurisdiction of the Special Judge to direct reinvestigation as was urged or otherwise."

27. Now, we shall proceed to examine the merit of the contentions raised before us. We may deal with the submissions (a) and (b), together, as they are intrinsically inter-related.

28. The CEC had submitted the Report dated 20th April, 2012 and it has been stated in the Report that opportunity of being heard had been granted to the affected parties. However, the contention before us is that while the CEC heard other parties, it had not heard various companies like M/s. South West

Mining Ltd. and M/s. JSW Steel Ltd. Firstly, the CEC is not vested with any investigative powers under the orders of this Court, or under the relevant notifications, in the manner as understood under the CrPC. The CEC is not conducting a regular inquiry or investigation with the object of filing chargesheet as contemplated under Section 173 CrPC. Their primary function and responsibility is to report to the Court on various matters relating to collusion in illegal and irregular activities that are being carried on by various persons affecting the ecology, environment and reserved forests of the relevant areas. While submitting such reports in accordance with the directions of this Court, the CEC is required to collect such facts. In other words, it has acted like a fact finding inquiry. The CEC is not discharging quasi-judicial or even administrative functions, with a view to determine any rights of the parties. It was not expected of the CEC to give notice to the companies involved in such illegalities or irregularities, as it was not determining any of their rights. It was simpliciter reporting matters to the Court as per the ground realities primarily with regard to environment and illegal mining for appropriate directions. It had made different recommendations with regard to prevention and prosecution of environmentally harmful and illegal activities carried on in collusion with government officers or otherwise. We are of the considered view that no prejudice has been caused to the intervenor/affected parties by non-grant of opportunity of hearing by the CEC. In any case, this Court has heard them and is considering the issues independently.

29. As far as the challenge to the enlargement of jurisdiction by the CEC beyond the reference made by the Court, is concerned, the said contention is again without any substance. We have referred to the various orders of this Court. The ambit and scope of proceedings before this Court, pending in the above writ petition and civil appeal, clearly show that the Court is exercising a very wide jurisdiction in the national interest, to ensure that there is no further degradation of the environment or damage to the forests and so that illegal mining

and exports are stopped. The orders are comprehensive enough to not only give leverage to the CEC to examine any ancillary matters, but in fact, place an obligation on the CEC to report to this Court without exception and correctly, all matters that can have a bearing on the issues involved in all these petitions in both the States of Karnataka and Andhra Pradesh. Thus, we reject this contention also.

30. Contention (c) is advanced on the premise that all matters stated by the CEC are sub-judice before one or the other competent Court or investigating agency and, thus, this Court has no jurisdiction to direct investigation by the CBI. In any case, it is argued that such directions would cause them serious prejudice.

31. This argument is misplaced in law and is misconceived on facts. Firstly, all the facts that had been brought on record by the CEC are not directly sub-judice, in their entirety, before a competent forum or investigating agency.

32. In relation to issue 1(a) raised by the CEC which also but partially is the subject matter of PCR No. 2 of 2011 pending before the Additional City Civil and Sessions Judge, Bangalore under the Prevention of Corruption Act. The Court took cognizance and summoned the accused to face the trial, writ against the same is pending in the High Court. It primarily relates to the improper de-notification of the land, which had been under acquisition but possession whereof was not taken. This land was purchased by the family members of the then Chief Minister for a consideration of Rs.40 lacs and was sold after de-notification for a sum of Rs.20 crores to South West Mining Ltd. after de-notification. For this purpose, office of the Chief Minister and other higher Government Officials were used. While the earlier part of above-noted violations is covered under PCR No. 2 of 2011, the transactions of purchase sale and other attendant circumstances are beyond the scope of the said pending case which refers only to the decision of de-notification. It appears that the entire gamut or the complete

facts stated by the CEC and supported by documents are not the matter sub-judice before the Trial Court. Similarly, issue 1 (b) relates to the donation of Rs.20 crores received by Prerna Education Society from M/s. South West Mining Ltd. The society is stated to be belonging to the members of the family of the Chief Minister Shri Yeddyurappa. The written submissions filed on behalf of M/s. South West Mining Ltd., do not reflect that issue 1(a) and (b) of the CEC report under consideration are directly and in their entirety are the subject matter of any investigations in progress and proceedings pending before any competent forum. These are merely informatory facts, supported by relevant and authentic documents, highlighted by the CEC in its report for consideration of the Court. A suspect has no indefeasible right of being heard prior to initiation of the investigation, particularly by the investigating agency. Even, in fact, the scheme of the Code of Criminal Procedure does not admit of grant of any such opportunity. There is no provision in the CrPC where an investigating agency must provide a hearing to the affected party before registering an FIR or even before carrying on investigation prior to registration of case against the suspect. The CBI, as already noticed, may even conduct pre-registration inquiry for which notice is not contemplated under the provisions of the Code, the Police Manual or even as per the precedents laid down by this Court. It is only in those cases where the Court directs initiation of investigation by a specialized agency or transfer investigation to such agency from another agency that the Court may, in its discretion, grant hearing to the suspect or affected parties. However, that also is not an absolute rule of law and is primarily a matter in the judicial discretion of the Court. This question is of no relevance to the present case as we have already heard the interveners.

33. In the case of *Narmada Bai v. State of Gujarat & Ors.* [(2011) 5 SCC 79], this Court was concerned with a case where the State Government had objected to the transfer of investigation to CBI of the case of a murder of a witness to a

fake encounter. The CBI had already investigated the case of fake encounter and submitted a charge sheet against high police officials. This Court analyzed the entire law on the subject and cited with approval the judgment of the Court in the case of *Rubabbuddin Sheikh v. State of Gujarat* [(2010) 2 SCC 200]. In that case, the Court had declared the law that in appropriate cases, the Court is empowered to hand over investigation to an independent agency like CBI even when the charge-sheet had been submitted. In the case of Narmada Bai, the Court had observed that there was a situation which upon analysis of the allegations it appeared that abduction of Sohrabuddin and Kausarbi thei their subsequent murder as well as the murder of the witnesses are one series of facts and was connected together as to form the same transaction under Section 220 of the Code of Criminal Procedure and it was considered appropriate to transfer the investigation of the subsequent case also to CBI.

34. If we analyse the abovestated principles of law and apply the same to the facts of the present case, then the Court cannot rule out the possibility that all these acts and transactions may be so inter-connected that they would ultimately form one composite transaction making it imperative for the Court to direct complete and comprehensive investigation by a single investigating agency. The need to so direct is, inter alia, for the following considerations:

(a) The report of the CEC has brought new facts, subsequent events and unquestionable documents on record to substantiate its recommendations.

(b) The subsequent facts, inquiry and resultant suspicion, therefore, are the circumstances for directing further and specialized investigation.

(c) The scope and ambit of present investigation is much wider than the investigations/proceedings

pending before the Court/investigating agencies.

(d) Various acts and transactions prima facie appear to be part of a same comprehensive transaction.

(e) The requirement of just, fair and proper investigation would demand investigation by a specialized agency keeping in view the dimensions of the transactions, the extent of money involved and manipulations alleged.

35. To give an example to emphasize that this is a case requiring further investigation and is fit to be transferred to the specialized investigating agency, we may mention that the South West Mining Ltd. was initially found to be a front company of JSW Steels Ltd. Thereafter all transactions were examined and the improper purchase of land and donations made by them came to light. These facts appear to be inherently interlinked. Despite that and intentionally, we are not dealing with the factual matrix of the case or the documents on record, in any detail or even discussing the merits of the case in relation to the controversies raised before us so as to avoid any prejudice to the rights of the affected parties before the courts in various proceedings and investigation including the proposed investigation.

36. Now, we shall proceed on the assumption that the illegalities, irregularities and offences alleged to have been committed by the affected parties are the subject matter, even in their entirety, of previous investigation cases, sub-judice before various Courts including the writ jurisdiction of the High Court. It is a settled position of law that an investigating agency is empowered to conduct further investigation after institution of a charge-sheet before the Court of competent jurisdiction. A magistrate is competent to direct further investigation in terms of Section 173(8) Cr.P.C. in the case instituted on a police report. Similarly, the Magistrate has powers under Section 202 Cr.P.C. to direct police investigation while keeping the trial

pending before him instituted on the basis of a private complaint in terms of that Section. The provisions of Section 210 Cr.P.C. use the expression 'shall' requiring the Magistrate to stay the proceedings of inquiry and trial before him in the event in a similar subject matter, an investigation is found to be in progress. All these provisions clearly indicate the legislative scheme under the Cr.P.C. that initiation of an investigation and filing of a chargesheet do not completely debar further or wider investigation by the investigating agency or police, or even by a specialized investigation agency. Significantly, it requires to be noticed that when the court is to ensure fair and proper investigation in an adversarial system of criminal administration, the jurisdiction of the Court is of a much higher degree than it is in an inquisitorial system. It is clearly contemplated under the Indian Criminal Jurisprudence that an investigation should be fair, in accordance with law and should not be tainted. But, at the same time, the Court has to take precaution that interested or influential persons are not able to misdirect or hijack the investigation so as to throttle a fair investigation resulting in the offenders escaping the punitive course of law. It is the inherent duty of the Court and any lapse in this regard would tantamount to error of jurisdiction.

37. In the case of *Rama Chaudhary v. State of Bihar* [(2009) 6 SCC 346], this Court was considering the scope of Sections 173(8), 173(2) and 319 of the CrPC in relation to directing further investigation. The accused raised a contention that in that case, report had been filed, charges had been framed and nearly 21 witnesses had been examined and at that stage, in furtherance to investigation taken thereafter, if a supplementary charge-sheet is filed and witnesses are permitted to be summoned, it will cause serious prejudice to the rights of the accused. It was contended that the Court has no jurisdiction to do so. The Trial Court permitted summoning and examination of the summoned witnesses in furtherance to the supplementary report. The order of the Trial Court was upheld by the High Court. While dismissing the special leave

petition, a Bench of this Court observed :

"14. Sub-section (1) of Section 173 CrPC makes it clear that every investigation shall be completed without unnecessary delay. Sub-section (2) mandates that as soon as the investigation is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government mentioning the name of the parties, nature of information, name of the persons who appear to be acquainted with the circumstances of the case and further particulars such as the name of the offences that have been committed, arrest of the accused and details about his release with or without sureties.

15. Among the other sub-sections, we are very much concerned about sub-section (8) of Section 173 which reads as under:

"173. (8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."

A mere reading of the above provision makes it clear that irrespective of the report under sub-section (2) forwarded to the Magistrate, if the officer in charge of the police station obtains further evidence, it is incumbent on his part to forward the same to the Magistrate with a further report with regard to such evidence in the form prescribed. The

abovesaid provision also makes it clear that further investigation is permissible, however, reinvestigation is prohibited.

16. The law does not mandate taking of prior permission from the Magistrate for further investigation. Carrying out a further investigation even after filing of the charge-sheet is a statutory right of the police. Reinvestigation without prior permission is prohibited. On the other hand, further investigation is permissible.

18. Sub-section (8) of Section 173 clearly envisages that on completion of further investigation, the investigating agency has to forward to the Magistrate a "further" report and not a fresh report regarding the "further" evidence obtained during such investigation.

19. As observed in *Hasanbhai Valibhai Qureshi v. State of Gujarat* the prime consideration for further investigation is to arrive at the truth and do real and substantial justice. The hands of the investigating agency for further investigation should not be tied down on the ground of mere delay. In other words

> "[t]he mere fact that there may be further delay in concluding the trial should not stand in the way of further investigation if that would help the court in arriving at the truth and do real and substantial as well as effective justice."

38. Reference can also be made to the judgment of this Court in the case of *National Human Rights Commission v. State of Gujarat & Ors.* [(2009) 6 SCC 342], wherein the Court was dealing with different cases pending in relation to the communal riots in the State of Gujarat and the trial in one of the cases was at the concluding stage. In the meanwhile, in another FIR filed in relation to a similar occurrence, further investigation was being conducted and was bound to have a bearing even on the pending cases. The Court, while permitting

inquiry/investigation, including further investigation, completed stayed the proceedings in the Trial Court as well and held as under :

> "10. We make it clear that SIT shall be free to work out the modalities and the norms required to be followed for the purpose of inquiry/investigation including further investigation. Needless to say the sole object of the criminal justice system is to ensure that a person who is guilty of an offence is punished.
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> 11. Mr K.T.S. Tulsi, learned Senior Counsel had submitted that in some cases the alleged victims themselves say that wrong persons have been included by the police officials as accused and the real culprits are sheltered. He, therefore, suggested that trial should go on, notwithstanding the inquiry/ investigation including further investigation as directed by us. We find that the course would not be appropriate because if the trial continues and fresh evidence/materials surface, it would require almost a de novo trial which would be not desirable."

39. We do not find any necessity to multiply the precedents on this issue. It is a settled principle of law that the object of every investigation is to arrive at the truth by conducting a fair, unbiased and proper investigation.

40. Referring to the plea of prejudice taken up by the affected parties before us, we are unable to see any element of prejudice being caused to the affected parties if the CBI is permitted to investigate the entire matter. The plea taken by the interveners before us is that M/s. JSW Steels Ltd. is a bona fide purchaser of iron ore from the open market and they have been affected by the unilateral actions of one M/s. Mysore Minerals Ltd. They state that they have no statutory liability to check origin of iron ore or to maintain Form 27. According to M/s. JSW Steels Ltd., they are already co-operating with the CBI in the investigation directed by the Supreme Court. As far as M/s. South West Mining Ltd. is concerned, it has stated that

it is the purchaser of the land for bona fide consideration and genuine purpose. The land has been converted to commercial use and that is why Rs.20 crores were paid as consideration. They further claimed that they had Rs.23.96 crores of pre-tax profit and, therefore, they were in a position to make the donation which they had made. Not only they, but other companies affiliated to Jindal Group have also made similar contributions. It is not for us to examine whether the stand taken by the intervener companies is correct or not. It requires to be investigated and an investigation per se would help them to clear their position, rather than subjecting them to face multifarious litigations, investigations and economic burden. Having heard them, we are unable to find any prejudice to parties if further or wider investigation is directed by this Court. The direction of further investigation is based upon documents and facts brought to light by the CEC as a result of examination conducted in the course of its primary function relating to inquiry into environmental violations and illegal mining activity. If the proceedings are permitted to continue and finally investigations reveal that a case which requires to be tried in accordance with law exists, then the interveners would have to face proceedings all over again. So, it is in their own interest that the specialized agency is permitted to investigate and bring out the true facts before the Court of competent jurisdiction.

41. We must notice that the criminal offences are primarily offences against the State and secondarily against the victim. In this case, if the investigation by specialized agency finds that the suspect persons have committed offences with or without involvement of persons in power, still such violation undoubtedly would have been a great loss to the environmental and natural resources and would hurt both the State and national economy. We cannot expect an ordinary complainant to carry the burden of proving such complex offences before the Court of competent jurisdiction by himself and at his own cost. Doing so would be a travesty of the criminal justice system.

42. It was ever and shall always remain the statutory the obligation of the State to prove offences against the violators of law. If a private citizen has initiated the proceedings before the competent court, it will not absolve the State of discharging its obligation under the provisions of the CrPC and the obligations of Rule of Law. The Court cannot countenance an approach of this kind where the State can be permitted to escape its liability only on the ground that multifarious complaints or investigations have been initiated by private persons or bodies other than the State. In our considered view, it enhances the primary and legal duty of the State to ensure proper, fair and unbiased investigation.

43. The facts of the present case reveal an unfortunate state of affairs which has prevailed for a considerable time in the mentioned districts of both the States of Andhra Pradesh and Karnataka. The CEC has recommended, and the complainant and petitioners have also highlighted, a complete failure of the State machinery in relation to controlling and protecting the environment, forests and minerals from being illegally mined and exploited.

44. Wherever and whenever the State fails to perform its duties, the Court shall step in to ensure that Rule of Law prevails over the abuse of process of law. Such abuse may result from inaction or even arbitrary action of protecting the true offenders or failure by different authorities in discharging statutory or legal obligations in consonance with the procedural and penal statutes. This Court expressed its concern about the rampant pilferage and illegal extraction of natural wealth and resources, particularly, iron ore, as also the environmental degradation and disaster that may result from unchecked intrusion into the forest areas. This Court, vide its order dated 29th July, 2011 invoked the precautionary principle, which is the essence of Article 21 of the Constitution of India as per the dictum of this Court in the case of *M.C. Mehta v. Union of India* [(2009) 6 SCC 142], and had consequently issued a ban on illegal mining. The Court also directed Relief and Rehabilitation Programmes to be

carried out in contiguous stages to promote inter-generational equity and the regeneration of the forest reserves. This is the ethos of the approach consistently taken by this Court, but this aspect primarily deals with the future concerns. In respect of the past actions, the only option is to examine in depth the huge monetary transactions which were effected at the cost of national wealth, natural resources, and to punish the offenders for their illegal, irregular activities. The protection of these resources was, and is the constitutional duty of the State and its instrumentalities and thus, the Court should adopt a holistic approach and direct comprehensive and specialized investigation into such events of the past.

45. Compelled by the above circumstances and keeping in mind the clear position of law supra, we thus direct;

a) The issues specified at point 1(a) and 1(b) of the CEC Report dated 20th April, 2012 are hereby referred for investigation by the Central Bureau of Investigation.

b) All the proceedings in relation to these items, if pending before any Court, shall remain stayed till further orders of this Court. The CBI shall complete its investigation and submit a Report to the Court of competent jurisdiction with a copy of the Report to be placed on the file of this Court within three months.

c) The Report submitted by the CEC and the documents annexed thereto shall be treated as 'informant's information to the investigating agency' by the CBI.

d) The CBI shall undertake investigation in a most fair, proper and unbiased manner uninfluenced by the stature of the persons and the political or corporate clout, involved in the present case. It will be open to the CBI to examine and inspect the records of

any connected matter pending before any investigating agency or any court.

e) The competent authority shall constitute the special investigating team, headed by an officer not below the rank of Additional Director General of Police/ Additional Commissioner forthwith.

f) Any investigation being conducted by any agency other than CBI shall also not progress any further, restricted to the items stated in clause (a) above, except with the leave of the Court. The CBI shall complete its investigation uninfluenced by any order, inquiry or investigation that is pending on the date of passing of this order.

g) This order is being passed without prejudice to the rights and contentions of any of the parties to the lis, as well as in any other proceedings pending before courts of competent jurisdiction and the investigating agencies.

h) All pleas raised on merits are kept open.

i) We direct all the parties, the Government of the States of Andhra Pradesh, Karnataka and all other government departments of that and/or any other State, to fully cooperate and provide required information to CBI.

46. With the above directions, we accept the recommendation of the CEC to the extent as afore-stated.

47. Let the matter stand over to 3rd August, 2012 for consideration of the Report dated 27th April, 2012 filed by the CEC.

R.P. Matter Adjourned.

UNION TERRITORY OF LAKSHADWEEP & ORS.

v.

SEASHELLS BEACH RESORT & ORS.

(Civil Appeal Nos.4625-4626 of 2012)

MAY 11, 2012

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

Environment - Lakshadweep islands - Tourist resorts - Order of High Court in writ petition directing the appellants to process the applications made by respondent for all clearances including finalisation of CRZ norms and pending final decision on the same, to permit the respondent to run the resort established by it and further directing the appellants to issue travel permits and entry passes required by tourists making use of the accommodation in the said resort - Challenge to - Held: The High Court's order proceeds entirely on humanitarian and equitable considerations, in the process neglecting equally, if not more, important questions having impact on future development and management of the Lakshadweep Islands - The High Court failed to appreciate that equitable considerations were wholly misplaced in a situation where the very erection of the building to be used as a resort violated the CRZ requirements or the conditions of land use diversion - The resort could not be commissioned under a judicial order in disregard of serious objections that were raised by the Administration, which objections had to be answered before any direction could issue from a writ Court - Direction given by Supreme Court for constitution of an Expert Committee - Committee to examine allegations regarding violation of the CRZ and other irregularities committed by the respondent or by other individuals/entities in relation to establishment and/or running resorts and 'home stays' in the islands - Allegations regarding irregularities in the matter of grant of permits to tourists visiting the islands as also in

regard to permissions granted to resort owners/home stays to operate on the islands also to be examined by the Committee - Committee to submit preliminary report about the steps taken by it - Matter be posted for orders before the Court after receipt of the preliminary report.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4625-4626 of 2012.

From the Judgment & Order dated 16.01.2012 of the High Court of Kerala at Ernakulam in W.P. No. 34398 of 2011 and Writ Appeal No. 68 of 2011.

H.P. Rawal, ASG, Ashok Bhan, V. Giri, D.S. Mahra, S.S. Rawat, Harsh N. Parekh, Dayan Krishnan, Gautam Narayan, Tara Chandra Sharma, B. Krishna Prasad, P.B. Krishnan, Sreegesh M.K., P.B. Subramanyan, A. Venayagam Balan for the appearing parties.

The order for the Court was delivered

O R D E R

1. Leave granted.

2. These appeals have been filed by the Union Territory of Lakshadweep against an order dated 16th January, 2012 passed by the High Court of Kerala at Ernakulam whereby the High Court has directed the appellants to process the applications made by respondent No.1-Seashells Beach Resort, hereinafter referred to as respondent, for all clearances including finalisation of CRZ norms and pending final decision on the same, to permit the respondent to run the resort established by it at Agatti. The High Court has further directed the appellants to issue travel permits and entry passes required by tourists making use of the accommodation in the said resort.

3. Lakshadweep Administration finds fault with the direction issued by the High Court on several grounds including

the ground that respondent-writ petitioner before the High Court had no licence from the Tourism Department and no clearance from the Coastal Zone Regulatory Authority or the Pollution Control Board to run the resort established by it. It is alleged that the direction issued by the High Court amounts to permitting the respondent to run a resort sans legal permission and authority and without any check, control or regulation regarding its affairs. The Administration also points out that diversion of land use qua different survey numbers in Agatti was obtained by one of the partners of the respondent for construction of dwelling houses and not for establishing a commercial establishment like a tourist resort and that respondent No.1 had misused the said permission by constructing a resort in the No Development Zone (NDZ) falling within 50 metres of High Tide Line and thereby violated the CRZ norms. The respondent has, according to the Administration, constructed cottage at a distance of 28 metres from the High Tide Line on the western side of the sea and thus violated the terms of the permission given to it. The Administration further alleges that it had never permitted the respondent to run a resort and that it had on the basis of a permission obtained from the local panchayat, which had no authority to issue such permission, started bringing tourists, including foreign tourists, to the resort on the pretext that the accommodation was in the nature of 'home stay'. The Administration asserts that neither the Union Territory of Lakshadweep nor the Government of India have taken any policy decision regarding permitting home stay arrangements on the Lakshadweep islands and that the High Court had completely overlooked the fact that all development in relation to the said islands shall have to be in accordance with the Integrated Island Management Plan and the CRZ norms. The Administration also relies upon a Notification dated 6th January, 2011 issued by the Government of India in exercise of its powers under Section 3 of the Environment (Protection) Act, 1986 which notification is intended to promote conservation and protection of the Island's unique environment and its marine area and to promote development through a sustainable

integrated management plan based on scientific principles, taking into account the vulnerability of the coast to natural hazards.

4. When these petitions came before us for preliminary hearing on 2nd March 2012, this Court while issuing notice to the respondent and staying the operation of the impugned order passed by the High Court, directed the petitioner and respondent No.2 to furnish the following information on affidavit:

(1) Whether the proposed Integrated Island Management Plan has been finalised for the Union Territory of Lakshadweep and whether CRZ for the said territory has been notified?

(2) If the CRZ has not been notified or the plan has not been finalised, the reasons for delay and the stage at which the matter rests at present and the particulars of the authority with whom the matter is pending.

(3) The total number of the applications received by the Union Territory of Lakshadweep for setting up of resorts and stage at which the said applications are pending/being processed.

(4) The nature and extent of the violations which the administration of the Union Territory of Lakshadweep have noticed in the proposed resorts and the action, if any, taken for removal of such violations. If no action has been taken/initiated for removal of the violation, the reasons for the failure of the authorities to do so and the persons responsible for the omission/inaction.

(5) The particulars of unauthorised resorts being operated in any part of the Union Territory of the Lakshadweep and the action proposed to be taken for closure/removal of such resorts.

5. In compliance with the above directions, the Administrator of the UT of Lakshadweep has filed an affidavit, inter-alia, stating:

(i) The proposed Integrated Island Management Plan (IIMP) for Agatti Island in pursuance of the notification dated 6th January, 2011 of Ministry of Environment and Forests has not been finalized as yet and is under finalization with the Administration of Union Territory of Lakshadweep. The Coastal Regulation Zone (CRZ) Notification for the whole country including the UT of Lakshadweep Island has been notified by the Ministry of Environment & Forests, Government of India vide CRZ Notification S.O. No. 114(E) dated 19th February, 1991.

(ii) In exercise of the powers conferred under Section 3(3)(i) and 3(3)(ii) of CRZ Notification dated 19th February, 1991 a Coastal Zone Management Plan for UT of Lakshadweep was also notified by the Administration on 22nd August, 1997 which is in force till date and shall be in force until 6th January, 2013.

(iii) The Government of India vide Notification S.O. No. 20(E) dated 6th January, 2011 provided that the Lakshadweep Island shall be managed on the basis of an Integrated Island Management Plan (IIMP) to be prepared as per the guidelines given in the notification. The notification stipulates that the Lakshadweep Island Administration shall, within a period of one year from the date of this notification, prepare the IIMPs, inter-alia specifying therein all the existing and proposed developments, conservation and preservation schemes, dwelling units including infrastructure projects such as schools, markets, hospitals, public facilities and the like. The Administration may, if it considers

necessary, take the help of research institutions having experience and specialisation in Coastal Resource Management in the preparation of IIMPs, taking into account the guidelines specified in the notification.

(iv) Since the Administration of Union Territory of Lakshadweep did not have the required expertise for the preparation of such a comprehensive Integrated Island Management Plan (IIMP) for which lot of scientific inputs are required, Centre for Earth Science Studies (CESS), Trivandrum was approached for preparing the IIMPs for all inhabited and uninhabited islands. The said Centre is, according to the Administration, a prestigious institution under the Ministry of Earth Sciences having experience and specialisation in coastal resource management and has extensive scientific database on Lakshadweep.

(v) The CESS informed the Administration that IIMP will be prepared within a period of one year. Work relating to preparation of Integrated Island Management Plan for Agatti and Chetlat Island in the first phase of the study have been completed and the draft plan for Agatti and Chetlat Islands have been submitted to Union Territory of Lakshadweep Administration on 2nd January, 2012 and the study of remaining islands viz. Kavaratti, Andrott, Minicoy, Kalpeni, Kiltan, Kadmat, Amini and Bitra have already started and are in progress.

(vi) The Administration has initiated action for giving wide publicity to the draft Integrated Island Management Plan for Agatti Island by uploading it on Lakshadweep website and will be published in two newspapers inviting comments/suggestions from the public as well as other stake holders in the

island. On receipt of the comments/suggestions, the Island Administration shall make necessary changes/modification in the draft plan if required and final IIMP shall be submitted to the Ministry of Environment and Forests, Government of India.

(vii) It is expected that the IIMP for Agatti and Chetlat Island will be finalised by 6th January 2013 as per the time limit given in the Notification and until that time the CRZ notification of 1991 and its Rules i.e. Coastal Zone Management Plan 1997 shall apply, as clearly stated in clause 3(ii) of the notification.

6. It is evident from the above assertions made in the affidavit of the Administrator that while the process of formulation of IIMPs for Lakshadweep has started, the draft plan received from the CESS is yet to be evaluated by the Administrator and sent for approval to the Government of India. In the meantime, another development has intervened in the form of UT of Lakshadweep, Department of Tourism, issuing a Notification dated 28th January, 2010 inviting proposals from local entrepreneurs and registered organisations from Lakshadweep group of islands for setting up of tourist resorts at Agatti Island fulfilling the prescribed requirements. The case of the Administration is that in response to this Notification the Department has received nine applications for setting up of tourist resorts, which were to be submitted along with:

(a) Environmental clearance from the Department of Environment and Forests;

(b) Land use diversion certificate from SDO/DC/Local Panchayat;

(c) Clearance from Lakshadweep Pollution Control Committee;

(d) Clearance from Coastal Zone Management Authority.

7. Despite reminders issued to the applicants, none of them has fulfilled the above conditions till date. In the result, all the nine applications are awaiting complete details from the applicants. Respondent also happens to be one of the applicants, out of the nine applicants, three of whom have started some construction activity which are at different stages of completion. Respondent is one of the three applicants who has started raising a construction. The case of the Administration is that neither the respondent nor the other applicants have complied with the requisite conditions including the coastal zone clearance. No final approval to any one of the applicants has, therefore, been granted, or could be granted having regard to the fact that as many as five huts constructed by the respondent are located in the NDZ area and are, therefore, in violation of the CRZ Notification 1991 and Coastal Zone Management Plan, 1997, in which the entire area within 50 meters from High Tide Line from both sides, western and eastern, is declared as No Development Zone. According to the Administration, the respondent has violated the conditions of the land use diversion certificate, inasmuch as the land use diversion certificate, permitted construction of dwelling houses away from the NDZ whereas the respondent has set up a commercial enterprise like a tourist resort, which was not authorised. According to the affidavit of the Administration, the Administration proposes to conduct a detailed inquiry to fix responsibility of officials for not taking action while construction of five huts in NDZ was being carried on by the respondent. The affidavit refers to a show cause notice issued to the respondent to remove the construction in Sy. Nos. 1300/1, 1301/1A and 1301/1 Part. Writ Petition No. 1312/2012 was filed by respondent against the said notice in which the High Court has directed the parties to maintain status quo in respect of the building in question.

8. The affidavit further states that a tourist resort owned by the Administration at Agatti is closed with effect from 4th February, 2012. The affidavit also refers to five resorts owned

by the Department of Tourism, UT of Lakshadweep, that the Administration runs at different islands which were constructed during 1980s and 1990s. The affidavit goes on to state that there is no "home stay" policy and the Administration has not authorised any owner of house to run a home stay. On an experimental basis, the 'Home based tourism' was started in Agatti during October-December 2011 by the Administration. The Administration, it is asserted, had hired few houses in the village Agatti which were lying vacant and owners of the said houses were paid on daily user basis whenever the guests were staying. That arrangement has now been stopped as a section of islanders had objected to the same. The Administration is engaged in discussing with various sections of society to frame a policy for "home stay", based on the Bed and Breakfast scheme of Government of India which will be applicable to the houses in the village area and resorts will not be covered under any such policy.

9. An affidavit has been filed by Deputy Director, Ministry of Environment and Forests, Paryavaran Bhawan, CGO Complex, New Delhi , which has taken the same line of argument as set up by the Administrator in his affidavit especially as regards the finalisation of IIMPs with the help of CESS, the issue of Government of India's Notification dated 6th January, 2011 and any construction in Coastal Regulation Zone between 50 meters and 500 meters from the High Tide Line being in violation of the CRZ Notification hence liable to be proceeded against by the Lakshadweep Coastal Zone Management Authority as per the provisions of the Environment (Protection) Act, 1986.

10. The Director, Tourism in UT of Lakshadweep has separately filed an affidavit stating only one tourist resort owned by the Union Territory is operating in Agatti.

11. Respondents No.1 and 2 have also filed an affidavit in reply, sworn by Mohd. Kasim H.K., S/o Syed Mohammed, one of the partners of respondent No.1. In this affidavit, the

respondent clearly emphasises that although the width of the 'No Development Zone' in respect of Agatti Island is uniformly 50 meters from the high tide line, the high tide line is not demarcated till date and the assertion that the respondent No.1 has violated the CRZ notification and raised construction in the 'No Development Zone' is without any basis. The respondent has also relied on the certificates issued by the PWD of the Lakshadweep Administration which according to the respondent show that the construction does not fall in the 'No Development Zone'. It is further stated that the respondents have obtained the requisite clearance like the occupancy certificate issued by the district Panchayat, No Objection Certificate issued by the Lakshadweep Pollution Control Committee, in principle approval granted by the petitioner-Administration, environmental clearance granted by the Department of Environment and Forests, provisional clearance granted by the Tourism Department, no objection certificate granted by the village Panchayat and no objection certificate granted by the district Panchayat.

12. The allegation that the land use diversion certificate has been violated, is also denied. The Administration was, according to the respondent, aware from the inception that the respondent proposed to set up tourist accommodation over the land held by them through a valid lease in their favour. The respondent had submitted an application seeking grant of the land use diversion certificate for the above project. The Administration had prior knowledge of the proposed project and had granted the approval to the same. Since the certificate wrongly mentioned construction of a dwelling house as the purpose of land use diversion the error was brought to the notice of the Administration. The respondent was, however, informed that the certificate had been granted in a general format and should not cause any worry to the respondent. The respondent has also vehemently disputed the assertion of the Administration that no resorts are functional at Agatti. The affidavit refers to Agatti Island Beach Resort, which has been

leased out in the year 1996 by the Administration to one T. Muthukoya. It also refers to multi-storeyed tourist accommodation being operated on Agatti Island. Photographs of these establishments have been placed on record. It enlists as many as six different establishments which, according to the respondent, are being run as tourist resorts. The affidavit also disputes the assertion of the Administration that the Home Stay has been discontinued w.e.f. February 2012. The affidavit refers to what is described as parallel tourism resorts set up with the active permission of the Administration.

13. The Administration has filed an affidavit in rejoinder sworn by one Asarpal Singh, Deputy Resident Commissioner for UT. Apart from reiterating the assertion made by the Administration in the affidavit, it alleges that the use of local material is forbidden in Lakshadweep islands as the locally available sand being coral dust is not allowed to be used for building purposes. All the building material is, therefore, imported from the mainland. The thatched roof over the hutments is also a false roofing as the cottages are air-conditioned and the thatched roof is only a camouflage. The rooms visible in the photographs are actually pucca constructions. The structures are made of cement and concrete. The accommodation is according to the Administration advertised for a price ranging between Rs.6000-12000/- per day.

14. We have referred copiously to the pleadings of the parties only to draw the contours of the controversy before us. Broadly speaking only two questions arise for our determination in the backdrop set out above. These are:

(1) Whether the High Court was in the facts and circumstances of the case correct in allowing the interim prayer of the respondent and permitting him to run the resort? and

(2) If the answer to question No. 1 be in the negative, what is the way forward?

We shall deal with the questions ad-seriatim.

Re. Question No. 1

15. Appearing for the appellant-UT Administration of Laskshdweep, Mr. H.P. Raval, learned Additional Solicitor General of India contended that the High Court had without adverting to the several aspects that arose for consideration permitted the respondent to run the resort simply because the respondent is alleged to have engaged 47 employees who were likely to be affected if the resort was shut down. Mr. Raval submitted that permitting the respondent to run a resort which was established in complete violation of the CRZ regulations and contrary to the land use diversion certificate granted in its favour was tantamount to placing a premium on an illegality committed by the said respondent.

16. Mr. Giri, learned senior counsel appearing for the respondents, on the other hand argued that the Administration was adopting double standards inasmuch as they were permitting certain resorts to operate while the resort which had secured the requisite permissions, was being prevented from doing its legitimate business. It was contended that in the absence of a policy forbidding 'home stay' arrangement for tourists visiting the Islands the refusal of the Administration to permit the resort for being used even as 'home stay' was arbitrary. It was also contended that while there were allegations of breach of the conditions, subject to which the authorities had granted clearances, such allegations were levelled only after the respondent had approached the High Court for redress.

17. The High Court has not indeed done justice to the issues raised by the parties, whether the same relate to the alleged violations committed by the respondent-entrepreneur

in setting up of a resort or the Administration permitting similar resorts to operate in the garb of 'home stay' arrangement while preventing the respondent from doing so. The High Court has not even referred to the Notification dated 6th January, 2011 issued by the Government under Section 3 of the Environment (Protection) Act, 1986 or the effect thereof on the establishment of the project that does not so far have a final clearance and completion certificate from the competent authority and is being accused of serious violations. The High Court's order proceeds entirely on humanitarian and equitable considerations, in the process neglecting equally, if not more, important questions that have an impact on the future development and management of the Lakshadweep Islands. We are not, therefore, satisfied with the manner in which the High Court has proceeded in the matter. The High Court obviously failed to appreciate that equitable considerations were wholly misplaced in a situation where the very erection of the building to be used as a resort violated the CRZ requirements or the conditions of land use diversion. No one could in the teeth of those requirements claim equity or present the administration with a fait accompli. The resort could not be commissioned under a judicial order in disregard of serious objections that were raised by the Administration, which objections had to be answered before any direction could issue from a writ Court. We have, therefore, no hesitation in holding that the order passed by the High Court is legally unsustainable. Question No. 1 is accordingly answered in the negative, and the impugned order set aside.

Re. Question No. 2

18. Lakshadweep or Laccadive is a cluster of islands situate at a distance ranging from two hundred to four hundred and forty kms. from the main land known for their natural beauty but fragile, ecological and environmental balance. Most of the islands are not inhabited, the total population living on the islands including Agatti, which is the largest in size, being just about sixty thousand. The island is of great attraction for tourists

both domestic and international who approach this unique destination by sea as also by air. The islands are centrally administered and have been the concern of the Administrators as much as the environmentalists. All the same there has not been much development activity in the area largely because of absence of any vision plan as to the manner and extent and the kind of development that would suit the area keeping in view its locational advantages and disadvantages. Progress in this direction is so slow that it is often overtaken by the pressure of the up market forces that push tourism inflow in these areas to higher levels with every passing year. While entrepreneurs may be keen to invest and develop facilities for tourists and infrastructure for locals living on the islands, the question is whether such pressure ought to disturb the Administration's resolve to permit only a planned development and management of these islands on a basis that is both ecologically and economically sustainable.

19. Given the fact that no vision or master plan for the development of the islands has been prepared so far, developments made over the past few decades, may be haphazard. Mr. Raval, however, submitted that the Government of India was conscious of the importance of the region and had in terms of Notification dated 6th January, 2011 directed the preparation of an integrated management plan for the islands. While broad guidelines were available in the said Notification, the details have to be worked out by experts not only in science, environment and the like but also town-planners who will have a major role to play in how the islands should develop. Having said that Mr. Raval fairly conceded that the draft IIMPs for two of the islands received from the CESS have not been evaluated by the U.T. Administration nor does the Administration have the assistance of any expert body that can look into the draft IIMPs and suggest modifications, improvements or alterations in the same. That being so neither the Lakshadweep Administration nor the Government of India were according to Mr. Raval averse to the constitution of an expert Committee that could

assist the Lakshadweep Administration in finalising the IIMPs so that the same is submitted to the Government of India for approval at the earliest.

20. Mr. Giri, learned counsel for the respondents too had no objection to the appointment of a committee of experts to do the needful. He however urged that since the committee could be requested to examine other aspects of the controversy also the same could be headed by a former Judge of this Court.

21. Notification dated 6th January, 2011 issued by the Government of India under Section 3 of the Environment (Protection) Act, 1986 read with sub-rule (3) of Rule 5 of the Environment (Protection) Rules, 1986, inter alia, provides for the preparation of Integrated Islands Management Plans for each of the islands in Lakshadweep. These IIMPs have to specify all the existing and proposed developments, conservation and preservation schemes, dwelling units including dwelling infrastructure projects such as, schools, markets, hospitals, public facilities and the like. The notification further provides that development activities in the island shall be included in the IIMPs in accordance with the rules and regulations and building bye-laws of local town and country planning for the time being in force in the islands and that all activities in the islands including the aquatic area shall be regulated by the Lakshadweep Islands Administration on the basis of the IIMPs. Notification also gives certain guidelines which have to be kept in view while preparing the IIMPs. It makes the UT Coastal Zone Management Authority responsible for enforcing and monitoring the notification and assisting in the task of constituting District Level Committees under the Chairmanship of District Magistrate concerned with at least three representatives of local traditional coastal communities. Notification also enumerates the activities that shall be prohibited on the islands including destruction of corals, mining of sand in and around coral areas, construction of shore protection works, disposal of untreated sewage or effluents,

and disposal of solid wastes including fly ash, industrial waste, medical waste etc. It also permits setting up of new industries and expansion of existing industries except those directly related to waterfront or directly needing offshore facilities. Suffice it to say that the Notification draws the contours of the IIMPs envisaged thereunder, but leaves the details to be worked out by the Lakshadweep Administration if necessary with the help of experts in the relevant fields.

22. The issue of the Notification, in our view, is a step forward in the direction of providing an integrated sustainable development of the islands along planned and scientific lines, taking into consideration all the relevant factors. As noticed in the earlier part of this order draft IIMPs for two islands, one of which happens to be Agatti, have already been submitted which are yet to be finalised by the Lakshadweep Administration.

23. In the light of the above we have no difficulty in directing the constitution of an Expert Committee with a request to it to look into the matters set out in the terms of reference which we are setting out herein below. The Lakshadweep Administration has proposed that the Committee could comprise of four expert members from different fields named in the memo filed by the Administration under the chairmanship of Justice R.V. Raveendran, former Judge of Supreme Court of India. Mr. Giri has no objection to the composition of the Committee being as proposed. We are also inclined to accept the proposal submitted in this regard. We are hopeful that the setting up of the Committee will not only provide expert assistance to the Lakshadweep Administration and eventually the Government of India in the preparation and approval of the IIMPs for the islands in question but also expedite the entire process for the general benefit of the people living on the islands as also for those visiting the place as tourists. Once the IIMPs are in place, all development activities will have to be regulated in accordance with the said plans which will make it so much easy for the Administration to grant approvals and clearances for activities that are permissible under such plans for the areas reserved

for the same. It will also provide for a broad framework for the future development of the islands without disturbing the ecological or environmental balance and affecting the beauty of the area.

24. That brings us to yet another aspect which has been debated at some length by learned counsel for the parties before us concerning the alleged violation of CRZ and the land use diversion certificate by the respondent. It is not possible for us to express any opinion on any one of those aspects for the same would require inspection and verification of facts on the spot apart from examination of the relevant record concerning the issue of the permission and the alleged violation of the conditions subject to which they were issued. That exercise can, in our opinion, be more effectively undertaken by the Expert Committee not only in relation to the respondent but also in relation to all other resorts and commercial establishments being run on the islands. So also the question, whether the Administration committed any violation of the CRZ Regulations by granting permission to any resort in the name of 'home stay' or committed any other irregularity or adopted any unfair or discriminatory approach towards any one or more resorts or commercial establishments is a matter that can be looked into by the Committee.

25. Suffice it to say that allegations and counter-allegations made by the parties against each other in regard to the violation of the CRZ and other irregularities in the matter of establishment and/or running of resorts and 'home stay' and grant of permits to tourists visiting the islands can also be examined by the Expert Committee and action, if any, considered appropriate by it recommended in the Report to be submitted to this Court. While doing so, the Committee shall also examine whether any official of the Lakshadweep Administration has wilfully or otherwise neglected the discharge of his duties whether the same related to violation of CRZ norms or any other act of omission or commission. The Committee

may examine whether there is any criminal element in any such neglect or act of omission or commission on the part of any of the officials in the Lakshadweep Administration.

26. We are told that CBI had been at one stage asked to look into certain violations alleged in relation to the affairs of the islands. The Committee may examine the said report also and recommend, if necessary, any investigation to be conducted by the CBI into the alleged blameworthy conduct of the officers if there be any need for such investigation.

27. In the result, we appoint the following Committee of experts:

Justice R.V. Raveendran, Former Judge, Supreme Court of India	-	Chairman
Dr. M. Baba, Executive Director, Advance Training Centre for Earth System Sciences and Climate, Indian Institute of Tropical Meteorology (IITM), Pune	-	Member
Mr. B.R. Subramaniam, Project Director Integrated Coastal and Marine Area Management (ICMAM) Project under Ministry of Earth Sciences, Govt. of India	-	Member
Prof. M.M. Kamath Chief Engineer (Civil) (retd.) Vice-Chairman, Expert Appraisal Committee on CRZ/Infrastructure Projects Constituted by Ministry of Environment and Forests	-	Member
Prof. E.F.N. Ribeiro School of Planning and Architecture, New Delhi	-	Member

28. Director, Science and Technology, Lakshadweep Administration, shall be the nodal officer, responsible for organising and providing the necessary administrative, secretarial and logistic support required by the Committee. The Committee shall endeavour to work on the following broad terms of reference:

(I) The Committee shall use its expertise for evaluation of the draft IIMPs received from CESS or others that may be received in due course, and make such additions or alterations in the same as it may consider proper having regard, inter alia, to the following:

(a) The development already in existence and the future developments, conservation and preservation of the entire area keeping in view the statutory Notification dated 6th January, 2011 issued by the Government of India under the provisions of the Environment Protection Act, 1986.

(b) The impact of the proposed development on the livelihood of indigenous population and the various vulnerability issues.

(c) Reservation/identification of suitable locations and areas for creation of public and semi-public facilities for development of tourism in the islands.

(d) Redevelopment/sustainable development of inhabited and/or uninhabited areas of each island as independent and self contained units or as part of a larger development plan along scientific lines.a

(II) The Committee may consider and recommend incorporation in the IIMP, Development Control

Regulations governing the developmental activity in accordance with the final proposals on the IIMP for the purpose of islanders' seeking clearances for permissible development activities on the islands. Such regulations may also include setting up of an appellate authority for the grievance redressal of the islanders with respect to such clearances. The Committee may suggest an outer time frame within which the Authority may have to respond to the applications of the islanders seeking permission for development activities.

(III) The Committee may examine the desirability and the feasibility of running 'home stays' for tourism purpose in the islands and may suggest the same to be incorporated in the IIMPs. The Committee may examine and suggest necessary guidelines keeping in mind environmental, economic and security considerations for running of such Home stays including norms/rules for such 'home stays' and the number of 'home stays' to be permitted, the number of permits to be granted, the norms for identification of houses for homestays, and the facilities to be offered etc.

(IV) The Committee may in its wisdom and discretion make suggestions on any other issue concerning the islands which it may deem fit.

29. The Committee shall examine allegations regarding violation of the CRZ and other irregularities committed by the respondent or by other individuals/entities in relation to establishment and/or running resorts and 'home stays' in the islands. Allegations regarding irregularities in the matter of grant of permits to the tourists visiting the islands as also in regard to permissions granted to the resort owners/home stays to operate on the islands shall also be examined by the Committee. So, also the Committee shall be free to examine

whether any official of the Lakshadweep Administration has been guilty of any act of omission or commission in the discharge of his official duties and if considered necessary recommend action against such officials.

30. The remuneration payable to the Chairman and the members of the Committee is not being determined by us. We deem it fit to leave that matter to be decided by the Committee keeping in view the nature of work to be undertaken by it and the time required to accomplish the same.

31. The Chairman of the Committee may, in his discretion co-opt or associate with the Committee, any other expert member from any field considered relevant by it or take the assistance of any scientific or expert body considered necessary for completion of the assignment.

32. The Committee shall evolve its own procedure including the place and time of the meetings, division of work, powers, duties and responsibilities of members etc.

33. The Lakshadweep Administration shall provide to the Committee the requisite information, documents, material, infrastructure or any other requirement for the successful implementation of the objectives of the Committee.

34. The expenses incurred directly or indirectly for the functioning/management of the Committee shall be borne by the Administration.

35. The Committee is requested to submit a preliminary report about the steps taken by it as far as possible within a period of two months from the date of receipt of a copy of this order.

36. The matter shall be posted for orders before the Court after the receipt of the preliminary report.

B.B.B. Matter pending.

THOTI MANOHAR
v.
STATE OF ANDHRA PRADESH
(Criminal Appeal No. 1739 of 2007)

MAY 15, 2012

[DR. B. S. CHAUHAN AND DIPAK MISRA, JJ.]

PENAL CODE, 1860:

ss. 302, 302/34, 324, 326 and 452 - Murder - Common intention - Two brothers and their cousin convicted by trial court - Cousin acquitted by High Court of the charge u/s 302/34 - Appeal by one of the convicts - Held: The material evidence clearly shows that the appellant along with his brother had the previous day threatened the deceased with dire consequences and had inimical relationship with the deceased and his family - On the day of occurrence both armed with deadly weapons went to the house of deceased and dragged him - Though the appellant did not give the blow, but his participation from the beginning till the end would clearly show that he shared the common intention with his brother - He had assaulted the other witnesses who tried to intervene - High Court rightly upheld his conviction.

EVIDENCE:

Evidence of related witnesses - Held: All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution - If on such scrutiny, their testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon - In the instant case, the occurrence in part took place inside the house and the rest of it slightly outside the premises of the deceased - Under these circumstances,

the family members and the close relatives are bound to be the natural witnesses - They intervened and sustained injuries - They are the most natural witnesses and there is nothing on record to doubt their presence at the place of occurrence.

Oral evidence - Discrepancies in - Held: The discrepancies pointed out are minor is nature - Giving undue importance to them would amount to adopting a hyper-technical approach - The court, while appreciating the evidence, should not attach much significance to minor discrepancies, which do not shake the basic version of the prosecution case, and, as such, are to be ignored - As regard non-explanation of injuries of the accused, the same were superficial in nature - Besides, non-explaining of injuries of the accused persons is always not fatal to the case of the prosecution.

The appellant (A-2) along with his real brother (A-1) and a distant cousin (A-3), was prosecuted for causing death of one 'KM' the father of PW-1 and causing injuries to him and other members of his family. The prosecution case was that A-1 had developed illicit relationship with the cousin sister of the 'KM' and because of this, she was sent to Bangalore. This enraged A-1 and he started picking up quarrels with 'KM' and his family. On 24.9.2009, A-1 and A-2 drove their cows into the crop of 'KM'. When PW-1 tethered the said cows in his house, A-1 and A-2 went there assaulted his family members, threatened them with dire consequences and took away the cattle. 'KM' and PW-1 approached the elders of the village including PWs 7 and 12, who secured the presence of A-1 and A-2 and told the parties that there would be a mediation on 26.9.2002. However, at about 11.00 a.m. on 25.9.2002, the three accused armed with deadly weapons entered the house of 'KM'; A-1 and A-2 dragged 'KM' and PW1 out of the house; A-1 assaulted 'KM' with iron rod, who became unconscious and fell down. When PW-6, the

younger brother of 'KM' intervened, A-2 struck him with billhook and A-3 also was stated to have assaulted him with iron rod. When PWs 2, 3, 4 and 5 intervened, they were also assaulted by the accused persons. All the injured were taken to the hospital where 'KM' was declared dead. The trial court convicted A-1 u/s 302 IPC and A-2 and A-3 u/s 302/34 IPC. All the accused were also convicted u/ss 452 and 324 IPC. A-2 was further convicted u/s 326 IPC. On appeal, the High Court interfered only to the extent that it acquitted A-3 of the offence punishable u/s 302/34 IPC.

Dismissing the appeal, the Court

HELD:

1.1 PW-1 has testified that on 24.9.2002, A-1 and A-2 had led their cows to graze in the sugarcane field of the deceased; he drove the cows to his house and tied them; A-1 and A-2 came and assaulted the deceased and him and threatened them with dire consequences before taking the cows back. He also stated regarding the decision to resolve the controversy by convening a Panchayat on 26.9.2002. The said version of PW-1 has received corroboration from PWs-2 to 6 and 10. Nothing has really been brought out to create a slightest doubt on that aspect. With this part of the occurrence, it is appropriate to connect the real genesis of the animosity, i.e., cousin sister of the deceased with whom A-1 had an illicit relationship and she was sent to Bangalore. P.W.1 as well as PWs-3, 4, 5 and 10, have categorically deposed about this aspect. In the cross-examination at the instance of A-1 and A-2 there was not even a proper suggestion to PW-1 in that regard. Thus, the genesis for the cavil and the subsequent disputes have been established beyond any reasonable doubt. [para 18] [1143-F-H; 1144-A-F]

1.2 As regards the incident on 25.9.2002, it is in the evidence of PW-1 that at about 11.00 a.m., A-1 and A-2, armed with weapons, came to his house and dragged the deceased; A-1 assaulted the deceased with an iron rod on his head, neck and all parts of the body. He has admitted that A-3 was a distant cousin and no role has been ascribed to him in the previous occurrence. It is also in his testimony that A-3 had not gone near the deceased. PW-2, another eye witness to the occurrence, has testified that A-1 had assaulted the deceased with the iron rod on the head, chest and other parts of his body. She also has not ascribed any role to A-3. PW-3, the wife of the deceased, has categorically deposed that A-1 had assaulted her husband. She has graphically stated the active role played by A-2. PW-4, who is another injured witness, has deposed about the assault by A-1 and the beatings by A-2 to other injured persons who intervened. Similar is the evidence of other injured eye witnesses. Additionally, the oral testimony has received corroboration from the medical evidence in material particulars. [para 19-22] [1144-F-H; 1145-A-C]

1.3 With regard to the injuries sustained by the accused having not been explained, it is worth noting that the injuries are superficial in nature, the accused were not sent for medical examination and further there is no suggestion whatsoever as regards the injuries sustained by them to any of the witnesses. The story built up as regards the fight between the two groups does not remotely appeal to common sense and, more so, in the absence of any evidence. Besides, non-explaining of injuries of the accused persons is always not fatal to the case of the prosecution. [para 23] [1145-D-G]

Sri Ram v. State of M.P. **2003 (6) Suppl. SCR 129 = 2004 (9) SCC 292 - relied on**

1.4 So far as the plea that all the witnesses, being

relatives, are interested witnesses is concerned, it is significant to note that the occurrence in part took place inside the house and the rest of it slightly outside the premises of the deceased. Under these circumstances, the family members and the close relatives are bound to be the natural witnesses. They intervened and sustained injuries. Their sustaining of injuries has got support from the ocular evidence as well as the medical evidence. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, their testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon. The evidence of the injured witnesses who are close relatives to the deceased have really not embellished or exaggerated the case of the prosecution. They are the most natural witnesses and there is nothing on record to doubt their presence at the place of occurrence. By no stretch of imagination, it can be stated that the presence of the said witnesses at the scene of the crime and at the time of occurrence was improbable. Their version is consistent and nothing has been suggested to bring any kind of inherent improbabilities in their testimonies. [para 24,26 and 29] [1146-C-D; 1147-E-G; 1148-F-G]

Dalip Singh v. State of Punjab **1954 SCR 145; and** *Masalti v. State of U.P.* **1964 SCR 133 = 1965 AIR 202;** *Hari Obula Reddi and others v. The State of Andhra Pradesh* **1981 AIR 82;** *Kartik Malhar v. State of Bihar* **1995 (5) Suppl. SCR 239 = 1996 (1) SCC 614; and** *Pulicherla Nagaraju alias Nagaraja Reddy v. State of Andhra Pradesh* **2006 (4) Suppl. SCR 633 = 2006 AIR 3010 - relied on**

1.5 As regards the discrepancies pertaining to time,

situation of the land, number of persons, etc., they are absolutely minor in nature. Giving undue importance to them would amount to adopting a hyper-technical approach. The court, while appreciating the evidence, should not attach much significance to minor discrepancies, which do not shake the basic version of the prosecution case, and, as such, are to be ignored. [para 30] [1149-B-C]

State of U.P. v. M.K. Anthony **1985 AIR 48 ;** *Appabhai and another v. State of Gujarat* **1988 AIR 696;** *Rammi alias Rameshwar v. State of Madhya Pradesh* **1999 (3) Suppl. SCR 1=1999 AIR 3544;** *State of H.P. v. Lekh Raj and another* **1999 (4) Suppl. SCR 286 = 2000 (1) SCC 247;** *Laxman Singh v. Poonam Singh* **2003 (3) Suppl. SCR 528= 2004 (10) SCC 94;** *Dashrath Singh v. State of U.P.* **2004 (3) Suppl. SCR 561 = 2004 (7) SCC 408;** *State of Punjab v. Jagir Singh Baljit Singh and Karam Singh* **1974 (1) SCR 328 =1973 AIR 2407 - relied on**

1.6 With regard to the plea that the appellant has been erroneously convicted with the aid of s.34 of the IPC, the High Court has noticed that A-1 and A-2 are real brothers and they have definite roles as regards the previous incident; and A-2 was intervened by the witnesses from assaulting the deceased. The material evidence on record clearly shows that A-1 and A-2 had threatened the deceased with dire consequences. The appellant had an inimical relationship with the deceased and his family as the previous occurrences would show. Despite a consensus being arrived at that there would be a panchayat on 26.9.2002, they, armed with deadly weapons, went to the house of the deceased and dragged him. The previous meeting of minds with pre-arranged plan or prior concert as has been held in number of authorities is difficult to establish by way of direct evidence. They are to be inferred from the conduct

and circumstances. As is evincible, the weapons the two accuse two accused carried were lethal in nature. The deceased was absolutely helpless and not armed with any weapon. True it is that A-2 did not give the blow, but his participation from the beginning till the end would clearly reveal that he shared the common intention with his brother. He had assaulted the other witnesses who had tried to intervene. Thus, though he might not have inflicted the injury, yet it can safely be concluded that he shared the common intention making him jointly liable. [para 32 and 37] [1150-D-E, F-H; 1152-E-H; 1153-A-C]

Ram Tahal and others v. The State of U.P. **1972 (2) SCR 423=1972 AIR 254 ;** *Rajesh Govind Jagesha v. State of Maharashtra* **1999 (4) Suppl. SCR 277 = 2000 AIR 160 ;** *Bishna alias Bhiswadeb Mahato and others v. State of West Bengal* **2005 (4) Suppl. SCR 892=2006 AIR 302; and** *Manik Das and others v. State of Assam* **2007 (7) SCR 863= 2007 AIR 2274 - relied on.**

Case Law Reference:

2003 (6) Suppl. SCR 129	**relied on**	**para 23**
1954 SCR 145	**relied on**	**para 24**
1964 SCR 133	**relied on**	**para25**
1981 AIR 82	**relied on**	**para 26**
1995 (5) Suppl. SCR 239	**relied on**	**para 27**
2006 (4) Suppl. SCR 633	**relied on**	**para 28**
1985 AIR 48	**relied on**	**para 30**
1988 AIR 696	**relied on**	**para 30**
1999 (3) Suppl. SCR 1	**relied on**	**para 30**
1999 (4) Suppl. SCR 286	**relied on**	**para 30**

2000 (1) SCC 247	**relied on**	**para 30**
2003 (3) Suppl. SCR 528	**relied on**	**para 30**
2004 (3) Suppl. SCR 561	**relied on**	**para 30**
1974 (1) SCR 328	**relied on**	**para 30**
1972 (2) SCR 423	**relied on**	**para 33**
1999 (4) Suppl. SCR 277	**relied on**	**para 34**
2005 (4) Suppl. SCR 892	**relied on**	**para 35**
2007 (7) SCR 863	**relied on**	**para 36**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1739 of 2007.

From the Judgment & Order dated 6.3.2007 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Criminal Appeal No. 603 of 2005.

Tara Chandra Sharma, Uma Datta for the Appellant.

D. Mahesh Babu, Suchitra H., for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. The present appeal, by special leave under Article 136 of the Constitution of India, is directed against the judgment of conviction and order of sentence dated 6.3.2007 passed by the High Court of Judicature, Andhra Pradesh at Hyderabad in Criminal Appeal No. 603 of 2005 whereby the Division Bench of the High Court partly allowed the appeal by acquitting the accused No. 3 (A-3), namely, Thoti Sivaram, for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860 (for short 'the IPC') but maintained the conviction and sentence in respect of other offences as had been imposed by the learned Sessions Judge, Chittoor in Sessions Case No. 108 of 2003. Be it noted, the accused No. 1 (A-1) was convicted for the offences punishable

under Sections 452, 302, 326 and 324 of the IPC, the accused No. 2 (A-2) was found guilty of the offences under Sections 452, 302 read with 34, and 324 and 326 of the IPC, and the accused No. 3 (A-3) was convicted under Sections 452, 302 read with Section 34, and 324 of the IPC and, accordingly, sentenced to rigorous imprisonment and fine which we shall state at a later stage.

2. The broad essential facts of the prosecution case are that A-1 and A- 2 are real brothers and A-3 is their cousin. A-1, Thoti Ekambaram, had developed illicit relationship with Dhanamma, the cousin sister of the deceased, Kuppuswamy Modali. The deceased, his brother Damodaran and other family members had an apprehension that if Dhanamma continued such kind of intimacy with A-1, she would not be in a position to perform the marriage of her daughter. The said apprehension compelled them to send Dhanamma and her daughter to Bangalore where Dhanamma lived with her son. This act of the deceased and his family members stirred up anger in the heart of A-1 and a sense of revenge ruled his thought. The accused waited for the opportunity to pick up quarrels and triggered altercations on every trivial issue with the deceased and his family. The trivial cavil slowly gave rise to a major incident and on one day, A-1 and others allowed their cattle into the sugarcane fields of the deceased who wantonly grazed there and spoiled the crops. As the factual matrix would undrape, on 24.9.2002 at about 3.00 p.m., A-1 and A-2 drove their cows again for grazing the crop of the deceased. On seeing the same, Sekhar, son of the deceased, brought those cattle to his house and tied them. At about 4.00 p.m., A-1 and A-2 went to the house of the deceased, picked up a quarrel, assaulted them and took away their cattle. They also threatened them with dire consequences. Being disturbed, Kuppuswamy Mudali (deceased) and his son Sekhar (PW 1) approached the elders of the village, namely, Gunasekhar and Amudalaputtur Kesava Reddy (PWs-7 and 12) and others, for convening a panchayat so that such unwarranted actions were not repeated. The said

elders secured the presence of A-1 and A-2, the deceased and his son and told all of them that there would be a mediation on 26.9.2002 and sincere efforts should be made to put the controversy to rest.

3. The case of the prosecution as further uncurtained is that on 25.9.2002, at about 11.00 a.m., when Sekhar, the deceased and Jayamma, wife of the deceased (PW-3), were in their house, A-1 and A-3 armed with iron rods and A-2 armed with billhook trespassed into the house of the deceased. A-1 and A-2 caught hold of him and his son and dragged them out of the house. A-1, Thoti Ekambaram, assaulted the deceased with iron rods on his head, neck and all over his body and caused injuries as a consequence of which he fell down and lost his consciousness. At that juncture, Arunachalam, PW-6, the younger brother of the deceased, intervened. Thoti Manohar, A-2, struck him with the billhook on his face as a result of which he sustained injuries. A-3 also assaulted him with iron rod on his chest. Rukminamma, PW-2, intervened and was assaulted by A-2. Jayamma, PW-3, was assaulted by A-1. Similarly, when Pargunam, PW-4, and Damodaran, PW-5, intervened, they were also beaten up by the accused persons. All the injured persons were taken to the Government hospital, Chittoor in a jeep for necessary treatment. In the hospital, Kuppuswamy Modali was declared dead. The other remaining injured were admitted in the hospital for treatment.

4. The narration in continuum is that Sekhar, PW-1, lodged an FIR at Police Station, Gangadhara, Nellore and Crime No. 70 of 2002 was registered under Sections 452, 302 and 324 read with Section 34 of the IPC against the accused persons. After the criminal law was set in motion, on 29.9.2002, the Circle Inspector of Police, P.W. 20, arrested A-1 and A-2 who led the said police officer to the sugarcane fields from where the weapons used in the crime were recovered and seized in the presence of panch witnesses. On 3.10.2002, A-3 was arrested. The concerned Investigating Officer recorded the

statements of the witnesses and, after completion of other formalities, placed the charge-sheet before the concerned Magistrate who committed the matter to the Court of Session.

5. The accused pleaded not guilty and claimed to be tried.

6. Be it noted, initially, the learned Additional District and Sessions Judge (Fast Track Court, Chittoor) was in-charge of the trial of the case but, thereafter, by direction of the High Court in Criminal M.P. No. 6915/2003, the matter was transferred to the Sessions Judge, Chittoor.

7. The prosecution, to establish the charges against the accused persons, examined 20 witnesses, exhibited 23 documents, namely, Exh. P-1 to P-23 and got MOs-1 to 9 marked.

8. The defence chose not to adduce any evidence. However, the contradictions and omissions found in the evidence of some of the prosecution witnesses were marked as Exh. D-1 to D-5.

9. The learned Sessions Judge appreciated the evidence of PW-1, Sekhar, the informant, PW-2, Rukmanamma, wife of Arunachalam, PW-3, Jayamma, mother of PW-1, PW-4 Parganam, PW-5, Damodaran and PW-6, Arunachalam, the injured eye witnesses who had supported the factum of assault on the deceased as well as on them; relied on the testimony of Gunasekhar, PW-7, S. Suri, PW- 8, and the then Circle Inspector of Police, PW-20, who conducted the investigation to accept the reliability of seizure of weapons in accordance with Section 27 of the Evidence Act, and further placed reliance on the evidence of PWs-10, 11, 12 and 14 which threw light on the illicit relationship of Dhanamma and her being sent to Bangalore which formed the genesis of bad blood and the course adopted by the deceased and his relatives to approach the elderly persons to convene a panchayat. The learned Sessions Judge also relied on the testimony of PW-9, Dr. Sai

Rani, who conducted the post mortem, PW-16, Dr. M. Krishnaveni, PW-17, Dr. Vijaya Gowri and PW-18, another medical officer, who examined the injured witnesses and gave certificates which were brought on record.

10. We may note here that the other witnesses are basically formal witnesses. It is also apt to state that only Govinda Reddy, PW 15, did not support the case of the prosecution.

11. Considering the evidence and the material brought on record, the learned Sessions Judge came to hold that the prosecution had been able to establish the charge under Section 452 of the IPC against A-1 to A-3, prove the offence under Section 302 of the IPC against A-1 to the hilt and bring home the charge for the offence under Section 302 read with Section 34 of the IPC against A-2 and A-3, and under Section 326 of the IPC against A-2. That apart, the learned trial judge found that the offence under Section 324 of the IPC against A-1 to A-3 was proven and, accordingly, convicted them for the said offences. As far as the sentence is concerned, A-1 was convicted to undergo life imprisonment for the offence under Section 302 of the IPC and to pay a fine of Rs.5000/-, in default, to undergo simple imprisonment for six months, rigorous imprisonment for two years under Section 452 of the IPC and to pay a fine of Rs.5,000/-, in default, to suffer simple imprisonment for one month and rigorous imprisonment for one year for the offence under Section 324 of the IPC. Similar sentence was imposed on A-2 for the offences under Sections 452, 302 read with Sections 34, and 324 of the IPC. As far as the offence under Section 326 is concerned, he was sentenced to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs.1,000/-, in default, to undergo simple imprisonment for three months. As far as A-3 is concerned, the sentence remained the same for the offences under Section 302 read with Section 34, and 452 and 324 of the IPC.

12. Being dissatisfied with the judgment of conviction and

the order of sentence, all the accused persons preferred appeal before the High Court.

13. Before the appellate court, it was contended that the learned trial Judge has grossly erred by placing reliance on the evidence of PWs-1 to 8, 10 and 12 despite the incurable discrepancies pertaining to the place and time of occurrence and further the learned trial Judge had totally erred by giving credence to the version of the witnesses who are relatives of the deceased and were absolutely interested to implicate the accused. That apart, it was canvassed that there was no circumstance on record to come to a definite conclusion that A-2 and A-3 shared a common intention with A-1 to do away with the life of the deceased inasmuch as they neither caused injury on the body of the deceased nor did they instigate or exhort A-1 to commit the murder and, therefore, they were only liable for their individual acts and to be convicted and sentenced for the offences committed by them. The said submissions were controverted by the public prosecutor contending that A-2 and A-3 came armed with deadly weapons to the house of the deceased and dragged him from his house and attacked him. That apart, submitted the learned public prosecutor before the appellate court, that they had earlier threatened the deceased with dire consequences and thus, the cumulative effect of the circumstances would go a long way to reveal that there was a common intention to extinguish the life spark of the deceased.

14. The High Court referred to the inquest report of the deceased, the injury reports of the injured persons, the human blood as found from the report of serologist contained in Exh. P-23, analysed the credibility and credentiality of the testimony of the eye witnesses and placed reliance on the seized articles and noted the consistency of the ocular evidence and the corroboration it had received from the medical evidence, the detailed narration of the assault on the witnesses by the assailants' group, the non involvement of A-3 with the previous incident and threat given and the role ascribed to him and came

to hold that there was no material to infer the common intention as far as A-3 was concerned and, accordingly, acquitted A- 3 for the offence punishable under Section 302 read with Section 34 of the IPC but sustained the conviction and sentence in respect of other offences. As far as the conviction and sentence of A-1 and A-2 are concerned, that was maintained.

15. We have heard the learned counsel for the parties and perused the documents on record.

16. It is submitted by the learned counsel for the appellant that there is material contradiction about A-1 and A-2 letting their cows graze in the sugarcane field of the deceased inasmuch as different versions have been given by PW-1, the informant, and PW-20, the Circle Inspector of Police who conducted the investigation. It is urged by him that the High Court has fundamentally erred by holding that there was intention on the part of A-1 to cause death of the deceased. The learned counsel would further contend that the deceased was the aggressor and the injuries found on A-1 and A-2 have not been explained as a consequence of which the case of the prosecution does not deserve acceptance. It is his further submission that when the High Court had acquitted A-3 on the foundation that he did not share the common intention, on the same charge the appellant – A-2 should also have been acquitted and, therefore, this Court should acquit him of the offence punishable under Section 302 read with Section 34 of the IPC. It is proponed by him that all the eye witnesses are interested witnesses and they have deliberately implicated the accused persons and further the prosecution has not made any endeavour to produce any independent witness.

17. The learned counsel for the State, in oppugnation, would submit that the accused were the aggressors and the same is absolutely demonstrable from the evidence brought on record and it does not remotely suggest any other version. After taking us through the evidence of the witnesses, he has contended that the prosecution witnesses are natural and

truthful and there is no reason to discard their version. In fact, they have given the true version of the occurrence. It is urged by him that the contention that the injuries on the accused persons have not been explained by the prosecution and hence, its version deserves rejection has no legs to stand upon inasmuch as the injuries are absolutely superficial, minor and in any case, they do not affect the prosecution case in its entirety, especially when the evidence adduced by the prosecution is clear, cogent and credible. The learned counsel would further contend that the case put forth by the prosecution in court is in conformity with the facts disclosed in the First Information Report. It is graphically clear from the testimony of the witnesses, the weapons used in the assault that have been seized, the blood- stained clothes which have been recovered and the evidence of the doctors who had examined the injured witnesses and conducted the post mortem that the prosecution has proved its case beyond reasonable doubt. It is further canvassed by him that the plea on behalf of appellant that Section 34 of the IPC is not attracted, regard being had to the fact that the said accused had not inflicted any injury on the deceased and hence, had not shared the common intention, is absolutely unacceptable on apposite appreciation of the circumstances and the evidence brought on record which clearly establish the sharing of common intention.

18. Firstly, we shall proceed to deal with the earlier part of the incident. PW-1, K. Sekhar, has testified that on 24.9.2002, A-1 and A-2 had led their cows to graze in the sugarcane field of the deceased. He has stated how he drove the cows to his house and tied them and how A-1 and A- 2, the real brothers, came and assaulted the deceased and himself and threatened them with dire consequences before taking the cows back. He has also mentioned that both the accused had pelted stones at them. Regarding the visit to the elders, summon to the accused and decision to resolve the controversy by convening a Panchayat on 26.9.2002, the same has been clearly stated by him. The said version of PW-1 has

received corroboration from PWs-2 to 6 and 10. Nothing has really been brought out to create a slightest doubt on that aspect. A contradiction which is sought to be highlighted is that there is no mention that the cows were led from the barren land of the accused to the sugarcane field of the deceased. The assertions that the cows belonged to A-1 and A-2; that they went to the field of the deceased and destroyed the crops; that they were driven by PW-1 to his house; that A-1 and A-2 reached the house of the deceased, pelted stones, assaulted and forcibly drove back their cows have been clearly established. With this part of the occurrence, it is appropriate to connect the real genesis of the animosity, i.e., Dhanamma with whom A-1 had an illicit relationship and she was sent to Bangalore. P.W.1 as well as PWs-3, 4, 5 and 10, have categorically deposed about this aspects. In the cross-examination at the instance of A-1 and A-2 there was not even a proper suggestion to PW-1 in that regard. As far as PW-4 is concerned, there is further assertion in the cross-examination that there was illicit intimacy between A-1 and Dhanamma which hurt the feelings of the family. Similar is the evidence of other witnesses. To destroy the said aspect of the evidence, it was suggested that as a marriage alliance broke between the daughter of Dhanamma and another, she was sent to Bangalore. The core part of the testimony has really not been shaken. Thus, the genesis for the cavil and the subsequent disputes have been established beyond any reasonable doubt.

19. Coming to the incident on 25.9.2002, it is in the evidence of PW-1 that at about 11.00 a.m., while the deceased, he and his mother were at their residence, A-1 and A-2 came armed with weapons and trespassed into the house. A-1 and A-2 dragged the deceased and A-1 assaulted the deceased with an iron rod on his head, neck and all parts of the body. He has admitted that A-3 Sivaram was a distant cousin and no role has been ascribed to him in the previous occurrence. It is also in his testimony that A-3 had not gone near the deceased.

20. PW-2, another eye witness to the occurrence, has testified that A-1 had assaulted the deceased with the iron rod on the head, chest and other parts of his body. She has not ascribed any role to accused No. 3.

21. PW-3 is the wife of the deceased. She has categorically deposed that A-1 had assaulted her husband. She has graphically stated the active role played by A-2.

22. PW-4, who is another injured witness, has deposed about the assault by A-1 and the beatings by A-2 to other injured persons who intervened. Similar is the evidence of other injured eye witnesses. Additionally, the earlier testimony has received corroboration from the medical evidence in material particular.

23. Now, we shall proceed to dwell with the criticism on the base of which the case of the prosecution is sought to be demolished. The learned counsel for the appellant would submit that the injuries sustained by the accused have not been explained. On a perusal of the evidence of PW-20, the Investigating Officer, it appears that when he arrested A-1 and A-2, there were certain injuries on their person and they stated that they had received the injuries at the hands of the deceased. It is worth noting that the injuries are superficial in nature, the accused were not sent for medical examination and further there is no suggestion whatsoever as regards the injuries sustained by them to any of the witnesses. The story built up as regards the fight between the two groups does not remotely appeal to common sense and, more so, in the absence of any evidence, it is like building a castle in Spain. Quite apart from the above, non- explaining of injuries of the accused persons is always not fatal to the case of the prosecution. In this context, we may usefully refer to *Sri Ram v. State of M.P.*[1] wherein it has been held that mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases and the said principle applies to cases where the injuries

1. (2004) 9 SCC 292.

sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested and so probable, consistent and creditworthy that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. Hence, we repel the said submission of the learned counsel for the appellants.

24. The second submission of the learned counsel for the appellant is that all the witnesses, being relatives, are interested witnesses. The occurrence in part took place inside the house and the rest of it slightly outside the premises of the deceased. Under these circumstances, the family members and the close relatives are bound to be the natural witnesses. They intervened and sustained injuries. Their sustaining of injuries has got support from the ocular evidence as well as the medical evidence. The same has been dislodged and if we allow ourselves to say so, not even a fragile attempt has been made to dislodge the same. By no stretch of imagination, it can be said that they are chance witnesses. In the obtaining factual matrix, they are the most natural witnesses. In this context, we may refer with profit the decision of this Court in *Dalip Singh v. State of Punjab*[2], wherein Vivian Bose, J., speaking for the Court, observed as follows: -

> "We are unable to agree with the learned Judges of the High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in *Rameshwar v. The State of Rajasthan* (1952) SCR 377 at p. 390 = (AIR 1952 SC 54 at page 59)."

2. AIR 1953 SC 364.

In the said case, it was further observed that a witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true that when feelings run high and there is personal cause for enmity, there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth.

25. In *Masalti v. State of U.P.*[3], it has been ruled that normally close relatives of the deceased would not be considered to be interested witnesses who would also mention the names of the other persons as responsible for causing injuries to the deceased.

26. In *Hari Obula Reddi and others v. The State of Andhra Pradesh*[4], a three-Judge Bench has held that evidence of interested witnesses is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. It can not be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon.

3. AIR 1965 SC 202.
4. AIR 1981 SC 82.

27. In *Kartik Malhar v. State of Bihar*[5], it has been opined that a close relative who is a natural witness cannot be regarded as an interested witness, for the term 'interested' postulates that the witness must have some interest in having the accused, somehow or the other, convicted for some animus or for some other reason.

28. In *Pulicherla Nagaraju alias Nagaraja Reddy v. State of Andhra Pradesh*[6], while dealing with the liability of interested witnesses who are relatives, a two-Judge Bench observed that it is well settled that evidence of a witness cannot be discarded merely on the ground that he is either partisan or interested or close relative to the deceased, if it is otherwise found to be trustworthy and credible. The said evidence only requires scrutiny with more care and caution, so that neither the guilty escapes nor the innocent is wrongly convicted. If on such carefulscrutiny, the evidence is found to be reliable and probable, then it can be acted upon. If it is found to be improbable or suspicious, it ought to be rejected. Where the witness has a motive to falsely implicate the accused, his testimony should have corroboration in regard to material particulars before it is accepted.

29. Tested on the anvil and touchstone of the aforesaid principles, we find that the evidence of the injured witnesses who are close relatives to the deceased have really not embellished or exaggerated the case of the prosecution. They are the most natural witnesses and there is nothing on record to doubt their presence at the place of occurrence. By no stretch of imagination, it can be stated that the presence of the said witnesses at the scene of the crime and at the time of occurrence was improbable. Their version is consistent and nothing has been suggested to bring any kind of inherent improbabilities in their testimonies.

30. The learned counsel for the appellant has endeavoured

5. (1996) 1 SCC 614.
6. AIR 2006 SC 3010.

hard to highlight certain discrepancies pertaining to time, situation of the land, number of persons, etc., but in our considered opinion, they are absolutely minor in nature. The minor discrepancies on trivial matters not touching the core of the matter cannot bring discredit to the story of the prosecution. Giving undue importance to them would amount to adopting a hyper-technical approach. The Court, while appreciating the evidence,should not attach much significance to minor discrepancies, for the discrepancies which do not shake the basic version of the prosecution case are to be ignored. This has been so held in *State of U.P. v. M.K. Anthony*[7]; *Appabhai and another v. State of Gujarat*[8]; *Rammi alias Rameshwar v. State of Madhya Pradesh*[9]; *State of H.P. v. Lekh Raj and another*[10]; *Laxman Singh v. Poonam Singh*[11] and *Dashrath Singh v. State of U.P.*[12] No evidence can ever be perfect for man is not perfect and man lives in an imperfect world. Thus, the duty of the court is to see with the vision of prudence and acceptability of the deposition regard being had to the substratum of the prosecution story. In this context, we may reproduce a passage from the decision of this Court in *State of Punjab v. Jagir Singh Baljit Singh and Karam Singh*[13], wherein H.R. Khanna, J., speaking for the Court, observed thus:-

> "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 crime with which he is charged. Crime is an event in real life and is the product

7. AIR 1985 SC 48.
8. AIR 1988 SC 696.
9. AIR 1999 SC 3544.
10. (2000) 1 SCC 247.
11. (2004) 10 SCC 94.
12. (2004) 7 SCC 408.
13. AIR 1973 SC 2407.

> 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."

31. In view of our aforesaid analysis, we are unable to accept the submission of the learned counsel for the appellant that the evidence of the eye witnesses should be rejected solely on the ground that they are close relatives and interested witnesses.

32. The next plank of submission which has been ambitiously and zealously pyramided by the learned counsel for the appellant is that the appellant has been erroneously convicted with the aid of Section 34 of the IPC. It is worth noting that the High Court has acquitted A-3 on the ground that he did not share the common intention. Certain distinct features have been emphasised by the High Court. They are (i) he is a distant cousin of A-1 and A-2 and belongs to a different village; (ii) he had no role to play with the genesis of the occurrence and the subsequent cavil; (iii) he had neither participated in the dragging of the deceased nor did he assault on his body; (iv) he was at a distance (v) A-1 and A-2 are real brothers and they have definite roles as regards the previous incident; and (vi) A-2 was intervened by the witnesses from assaulting the deceased. The material evidence on record clearly shows that A-1 and A-2 had threatened the deceased with dire consequences. Though they had gone to the elders on 24.9.2002 and the Panchayat was to be convened on 26.9.2002, yet on 25.9.2002 at 11.00 a.m., armed with lethal weapons, they went to the house of the deceased.

33. In *Ram Tahal and others v. The State of U.P.*[14], while dealing with the applicability of Section 34 of the IPC, a two-Judge Bench observed there is no doubt that a common intention should be anterior in time to the commission of the crime showing a pre-arranged plan and prior concert, and though it is difficult in most cases to prove the intention of an individual, yet it has to be inferred from the act or conduct or other relevant circumstances of the case. This inference can be gathered by the manner in which the accused arrived on the scene and mounted the attack, the determination and concert with which the beating was given or the injuries caused by one or some of them, the acts done by others to assist those causing the injuries, the concerted conduct subsequent to the commission of the offence, for instance, that all of them had left the scene of the incident together, and other acts which all or some may have done as would help in determining the common intention. In other words, the totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be convicted.

34. In *Rajesh Govind Jagesha v. State of Maharashtra*[15], a two-JudgeBench has held that the existence of common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the purpose of common intention, even the participation in the commission of the offence need not be proved in all cases.

35. In *Bishna alias Bhiswadeb Mahato and others v. State of West Bengal*[16], it has been held that for the purpose of attracting Section 34 of the IPC, specific overt act on the part of the accused is not necessary. He may even wait and watch. Inaction on the part of an accused may sometime go a long

14. AIR 1972 SC 254.

15. AIR 2000 SC 160.

16. AIR 2006 SC 302.

way to achieve a common intention or an object with others.

36. In *Manik Das and others v. State of Assam*[17], it has been held as follows:-

> "The Section does not say "the common intention of all", nor does it say "and intention common to all". Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in *Ch. Pulla Reddy and Ors. v. State of Andhra Pradesh* (AIR 1993 SC 1899). Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused."

37. Coming to the case at hand, the appellant had an inimical relationship with the deceased and his family as the previous occurrences would show. Despite a consensus being arrived at that there would be a panchayat on 26.9.2002, they, armed with deadly weapons, went to the house of the deceased and dragged the deceased. The previous meeting of minds with pre-arranged plan or prior concert as has been held in number of authorities is difficult to establish by way of direct evidence. They are to be inferred from the conduct and circumstances. As is evincible, the weapons they carried were lethal in nature.

17. AIR 2007 SC 2274.

The deceased was absolutely helpless and not armed with any weapon. It was most unexpected on their part as normally it was expected that there would be a panchayat on the next day. The two brothers, A-1 and A-2, dragged the deceased outside the house and A-1 gave the blows. True it is that A-2 did not give the blow, but his participation from the beginning till the end would clearly reveal that he shared the common intention with his brother. He had assaulted the other witnesses who had tried to intervene. Thus, though he might not have inflicted the injury, yet it can safely be concluded that he shared the common intention making him jointly liable.

38. In view of our preceding analysis, we do not find any merit in this appeal and, accordingly, the same stands dismissed.

R.P. Appeal dismissed.

AMAR PAL SINGH
v.
STATE OF U.P. AND ANR.
(Criminal Appeal No. 651 of 2009)

MAY 17, 2012

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Judiciary - Adverse remarks and direction against Subordinate Judicial officer in judgment of High Court - Expunction of - Application filed before appellant, the Chief Judicial Magistrate, Bulandshahar, u/s.156(3) of CrPC for issuance of direction to the police to register FIR and make investigation into the alleged criminal offences - Appellant dismissed the application - In revision, High Court set aside the impugned order and made adverse comments and observations against the appellant and also passed direction for appropriate action against him - Prayer for expunction of comments, observations and the direction passed against the appellant - Held: Derogatory remarks against a judicial officer not only causes immense harm to him individually (as the expunction of the remarks later on may not completely resuscitate his reputation) but also affects the credibility of the institution and corrodes the sacrosanctity of its zealously cherished philosophy - A judge of a superior Court however strongly he may feel about the unmerited and fallacious order passed by an officer, but is required to maintain sobriety, calmness, dispassionate reasoning and poised restraint - The concept of loco parentis has to take a foremost place in the mind to keep at bay any uncalled for, any unwarranted remarks - In the case at hand, the observations, the comment and the eventual direction were wholly unwarranted and uncalled for - Appellant had felt that due to delay and other ancillary factors there was no justification to exercise power u/s.156(3) CrPC - High Court, as is manifest, had a different

perception of the whole scenario - Perceptions of fact and application of law may be erroneous but that never warrants such kind of observations and directions - Regard being had to the aforesaid, the remarks and the direction against the appellant are expunged - If the said remarks have been entered into the annual confidential roll of the judicial officer the same shall stand expunged.

An application was filed before the appellant, the Chief Judicial Magistrate, Bulandshahar, under Section 156(3) of CrPC for issuance of direction to the police to register FIR and make investigation into the alleged offences of murderous assault causing fire-arm injuries to one person. The appellant ascribed certain reasons and dismissed the application. Dissatisfied, the complainant preferred revision before the High Court which while setting aside the order of appellant-Chief Judicial Magistrate made adverse comments and observations against the appellant and also passed direction for appropriate action against him.

Prayer was made in the instant appeal to delete the aforesaid comments, observations and the ultimate direction passed by the High Court. It was submitted on behalf of the appellant that the observations and the consequential direction made by the High Court were totally unwarranted and indubitably affected the self-esteem and career of a member of the subordinate judiciary and therefore deserved to be expunged.

The issue which therefore arose for consideration was whether the remarks and the directions made by the High Court were made in consonance with the principles laid down by the various pronouncements of this Court and was in accord with judicial decorum and propriety.

Allowing the appeal, the Court

HELD:1. The present appeal frescoes a picture and exposits a canvas how, despite numerous pronouncements of this Court, while dealing with the defensibility of an order passed by a Judge of subordinate court when it is under assail before the superior Court in appeal or revision, the imperative necessity of use of temperate and sober language warranting total restraint regard being had to the fact that a judicial officer is undefended and further, more importantly, such unwarranted observations, instead of enhancing the respect for the judiciary, creates a concavity in the hierarchical system and brings the judiciary downhill, has been totally ostracised. Further, the trend seems to be persistent like an incurable cancerous cell which explodes out at the slightest imbalance. [Para 1] [1160-A-C]

Masuman v. State of U.P. and Anr. **2007 AIJ (1) 221 - referred to.**

2.1. For more than four decades this Court has been laying emphasis on the sacrosanct duty of a Judge of a superior Court how to employ the language in judgment so that a message to the officer concerned is conveyed. It has been clearly spelt out that there has to be a process of reasoning while unsettling the judgment and such reasoning are to be reasonably stated with clarity and result orientation. A distinction has been lucidly stated between a message and a rebuke. A Judge is required to maintain decorum and sanctity which are inherent in judicial discipline and restraint. A judge functioning at any level has dignity in the eyes of public and credibility of the entire system is dependent on use of dignified language and sustained restraint,moderation and sobriety. Independence of judiciary has an insegregable and inseparable link with its credibility. Unwarranted comments on the judicial officer creates a

dent in the said credibility and consequently leads to some kind of erosion and affects the conception of rule of law. The sanctity of decision making process should not be confused with sitting on a pulpit and delivering sermons which defy decorum because it is obligatory on the part of the superior Courts to take recourse to correctional measures. A reformative method can be taken recourse to on the administrative side. It is condign to state it should be paramount in the mind of a Judge of superior Court that a Judicial officer projects the face of the judicial system and the independence of judiciary at the ground reality level and derogatory remarks against a judicial officer would cause immense harm to him individually (as the expunction of the remarks later on may not completely resuscitate his reputation) but also affects the credibility of the institution and corrodes the sacrosanctity of its zealously cherished philosophy. A judge of a superior Court however strongly he may feel about the unmerited and fallacious order passed by an officer, but is required to maintain sobriety, calmness, dispassionate reasoning and poised restraint. The concept of loco parentis has to take a foremost place in the mind to keep at bay any uncalled for, any unwarranted remarks. [Para 19] [1170-D-H; 1171-A-D]

2.2. Every judge has to remind himself about the aforesaid principles and religiously adhere to them. There is a distinction between a man who has command over 'Shastras' and the other who knows it and puts into practice. He who practises them can alone be called a 'vidvan'. The said principle can be taken recourse to, for one may know or be aware of that use of intemperate language should be avoided in judgments but while penning the same the control over the language is forgotten and acquired knowledge is not applied to the arena of practice. Or to put it differently the knowledge stands still and not verbalised into action. Therefore, a

committed comprehensive endeavour has to be made to put the concept to practice so that it is concretised and fructified and the litigations of the present nature are avoided. [Para 20] [1171-E-G]

Ishari Prasad Mishra v. Mohammad Isa **AIR 1963 SC 1728: 1963 SCR 722;** *Alok Kumar Roy v. Dr. S.N. Sarma and Anr.* **AIR 1968 SC 453: 1968 SCR 813;** *Ishwar Chand Jain v. High Court of Punjab and Haryana and Anr.* **AIR 1988 SC 1395: 1988 (1) Suppl. SCR 396;** *K. P. Tiwari v. State of Madhya Pradesh* **AIR 1994 SC 1031: 1993 (3) Suppl. SCR 497;** *Kasi Nath Roy v. State of Bihar* **AIR 1991 SC 3240;** *Braj Kishore Thakur v. Union of India* **1997 SCR 420;** *A. M. Mathur v. Pramod Kumar Gupta* **AIR 1990 SC 1737: 1990 (2) SCR 110 ;** *Re; K, a Judicial officer* **AIR 2001 SC 1972;** *State of Uttar Pradesh v. Mohammad Naim* **AIR 1964 SC 703: 1964 SCR 363;** *Samya Sett v. Shambu Sarkar and Anr.* **AIR 2005 SC 3309: 2005 (2) Suppl. SCR 686 and** *State of M. P. v. Nandlal Jaiswal and Ors.* **1987 1 SCR 1;** *State of Bihar v. Nilmani Sahu and Anr.* **(1999) 9 SCC 211 - relied on.**

3. In the case at hand, the observations, the comment and the eventual direction were wholly unwarranted and uncalled for. The appellant-Chief Judicial Magistrate had felt that due to delay and other ancillary factors there was no justification to exercise the power under Section 156 (3) of the Code. The High Court, as is manifest, had a different perception of the whole scenario. Perceptions of fact and application of law may be erroneous but that never warrants such kind of observations and directions. Regard being had to the aforesaid, the remarks and the direction against the appellant [as reproduced in paragraph three of this judgment] are expunged. If the said remarks have been entered into the annual confidential roll of the judicial officer the same shall stand expunged. A copy of the order be sent by the Registrar of this Court to the

Registrar General of the High Court of Allahabad to be placed on the personal file of the concerned judicial officer. [Para 21] [1171-H; 1172-A-D]

Case Law Reference:

2007 AIJ (1) 221	**referred to**	**Para 7**
1963 SCR 722	**relied on**	**Para 9**
1968 SCR 813	**relied on**	**Para 10, 17**
1988 (1) Suppl. SCR 396	**relied on**	**Para 11**
1993 (3) Suppl. SCR 497	**relied on**	**Para 12**
AIR 1991 SC 3240	**relied on**	**Para 13**
1997 SCR 420	**relied on**	**Para 14**
1990 (2) SCR 110	**relied on**	**Para 15**
AIR 2001 SC 1972	**relied on**	**Para 16**
1964 SCR 363	**relied on**	**Para 16, 17**
2005 (2) Suppl. SCR 686	**relied on**	**Para 17**
1987 1 SCR 1	**relied on**	**Para 17**
(1999) 9 SCC 211	**relied on**	**Para 18**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 651 of 2009.

From the Judgment and Order dated 31.05.2007 of the High Court of Judicature at Allahabad in Criminal Revision No. 1541 of 2007.

S.S. Dahiya, M.S. Bakshi, Debasis Misra for the Appellant.

R.K. Dash, Abhishth Kumar, Dr. Monika Guaain for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. The present appeal frescoes a picture and exposits a canvas how, despite numerous pronouncements of this Court, while dealing with the defensibility of an order passed by a Judge of subordinate court when it is under assail before the superior Court in appeal or revision, the imperative necessity of use of temperate and sober language warranting total restraint regard being had to the fact that a judicial officer is undefended and further, more importantly, such unwarranted observations, instead of enhancing the respect for the judiciary, creates a concavity in the hierarchical system and brings the judiciary downhill, has been totally ostracised. Further, the trend seems to be persistent like an incurable cancerous cell which explodes out at the slightest imbalance.

2. The appellant, a judicial officer, being aggrieved by the comments and observations passed by the learned Single Judge of High Court of Judicature at Allahabad in Criminal Revision No. 1541 of 2007 vide order dated 31.05.2007, has preferred the present appeal. The brief resume of facts are that one Sunil Solanki had filed an application under Section 156 (3) of the Code of Criminal Procedure (for short 'the Code') before the Chief Judicial Magistrate, Bulandshahar with the allegation that on 11.02.2007 at 09.30 p.m. when he was standing outside the door of his house along with some others, a marriage procession passed through the front door of his house and at that juncture, one Mauzzim Ali accosted him and eventually fired at him from his country made pistol which caused injuries on the abdomen area of Shafeeque, one of his friends. However, as good fortune would have it, said Shafeeque escaped unhurt. Because of the said occurrence, Sunil Solanki endeavoured hard to get the FIR registered at the concerned police station but the entire effort became an exercise in futility as a consequence of which he was compelled to knock at the doors of the learned Chief Judicial Magistrate

by filing an application under Section 156 (3) of the Code for issue of a direction to the police to register an FIR and investigate the matter. While dealing with the application, the learned Chief Judicial Magistrate, the appellant herein, ascribed certain reasons and dismissed the same.

3. Being dissatisfied, said Sunil Solanki preferred a revision before the High Court and the learned Single Judge, taking note of the allegations made in the application, found that it was a fit case where the learned Magistrate should have directed the registration of FIR and investigation into the alleged offences. While recording such a conclusion, the learned Judge has made certain observations which are reproduced below:-

> "This conduct of chief Judicial Magistrate is deplorable and wholly malafide and illegal"

Thereafter the learned Judge treated the order to be wholly hypothetical and commented it was :-

> "vexatiously illegal"

After so stating the learned Single Judge further stated that Chief Judicial Magistrate has committed a blatant error of law. Thereafter the passage runs thus:-

> ".....and has done unpardonable injustice to the injured and the informant. His lack of sensitivity and utter callous attitude has left the accused of murderous assault to go Scot-free to this day."

After making the aforesaid observations, he set aside the order and remitted the matter to the Chief Judicial Magistrate to decide the application afresh in accordance with law as has been spelt out by the High Court of Allahabad in the case of *Masuman v. State of U.P. and Another*[1]. Thereafter, he directed as follows-

1. 2007 ALJ (1) 221.

> "Let a copy of this order be sent to the Administrative Judge, Bulandshahar to take appropriate action against the concerned C.J.M. as he deem fit."

4. The prayer in the Special Leave Petition is to delete the aforesaid comments, observations and the ultimate direction.

5. We have heard Mr. Ratnakar Dash, learned senior counsel for the appellant and the learned counsel for the State.

6. It is submitted by the learned senior counsel appearing on behalf of the appellant that the aforesaid observations and the consequential direction were totally unwarranted and indubitably affect the self-esteem and career of a member of the subordinate judiciary and therefore deserve to be expunged.

7. The learned counsel for the State has fairly stated that a judicial officer enjoys a status in the eyes of the public at large and his reputation stabilises the inherent faith of a litigant in the system and establishes authenticity and hence, the remarks made by the learned Single Judge should not be allowed to stand.

8. At the very outset, we make it clear that we are neither concerned with the justifiability of the order passed by the Chief Judicial Magistrate nor are we required to dwell upon the legal pregnability of the order passed by the learned Single Judge as far as it pertains to dislodging of the order of the learned Magistrate. We are only obliged to address to the issue whether the aforesaid remarks and the directions have been made in consonance with the principles that have been laid down by the various pronouncements of this Court and is in accord with judicial decorum and propriety.

9. In *Ishwari Prasad Mishra v. Mohammad Isa*[2], the High Court, while dealing with the judgment of the trial court in an appeal before it, had passed severe strictures against the trial

2. AIR 1963 SC 1728.

court at several places and, in substance, had suggested that the decision of the trial court was not only perverse but was also based on extraneous considerations. Dealing with the said kind of delineation and the comments, Gajendragadkar, J (as His Lordship then was) authoring the judgment held that the High Court was not justified in passing the strictures against the trial Judge. The Bench observed that judicial experience shows that in adjudicating upon the rival claims brought before the courts, it is not always easy to decide where the truth lies. Evidence is adduced by the respective parties in support of their conflicting contentions and circumstances are similarly pressed into service. In such a case, it is, no doubt, the duty of the Judge to consider the evidence objectively and dispassionately, examine it in the light of probabilities and decide which way the truth lies. The impression formed by the Judge about the character of the evidence will ultimately determine the conclusion which he reaches. But it would be unsafe to overlook the fact that all judicial minds may not react in the same way to the said evidence and it is not unusual that evidence which appears to be respectable and trustworthy to one Judge may not appear to be respectable and trustworthy to another Judge. That explains why in some cases courts of appeal reverse conclusions of facts recorded by the trial Court on its appreciation of oral evidence. The knowledge that another view is possible on the evidence adduced in a case acts as a sobering factor and leads to the use of temperate language in recording judicial conclusions. Judicial approach in such cases would always be based on the consciousness that one may make a mistake; that is why the use of unduly strong words in expressing conclusions, or the adoption of unduly strong intemperate, or extravagant criticism against the contrary view, which are often founded on a sense of infallibility should always be avoided. It is worth noting that emphasis was laid on sobriety, judicial poise and balance.

10. In *Alok Kumar Roy v. Dr. S. N. Sarma and Anr.,*[3] the

3. AIR 1968 SC 453.

Constitution Bench was dealing the issue whether a Judge of High Court can pass order in that capacity while he was working as Head of the Commission of enquiry and whether he can entertain writ petition and pass interim order while being at a place which was not seat of High Court. The learned Chief Justice of High Court while dealing with the matter commented on the Judge that he had passed the order in "unholy haste and hurry". That apart certain observations were made. While not appreciating the said remarks in the judgment against a colleague, their Lordships opined that such observations even about the Judges of subordinate courts with the clearest evidence of impropriety are uncalled for in a judgment. The Constitution Bench further proceeded to state that it is necessary to emphasise that judicial decorum has to be maintained at all times and even where criticism is justified it must be in language of utmost restraint, keeping always in view that the person making the comment is also fallible. Even when there is jurisdiction for criticism, the language should be dignified and restrained.

11. In *Ishwar Chand Jain v High Court of Punjab and Haryana and Anr.*[4], it has been observed that while exercising control over subordinate judiciary under Article 235 of the Constitution, the High Court is under a Constitutional obligation to guide and protect subordinate judicial officers.

12. In *K. P. Tiwari v. State of Madhya Pradesh*[5], the High Court while reversing the order passed by the lower Court had made certain remarks about the interestedness and the motive of the lower Court in passing the impugned order. In that context this Court observed that one of the functions of the higher Court is either to modify or ser aside erroneous orders passed by the lower Court. It has been further observed that a judge tries to discharge his duties to the best of his capacity. While doing so, sometimes, he is likely to err. "It is well said that a judge

4. AIR 1988 SC 1395.

5. AIR 1994 SC 1031.

who has not committed an error is yet to be born", and that applies to judges at all levels from the lowest to the highest. Sometimes, the difference in views of the higher and the lower courts is purely a result of a difference in approach and perception. On such occasions, the lower courts are not necessarily wrong and the higher courts always right. It has also to be remembered that the lower judicial officers mostly work under a charged atmosphere and are constantly under a psychological pressure with all the contestants and their lawyers almost breathing down their necks - more correctly upto their nostrils. They do not have the benefit of a detached atmosphere of the higher courts to think coolly and decide patiently. Every error, however gross it may look, should not, therefore, be attributed to improper motive. It is possible that a particular judicial officer may be consistently passing orders creating a suspicion of judicial conduct which is not wholly or even partly attributable to innocent functioning. Even in such cases, the proper course for the higher court to adopt is to make note of his conduct in the confidential record of his work and to use it on proper occasions. The judges in the higher courts have also a duty to ensure judicial discipline and respect for the judiciary from all concerned. The respect for the judiciary is not enhanced when judges at the lower level are criticised intemperately and castigated publicly. No greater damage can be done to the administration of justice and to the confidence of the people in the judiciary than when the judges of the higher courts publicly express lack of faith in the subordinate judges for one reason or the other. It must be remembered that the officers against whom such strictures are publicly passed, stand condemned for ever in the eyes of their subordinates and of the members of the public. No better device can be found to destroy the judiciary from within. The judges must, therefore, exercise self-restraint. There are ways and ways of expressing disapproval of the orders of the subordinate courts but attributing motives to them is certainly not one of them as that is the surest way to take the judiciary downhill.

13. In *Kasi Nath Roy v. State of Bihar*[6] it has been ruled that in our hierarchical judicial system the appellate and revisional Courts have been set up with the pre-supposition that the lower Courts in some measure of cases can go wrong in decision making, both on facts as also on law. The superior Courts have been established to correct errors but the said correction has to be done in a befitting manner maintaining the dignity of the Court and independence of the judiciary. It is the obligation of the higher Courts to convey the message in the judgment to the officers concerned through a process of reasoning, essentially, persuasive, reasonable, mellow but clear and result orienting but rarely a rebuke.

14. In *Braj Kishore Thakur v. Union of India*[7] this Court disapproved the practice of passing strictures for orders against the subordinate officers. In that context the two-Judge Bench observed thus:-

> "No greater damage can be caused to the administration of justice and to the confidence of people in judicial institutions when judges of higher courts publicly express lack of faith in the subordinate judges. It has been said, time and again, that respect for judiciary is not in hands by using intemperate language and by casting aspersions against lower judiciary."

15. In *A. M. Mathur v. Pramod Kumar Gupta*[8] though in a different context immense emphasis was laid on judicial restraint and discipline, it is appropriate to reproduce a passage from the said decision:-

> "Judicial restraint and discipline are as necessary to the orderly administration of justice as they are to the effectiveness of the army. The duty of restraint, this humility of function should be a constant theme of our judges. This quality in decision making is as much necessary for

6. AIR 1991 SC 3240.
7. 1997 SCR 420.
8. AIR 1990 SC 1737.

judges to command respect as to protect the independence of the judiciary. Judicial restraint in this regard might better be called judicial respect; that is, respect by the judiciary. Respect to those who come before the Court as well to other coordinate before the Court as well to other coordinate branches of the State, the Executive and Legislature. There must be mutual respect. When these qualities fail or when litigants and public believe that the judge has failed in these qualities, it will be neither good for the judge nor for the judicial process."

16. In *Re; K, a Judicial officer,*[9] a two-Judge Bench of this Court was dealing about the adverse remarks contained in the judgment of the High Court disposing of a Criminal Misc. Petition under Section 482 of the Code and the expunction sought by a Metropolitan Magistrate was aggrieved of such remark. After discussing that aggrieved judicial officer could approach this Court for expunging the remarks the Bench opined under what circumstances the exercise of power of making remarks can withstand scrutiny. The Bench reiterated the view expressed in *State of Uttar Pradesh v. Mohammad Naim*[10], wherein it was clearly stated that the overall test is that the criticism or observation must be judicial in nature and should not formally depart from sobriety, moderation and reserve. Thereafter their Lordships referred to the conception of judicial restraint, the controlling power, the expectations of subordinate judiciary form the High Court, the statutory jurisdiction exercised by the High Court and eventually opined that the High Courts have to remember that criticisms and observations touching a subordinate judicial officer incorporated in judicial pronouncements have their won mischievous infirmities. Thereafter the Court proceeded to enumerate the infirmities. They read as follows:-

9. AIR 2001 SC 1972.

10. AIR 1964 SC 703.

"Firstly, the judicial officer is condemned unheard which is violative of principles of natural justice. A member of subordinate judiciary himself dispensing justice should not be denied this minimal natural justice so as to shield against being condemned unheard. Secondly, the harm caused by such criticism or observation may be incapable of being undone. Such criticism of the judicial officer contained in a judgment, reportable or not, is a pronouncement in open and therefore becomes public. The same Judge who found himself persuaded, sitting on judicial side, to make observations guided by the facts of a single case against a subordinate Judge may sitting on administrative side and apprised of overall meritorious performance of the subordinate Judge, may irretrievably regret his having made those observations on judicial side the harming effect whereof even he himself cannot remove on administrative side. Thirdly, human nature being what it is, such criticism of a judicial officer contained in the judgment of a higher Court gives the litigating party a sense of victory not only over his opponent but also over the Judge who had decided the case against him. This is subversive of judicial authority of the deciding Judge. Fourthly, seeking expunging of the observations by judicial officer by filing an appeal or petition of his own reduces him to the status of a litigant arrayed as a party before the High Court or Supreme Court - a situation not very happy from the point of view of the functioning of the judicial system."

Thereafter the Bench laid down how the matter should be handled and should be dealt with on the administrative side and ultimately expunged the remarks.

17. In *Samya Sett v. Shambu Sarkar and Anr.,*[11] the court was dealing with the case where a judicial officer was constrained to approach this court for expunging the remarks

11. AIR 2005 SC 3309.

made by Single Judge of the High Court of Calcutta against him. Their Lordships referred to the decisions in *Mohammad Naim* (supra), *Alok Kumar Roy* (supra), *State of M. P. v. Nandlal Jaiswal and Ors.*[12] and certain other authorities and opined that the stricture was totally inappropriate. In that context the court referred to certain passages about the view expressed in other countries. We think it apt to reproduce them.

> "It is universally accepted and we are conscious of the fact that judges are also human beings. They have their own likes and dislikes; their preferences and prejudices. Dealing with an allegation of bias against a Judge, in Linahan, Re, (1943) 138 F IInd 650, Frank J. stated;
>
> > "If, however, 'bias' and 'partiality' be defined to mean that total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial, and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions and the processes of education, formal and informal create attitudes which precede reasoning in particular instances and which, therefore, by definition are prejudices."
>
> Justice John Clarke has once stated;
>
> > "I have never known any judges, no difference how austere of manner, who discharged their judicial duties in an atmosphere of pure, unadulterated reason. Alas! we are 'all the common growth of the Mother Earth' - even those of us who wear the long robe."

18. In *State of Bihar v. Nilmani Sahu and Anr.*[13] a sitting judge of the Patna High Court had approached this Court for

12. 1987 1 SCR 1.

13. (1999) 9 SCC 211.

expunction of the some observations made by this Court in disposing of a special leave petition arising out of a land acquisition proceeding. A Bench of this Court had used the expression "We find that the view taken by the learned Singh Judge, Justice P. K. Dev, with due respect, if we can say so, is most atrocious". The learned Single Judge had treated this to be stigmatic and approached this Court and raised a contention that it was not necessary for the decision. A two-Judge Bench of this Court after hearing the learned counsel for the parties and considering the judgment of this Court opined the expression used in the judgment was wholly inappropriate inasmuch as when this Court uses an expression against the judgment of the High Court it must be in keeping with dignity of the person concerned. Eventually the said observations were deleted.

19. From the aforesaid enunciation of law it is quite clear that for more than four decades this Court has been laying emphasis on the sacrosanct duty of a Judge of a superior Court how to employ the language in judgment so that a message to the officer concerned is conveyed. It has been clearly spelt out that there has to be a process of reasoning while unsettling the judgment and such reasoning are to be reasonably stated with clarity and result orientation. A distinction has been lucidly stated between a message and a rebuke. A Judge is required to maintain decorum and sanctity which are inherent in judicial discipline and restraint. A judge functioning at any level has dignity in the eyes of public and credibility of the entire system is dependent on use of dignified language and sustained restraint, moderation and sobriety. It is not to be forgotten that independence of judiciary has an insegregable and inseparable link with its credibility. Unwarranted comments on the judicial officer creates a dent in the said credibility and consequently leads to some kind of erosion and affects the conception of rule of law. The sanctity of decision making process should not be confused with sitting on a pulpit and delivering sermons which defy decorum because it is obligatory

on the part of the superior Courts to take recourse to correctional measures. A reformative method can be taken recourse to on the administrative side. It is condign to state it should be paramount in the mind of a Judge of superior Court that a Judicial officer projects the face of the judicial system and the independence of judiciary at the ground reality level and derogatory remarks against a judicial officer would cause immense harm to him individually (as the expunction of the remarks later on may not completely resuscitate his reputation) but also affects the credibility of the institution and corrodes the sacrosanctity of its zealously cherished philosophy. A judge of a superior Court however strongly he may feel about the unmerited and fallacious order passed by an officer, but is required to maintain sobriety, calmness, dispassionate reasoning and poised restraint. The concept of loco parentis has to take a foremost place in the mind to keep at bay any uncalled for any unwarranted remarks.

20. Every judge has to remind himself about the aforesaid principles and religiously adhere to them. In this regard it would not be out of place to sit in the time machine and dwell upon the sagacious saying of an eminent author who has said that there is a distinction between a man who has command over 'Shastras' and the other who knows it and puts into practice. He who practises them can alone be called a 'vidvan'. Though it was told in a different context yet the said principle can be taken recourse to, for one may know or be aware of that use of intemperate language should be avoided in judgments but while penning the same the control over the language is forgotten and acquired knowledge is not applied to the arena of practice. Or to put it differently the knowledge stands still and not verbalised into action. Therefore, a committed comprehensive endeavour has to be made to put the concept to practice so that it is concretised and fructified and the litigations of the present nature are avoided.

21. Coming to the case at hand in our considered opinion

the observations, the comment and the eventual direction were wholly unwarranted and uncalled for. The learned Chief Judicial Magistrate had felt that the due to delay and other ancillary factors there was no justification to exercise the power under Section 156 (3) of the Code. The learned Single Judge, as is manifest, had a different perception of the whole scenario. Perceptions of fact and application of law may be erroneous but that never warrants such kind of observations and directions. Regard being had to the aforesaid we unhesitatingly expunge the remarks and the direction which have been reproduced in paragraph three of our judgment. If the said remarks have been entered into the annual confidential roll of the judicial officer the same shall stand expunged. That apart a copy of the order be sent by the Registrar of this Court to the Registrar General of the High Court of Allahabad to be placed on the personal file of the concerned judicial officer.

22. The appeal is allowed accordingly.

B.B.B. Appeal allowed.

HUIDROM KONUNGJAO SINGH
v.
STATE OF MANIPUR & ORS.
(Criminal Appeal No. 840 of 2012)

MAY 17, 2012

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

NATIONAL SECURITY ACT, 1980:

s. 3(2) - Order of detention passed against a person arrested for an offence punishable u/s 302 IPC and s.25(1-C) Arms Act - Held: In the instant case, resorting to the provisions of N.S. Act was not permissible, since the detenu had not moved any bail application and no other co-accused, if any, had been enlarged on bail - Factors to be taken into consideration while passing an order of detention in respect of a person who is already in custody, enumerated in the judgment - Constitution of India, 1950 - Arts. 21 and 22.

The appellant's son (detenu) was arrested on 19.6.2011 in connection with an offence punishable u/s 302 IPC and s. 25(1-C), Arms Act. The District Magistrate passed a detention order u/s 3(2) of the National Security Act, 1980, on various grounds with an apprehension that as in similar cases, the accused involved therein had been enlarged on bail, the detenu in the instant case would also be released on bail and he would indulge in activities prejudicial to public order. The detention order was confirmed on 16.8.2011. The writ petition filed by the father of the detenu having been dismissed by the High Court, he filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1 The question of personal liberty of a person is sacrosanct and State Authority cannot be

permitted to take it away without following the procedure prescribed by law, otherwise it would be violative of the fundamental rights guaranteed under Arts. 21 and 22 of the Constitution. [para 4] [1178-E]

Ayya alias Ayub v. State of U.P. & Anr., **1988 (3) Suppl. SCR 967 = AIR 1989 SC 364;** *Yumman Ongbi Lembi Leima v. State of Manipur & Ors.,* **(2012) 2 SCC 176 - referred to.**

1.2 There is no prohibition in law to pass the detention order in respect of a person who is already in custody in respect of criminal case. However, if the detention order is challenged, the detaining authority has to satisfy the court the facts: (1) the authority was fully aware of the fact that the detenu was actually in custody; (2) there was reliable material before the said authority on the basis of which he could have reasons to believe that there was real possibility of his release on bail and further on being released he would probably indulge in activities which are prejudicial to public order; and (3) keeping this in view, the authority felt it necessary to prevent him from indulging in such activities and, therefore, detention order was necessary. In case either of these facts does not exist the detention order would stand vitiated. [para 9] [1180-G-H; 1181-A-C]

Dharmendra Suganchand Chelawat & Anr. v. Union of India & Ors., **1990 (1) SCR 303 = AIR 1990 SC 1196** *Rameshwar Shaw v. District Magistrate, Burdwan,* **1964 SCR 921 = AIR 1964 SC 334;** *Masood Alam v. Union of India,* **1973 (3) SCR 268 =AIR 1973 SC 897;** *Dulal Roy v. District Magistrate, Burdwan,* **1975 (3) SCR 186 = AIR1975 SC 1508;** *Alijan Mian v. District Magistrate, Dhanbad,* **1983 (3) SCR 939 = AIR 1983 SC 1130;** *Ramesh Yadav v. District Magistrate, Etah,* **AIR1986 SC 315;** *Suraj Pal Sahu v. State of Maharashtra,* **1986 (3) SCR 837 = AIR 1986 SC 2177;** *Binod Singh v. District Magistrate, Dhanbad,* **1986 (3) SCR 906 = AIR 1986 SC 2090;** *Smt. Shashi Aggarwal v. State of U.P.,* **AIR 1988 SC 596;** *Amritlal & Ors. v. Union government*

through Secretary, Ministry of Finance & Ors., **2000 (4) Suppl. SCR 450 = AIR 2000 SC 3675;** *N. Meera Rani v. Govt. of Tamil Nadu,* **1989 (3) SCR 901 = AIR 1989 SC 2027;** *Kamarunnissa v. Union of India & Anr.,* **1990 (1) Suppl. SCR 457 = AIR 1991 SC 1640; and** *Union of India v. Paul Manickam and Anr.,* **2003 (4) Suppl. SCR 618 =AIR 2003 SC 4622;** *A. Geetha v. State of Tamil Nadu & Anr.,* **2006 (5) Suppl. SCR 724 =AIR 2006 SC 3053;** *Rajesh Gulati v. Govt-of NCT of Delhi,* **AIR 2002 SC 3094;** *Ibrahim Nazeer v. State of T.N. & Ors.* **2006 (3) Suppl. SCR 357 = (2006) 6 SCC 64; and** *Senthamilselvi v. State of T.N. & Anr.* **2006 (3) Suppl. SCR 24 = (2006) 5 SCC 676 - referred to.**

1.3 It is not the similar case, i.e. involving similar offence, but it should be that the co-accused in the same offence is enlarged on bail and on the basis of which the detenu could be enlarged on bail. [para 12] [1183-C]

Rekha v. State of Tamil Nadu through Secretary to Govt. & Anr., **2011 (4) SCR 740 = (2011) 5 SCC 244 - referred to.**

1.4 In the instant case, the detenu had been arrested for the offence u/s 302 IPC read with s.25(1-A) Arms Act, related to FIR No.53 (6) 2011 dated 14.6.2011. The FIR had been lodged against unknown persons, however, the detenu was arrested on 19.6.2011 in respect of the said offence. Subsequently, the detention order dated 30.6.2011 was passed by the District Magistrate under N.S. Act on various grounds, inter-alia, that the detenu was involved in extorting of money and giving shelter to underground members of an unlawful association and his activities were pre-judicial to the security of the State and maintenance of public order. In support of the detention order, a large number of documents had been relied upon and supplied to the detenu including the copy of FIR No.254 (12) 2010 u/s 17/20 of the Unlawful Activities (Prevention) Act, 1967(UA (P) Act) and copy of

FIR No. 210 (5) 2011u/s 20 of the UA (P) Act and release orders dated 13.12.2010 and 1.6.2011 passed in those cases. In the instant case, admittedly, the bail orders relied upon do not relate to the co-accused in the same case. The accused released in those cases on bail had no concern with the present case. Merely, because somebody else in similar cases had been granted bail, there could be no presumption that in the instant case had the detenu applied for, he could have been released on bail. As the detenu in the instant case has not moved the bail application and no other co-accused, if any, had been enlarged on bail, resorting to the provisions of Act was not permissible. Therefore, the impugned order of detention is based on mere ipse dixit statement in the grounds of detention and cannot be sustained in the eyes of law and, as such, is quashed. [para 13-15] [1183-D-H; 1184-A-D]

Case Law Reference:

1988 (3) Suppl. SCR 967	**referred to**	**para 4**
2012 (2) SCC 176	**referred to**	**para 5**
1990 (1) SCR 303	**referred to**	**para 6**
1964 SCR 921	**referred to**	**para 6**
1973 (3) SCR 268	**referred to**	**para 6**
1975 (3) SCR 186	**referred to**	**para 6**
1983 (3) SCR 939	**referred to**	**para 6**
1986 AIR 315	**referred to**	**para 6**
1986 (3) SCR 837	**referred to**	**para 6**
1986 (3) SCR 906	**referred to**	**para 6**
1988 AIR 596	**referred to**	**para 6**
2000 (4) Suppl. SCR 450	**referred to**	**para 7**

1989 (3) SCR 901	**referred to**	**para 7**
1990 (1) Suppl. SCR 457	**referred to**	**para 7**
2003 (4) Suppl. SCR 618	**referred to**	**para 7**
2006 (3) Suppl. SCR 357	**referred to**	**para 8**
2006 (5) Suppl. SCR 724	**referred to**	**para 8**
2006 (3) Suppl. SCR 24	**referred to**	**para 8**
AIR 2002 SC 3094	**referred to**	**para 8**
2011 (4) SCR 740	**referred to**	**para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 840 of 2012.

From the Judgment & Order dated 13.01.2012 of the Gauhati High Court, Imphal Bench in Writ Petition (Crl.) No. 98 of 2011.

R.P. Bhatt, L. Roshmani, Somiran Sharma, B. Sunita Rao, Anindita Popli, Khawairakpam Nobin Singh for the appearing parties.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This Criminal Appeal has been preferred against the impugned judgment and order dated 13.l.2012 passed by the Gauhati High Court, Imphal Bench at Imphal in Writ Petition (Crl.) No.98 of 2011 dismissing the Habeas Corpus petition challenging the order of detention of appellant's son dated 30.6.2011 passed by the District Magistrate, Imphal West District under Section 3(2) of the National Security Act, 1980 (hereinafter called `the Act').

2. The son of the appellant, namely, Huidrom Shantikumar Singh was arrested on 19.6.2011 by the Imphal Police under Section 302 of Indian Penal Code, 1860 (hereinafter called

`IPC') read with Section 25(1-C) of the Arms Act, 1959 (hereinafter called `Arms Act'). The District Magistrate, Imphal West passed the detention order dated 30.6.2011 under the Act on various grounds with an apprehension that as in similar cases, the accused involved therein had been enlarged on bail the detenu in this case would also be released on bail and he would indulge in activities prejudicial to public order.

3. The appellant's son was served with the grounds of detention dated 2.7.2011. The detenu made representations on 16.7.2011to the Central Government as well as to the Government of Manipur which stood rejected. The detention order was confirmed vide order dated 16.8.2011and confirmation order was furnished to the detenu on 18.8.2011. The appellant filed Writ Petition (Crl.) No.98 of 2011 challenging the detention order in Gauhati High Court (Imphal Bench) which stood dismissed vide impugned judgment and order dated 13.1.2012. Hence, this appeal.

4. The question of personal liberty of a person is sacrosanct and State Authority cannot be permitted to take it away without following the procedure prescribed by law, otherwise it would be violative of the fundamental rights guaranteed under Articles 21 and 22 of the Constitution. In *Ayya alias Ayub v. State ofU.P. & Anr.,* AIR 1989 SC 364, this Court held that the law of preventive detention is based and could be described as a "jurisdiction of suspicion" and the compulsion of values of freedom of democratic society and of social order sometimes might compel a curtailment of individual's liberty.

5. In *Yumman Ongbi Lembi Leima v. State of Manipur & Ors.,* (2012) 2 SCC 176, this Court held that personal liberty of an individual is the most precious and prized right guaranteed under the Constitution in Part III thereof. The State has been granted the power to curb such rights under criminal laws as also under the laws of preventive detention, which, therefore, are required to be exercised with due caution as well as upon a proper appreciation of the facts as to whether such acts are

in any way prejudicial to the interest and the security of the State and its citizens, or seek to disturb public law and order, warranting the issuance of such an order.

6. Whether a person who is in jail can be detained under detention law has been a subject matter of consideration before this Court time and again. In *Dharmendra Suganchand Chelawat & Anr. v. Union of India & Ors.,* AIR 1990 SC 1196, this Court while considering the same issue has reconsidered its earlier judgments on the point in *Rameshwar Shaw v. District Magistrate, Burdwan,* AIR 1964 SC 334; *Masood Alam v. Union of India,* AIR 1973 SC 897; *Dulal Roy v. District Magistrate, Burdwan,* AIR 1975 SC 1508; *Alijan Mian v. District Magistrate, Dhanbad,* AIR 1983 SC 1130; *Ramesh Yadav v. District Magistrate, Etah,* AIR1986 SC 315; *Suraj Pal Sahu v. State of Maharashtra,* AIR 1986 SC 2177; *Binod Singh v. District Magistrate, Dhanbad,* AIR 1986 SC 2090; *Smt. Shashi Aggarwal v. State of U.P.,* AIR 1988 SC 596, and came to the following conclusion:

> "The decisions referred to above lead to the conclusion that an order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detaining authority was aware of the fact that the detenu is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention. The expression "compelling reasons" in the context of making an order for detention of a person already in custody implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the near future, and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such

> activities."

7. In *Amritlal & Ors. v. Union government through Secretary, Ministry of Finance & Ors.,* AIR 2000 SC 3675, similar issue arose as the detaining authority recorded his satisfaction for detention under the Act, in view of the fact that the person, who was already in jail, was going to move a bail application. In the grounds of detention it had been mentioned that there was "likelihood of the detenu moving an application for bail" and hence detention was necessary. This Court held that there must be cogent materials before the authority passing the detention order that there was likelihood of his release on bail.

(See also: *N. Meera Rani v. Govt. of Tamil Nadu,* AIR 1989 SC 2027; *Kamarunnissa v. Union of India & Anr.,* AIR 1991 SC 1640; and *Union of India v. Paul Manickam and Anr.,* AIR 2003 SC 4622).

8. This Court while deciding the case in *A. Geetha v. State of Tamil Nadu & Anr.,* AIR 2006 SC 3053, relied upon its earlier judgments in *Rajesh Gulati v. Govt- of NCT of Delhi,* AIR 2002 SC 3094; *Ibrahim Nazeer v. State of T.N. & Ors.,* (2006) 6 SCC 64; and *Senthamilselvi v. State of T.N. & Anr.,* (2006) 5 SCC 676, and held that the detaining authority should be aware that the detenu is already in custody and is likely to be released on bail. The conclusion that the detenu may be released on bail cannot be ipse dixit of the detaining authority. His subjective satisfaction based on materials, normally, should not to be interfered with.

9. In view of the above, it can be held that there is no prohibition in law to pass the detention order in respect of a person who is already in custody in respect of criminal case. However, if the detention order is challenged the detaining authority has to satisfy the Court the following facts:

(1) The authority was fully aware of the fact that the detenu was actually in custody.

(2) There was reliable material before the said authority on the basis of which he could have reasons to believe that there was real possibility of his release on bail and further on being released he would probably indulge in activities which are prejudicial to public order.

(3) In view of the above, the authority felt it necessary to prevent him from indulging in such activities and therefore, detention order was necessary.

In case either of these facts does not exist the detention order would stand vitiated.

10. The present case requires to be examined in the light of aforesaid settled legal proposition. Learned counsel for the appellant Shri L. Roshmani has submitted that the detenu had never moved the bail application after his arrest and he had not been involved in any criminal case earlier. Reliance had been placed upon two bail orders. They are related to different FIRs and not to the same case. The bail had been granted to the accused in those cases and none of them had been co-accused with the detenu in this case. Therefore, it was not permissible for the detaining authority to rely upon those bail orders and there was no material before the detaining authority on the basis of which the subjective satisfaction could be arrived that the detenu in the instant case was likely to be released on bail and after being released on bail he would indulge in the activities detrimental to the society at large and would cause the problem of public order.

11. On the other hand, Shri R.P. Bhatt, learned senior counsel appearing for Union of India and Shri K. Nobin Singh, learned counsel appearing for the State have submitted that it is not necessary that the co-accused in the same offence is enlarged on bail. What is required to be considered by the

detaining authority is whether in a similar case, i.e. in similar offence, bail has been granted on the basis of which the detenu, in case applies for bail, would be enlarged on bail.

12. In *Rekha v. State of Tamil Nadu through Secretary to Govt. & Anr.,* (2011) 5 SCC 244, this Court while dealing with the issue held :

> "A perusal of the above statement in Para 4 of the grounds of detention shows that no details have been given about the alleged similar cases in which bail was allegedly granted by the court concerned. Neither the date of the alleged bail orders has been mentioned therein, nor the bail application number, nor whether the bail orders were passed in respect of the *co-accused on the same case,* nor whether the bail orders were passed in respect of other co-accused in cases on the same footing as the case of the accused……
>
> In our opinion, if details are given by the respondent authority about the alleged bail orders in similar cases mentioning the date of the orders, the bail application number, whether the bail order was passed in respect *of the co-accused in the same case,* and whether the case of the *co-accused* was on the same footing as the case of the petitioner, then, of course, it could be argued that there is likelihood of the accused being released on bail, because it is the normal practice of most courts that if a *co-accused* has been granted bail and his case is on the same footing as that of the petitioner, then the petitioner is ordinarily granted bail……. A mere ipse dixit statement in the grounds of detention cannot sustain the detention order and has to be ignored……
>
> In our opinion, there is a real possibility of release of a person on bail who is already in custody provided he has moved a bail application which is pending. It follows logically that if no bail application is pending, then there is

no likelihood of the person in custody being released on bail, and hence the detention order will be illegal. However, there can be an exception to this rule, that is, where a *co-accused whose case stands on the same footing had been granted bail.* In such cases, the detaining authority can reasonably conclude that there is likelihood of the detenu being released on bail even though no bail application of his is pending, since most courts normally grant bail on this ground."

(Emphasis added)

Thus, it is evident from the aforesaid judgment that it is not the similar case, i.e. involving similar offence. It should be that the co-accused in the same offence is enlarged on bail and on the basis of which the detenu could be enlarged on bail.

13. So far as the appellant's son is concerned, he had been arrested for the offence related to FIR No.53 (6) 2011 under Section 302 IPC read with Section 25(1-A) Arms Act dated 14.6.2011. The FIR had been lodged against unknown persons, however, appellant's son was arrested on 19.6.2011 in respect of the said offence. Subsequently, the detention order dated 30.6.2011 was passed by the District Magistrate under N.S. Act on various grounds, inter-alia, that the appellant's son was involved in extorting of money and giving shelter to underground members of unlawful association, namely, Kangleipak Communist Party vide notification published in the Gazette of India on 13.11.2009 as his activities were pre-judicial to the security of the State and maintenance of public order. In support of the detention order, a large number of documents had been relied upon and supplied to the appellant's son including the copy of FIR No.254 (12) 2010 under Section 17/20 of the Unlawful Activities (Prevention) Act, 1967 (hereinafter called UA (P) Act) and copy of FIR No. 210 (5) 2011 under Section 20 of the UA (P) Act and released orders in those cases dated 13.12.2010 and 1.6.2011 respectively had been passed.

14. In the instant case, admittedly, the said bail orders do not relate to the co-accused in the same case. The accused released in those cases on bail had no concern with the present case. Merely, because somebody else in similar cases had been granted bail, there could be no presumption that in the instant case had the detenu applied for bail could have been released on bail. Thus, as the detenu in the instant case has not moved the bail application and no other co-accused, if any, had been enlarged on bail, resorting to the provisions of Act was not permissible. Therefore, the impugned order of detention is based on mere ipse dixit statement in the grounds of detention and cannot be sustained in the eyes of law.

15. The appeal succeeds and is allowed. The impugned judgment and order is hereby set aside and detention order dated 30.6.2011 is quashed.

R.P. Appeal allowed.