STATE OF RAJASTHAN
v.
VINOD KUMAR
(Criminal Appeal No.1887 of 2008)

MAY 18, 2012

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

PENAL CODE, 1860:

ss. 376 and 376/120B - Minimum prescribed sentence - Conviction and sentence of 7 yeas of RI awarded by trial court to both the accused - High Court reducing the sentence to 5 years in case of main accused and to the period already undergone (11 months and 25 days) in case of co-accused - Held: In the instant case, the accused pleaded only for reduction of punishment, but the Public Prosecutor vehemently opposed the prayer - Though the High Court further took note that awarding punishment lesser than the minimum sentence of 7 years was permissible only for adequate and special reasons, no such reasons have been recorded by it for doing so, and, thus, the High court failed to ensure compliance of the mandatory requirement - Such an order is violative of the mandatory requirement of law and has defeated the legislative mandate - In the facts and circumstances of the case, sentences awarded by the High Court set aside and seven years R.I. awarded by the trial court restored.

s.376(1), proviso - Sentence less than the minimum - For "adequate and special reasons" - Held: The statutory requirement for awarding the punishment less than seven years is to record adequate and special reasons in writing - In a case like the instant one, in order to impose the punishment lesser than that prescribed in the statute, there must be exceptional reasons relating to the crime as well as

to the criminal - In the context of sentencing process, special reasons must be 'special' to the accused in the facts and circumstances of the case in which the sentence is being awarded.

INTERPRETATION OF STATUTES:

Exception clause - Interpretation of - Proviso to s.376 IPC - Held: Exception clause is always required to be strictly interpreted even if there is a hardship to any individual - The natural presumption in law is that but for the proviso, the enacting part of the Section would have included the subject matter of the proviso, the enacting part should be generally given such a construction which would make the exceptions carved out by the proviso necessary and a construction which would make the exceptions unnecessary and redundant should be avoided - The power under the proviso is not to be used indiscriminately in a routine, casual and cavalier manner for the reason that an exception clause requires strict interpretation - The court while exercising the discretion in the exception clause has to record "exceptional reasons" for resorting to the proviso - Recording of such reasons is sine qua non for granting the extraordinary relief - What is adequate and special would depend upon several factors and no straight jacket formula can be laid down.

SENTENCE/SENTENCING

Punishment u/s 376 IPC - Held: The law on the issue can be summarised to the effect that punishment should always be proportionate/commensurate to the gravity of offence - Religion, race, caste, economic or social status of the accused or victim are not the relevant factors for determining the quantum of punishment - The court has to decide the punishment after considering all aggravating and mitigating factors and the circumstances in which the crime has been committed - Conduct and state of mind of the accused and

age of the sexually assaulted victim and the gravity of the criminal act are the factors of paramount importance - The court must exercise its discretion in imposing the punishment objectively considering the facts and circumstances of the case - The legislature introduced the imposition of minimum sentence by amendment in the IPC w.e.f. 25.12.1983, therefore, the courts are bound to bear in mind the effect thereof.

Meet Singh v. The State of Punjab, **1980 (2) SCR 1152 = AIR 1980 SC 1141;** *Madhukar Bhaskarrao Joshi v. State of Maharashtra,* **2000 (4) Suppl. SCR 475 = AIR 2001 SC 147;** *State of Jammu & Kashmir v. Vinay Nanda,* **2001(1) SCR 399 =AIR 2001 SC 611;** *State of Karnataka v. Raju,* **2007 (9) SCR 970 = AIR 2007 SC 3225;** *State of Madhya Pradesh v. Babbu Barkare @ Dalap Singh,* **2005 (1) Suppl. SCR 381 = AIR 2005 SC 2846;** *Dinesh @ Buddha v. State of Rajasthan,* **2006 (2) SCR 793 = AIR 2006 SC 1267;** *Shailesh Jasvantbhai & Anr. v. State of Gujarat & Ors.,* **2006 (1) SCR 477 = (2006) 2 SCC 359; and** *State of Madhya Pradesh v. Basodi* **2009 (6) SCR 1166 = AIR 2009 SC 3081;** *State of Karnataka v. Krishnappa,* **2000 (2) SCR 761 = AIR 2000 SC 1470;** *State of Punjab v. Prem Sagar and Ors.,* **2008 (12) SCR 959 = (2008) 7 SCC 550;** *State of Madhya Pradesh v. Santosh Kumar,* **2006 (3) Suppl. SCR 548 = AIR 2006 SC 2648;** *Harbans Singh v. State of Punjab,* **1985 (1) SCR 214 =AIR 1984 SC 1594;** *State of Andhra Pradesh v. Vasudeva Rao,* **2003 (5) Suppl. SCR 500 =AIR 2004 SC 960;** *State of M.P. v. Babulal,* **2007 (12) SCR 795 = AIR 2008 SC 582; and** *State of Rajasthan v. Gajendra Singh,* **2008 (11) SCR 816 = (2008) 12 SCC 720;** *Kamal Kishore etc. v. State of Himachal Pradesh* **= 2000 (3) SCR 473 = AIR 2000 SC 1920;** *Bhupinder Sharma v. State of Himachal Pradesh,* **2003 (4) Suppl. SCR 792 = AIR 2003 SC 4684; and** *State of Andhra Pradesh v. Polamala Raju @ Rajarao,* **2000 (2) Suppl. SCR 329 =AIR 2000 SC 2854;** *State of M.P. v. Bala @ Balaram,* **2005 (3) Suppl. SCR 859 = AIR 2005 SC 3567; and** *Ravji*

@ Ram Chandra v. State of Rajasthan **1995 (6) Suppl. SCR 195 =AIR 1996 SC 787- relied on**

S. Sundaram Pillai, etc. v. V.R. Pattabiraman, **1985 (2) SCR 643 =AIR 1985 SC 582;** *Union of India & Ors. v. M/s. Wood Papers Ltd. & Anr.,* **1990 (2) SCR 659 = AIR 1991 SC 2049;** *Grasim Industries Ltd. & Anr. v. State of Madhya Pradesh & Anr.,* **AIR 2000 SC 66;** *Laxminarayan R. Bhattad & Ors. v. State of Maharashtra & Anr.,* **2003 (3) SCR 409 = AIR 2003 SC 3502;** *Project Officer, ITDP & Ors. v. P.D. Chacko* **2010 (6) SCR 846 = AIR 2010 SC 2626; and** *Commissioner of Central Excise, New Delhi v. Hari Chand Shri Gopal & Ors.* **2010 (13) SCR 820 = (2011) 1 SCC 236 - referred to.**

Case Law Reference:

1980 (2) SCR 1152	**relied on**	**para 9**
2000 (4) Suppl. SCR 475	**relied on**	**para 10**
2001 (1) SCR 399	**relied on**	**para 11**
2007 (9) SCR 970	**relied on**	**para 12**
2005 (1) Suppl. SCR 381	**relied on**	**para 12**
2006 (2) SCR 793	**relied on**	**para 12**
2006 (1) SCR 477	**relied on**	**para 12**
2009 (6) SCR 1166	**relied on**	**para 12**
2000 (2) SCR 761	**relied on**	**para 13**
2008 (12) SCR 959	**relied on**	**para 14**
2006 (3) Suppl. SCR 548	**relied on**	**para 15**
1985 (1) SCR 214	**relied on**	**para 15**
2003 (5) Suppl. SCR 500	**relied on**	**para 15**

2007 (12) SCR 795	**relied on**	**para 15**
2008 (11) SCR 816	**relied on**	**para 15**
2000 (3) SCR 473	**relied on**	**para 16**
2003 (4) Suppl. SCR 792	**relied on**	**para 16**
2000 (2) Suppl. SCR 329	**relied on**	**para 16**
2005 (3) Suppl. SCR 859	**relied on**	**para 17**
1995 (6) Suppl. SCR 195	**relied on**	**para 18**
1985 (2) SCR 643	**referred to**	**para 19**
1990 (2) SCR 659	**referred to**	**para 19**
AIR 2000 SC 66	**referred to**	**para 19**
2003 (3) SCR 409	**referred to**	**para 19**
2010 (6) SCR 846	**referred to**	**para 19**
2010 (13) SCR 820	**referred to**	**para 19**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1887 of 2008.

From the Jugment & Order dated 5.4.2007 of the High Court of Judicature for Rajasthan Bench at Jaipur in S.B. Criminal Appeal No. 103 of 2005.

WITH

Criminal Appeal No. 1888 of 2008

Ram Naresh Yadav, Milind Kumar for the Appellant.

Naresh K. Sharma, Vivek Raj Singh Bajwa, Dr. Chaudhary Shamsuddin Khan, Lal Pratap Singh, Ram Niwas for N. Annapoorani for the Respondent.

The Order of the Court was delivered

O R D E R

1. These appeals have been preferred by the State against the judgment and order dated 5.4.2007 passed by the High Court of Judicature for Rajasthan (Jaipur Bench) in S.B. Criminal Appeal No.103 of 2005 and S.B. Criminal Appeal No.82 of 2005, by which, the conviction of the respondents Vinod Kumar underSection 376 of the Indian Penal Code, 1860 (hereinafter called IPC) and Heera Lal under Section 376 read with Section 120B IPC made by the Special Judge, Scheduled Castes/Scheduled Tribes (Prevention of Atrocities) Act (hereinafter called SC/ST Act) Jaipur dated 22.1.2005 passed in Sessions Case No.123 of 2002 has been maintained but the sentence of respondent Vinod Kumar has been reduced from 7 years to 5 years and that of accused Heera Lal from 7 years to 11 months and 25 days.

2. Facts and circumstances giving rise to these appeals are that on 29.8.2002, Guddi, complainant, appeared before the Officer Incharge of the police station alongwith her brother-in-law Babu Lal and submitted a report that one day earlier, i.e. on 28.8.2002 she attended a memorial function in respect of death of her relative. She left the place alongwith Babu Lal, her brother-in-law and stayed in the Jai Hotel. Two persons came there and one of them introduced himself to be the Station House Officer and wanted to check the room. Another person asked her relationship with other occupant Babu Lal. She informed about her relationship but he raised the question as to why such a relationship has not been disclosed in the Hotel Register and thus, under this pretext, they entered into the room for holding enquiry. They took Babu Lal, brother-in-law of the complainant outside. Thereafter, one of them came alone into the room, bolted the door from inside, and pushed her on the cot forcibly and committed rape upon her. She raised alarm but in vain. After commission of rape he fled away by opening the door of the room. She also gave the description of the said person.

3. On the basis of the aforesaid report, Case No.168 of 2002 under Sections 376, 120B IPC was registered and investigation commenced. During the course of investigation, the accused were arrested and identification parade took place. The prosecutrix was medically examined. After completion of the investigation, chargesheet under Sections 376, 120B IPC and Section 3(2) (5) of SC/ST Act was filed against Vinod Kumar and Heera Lal. The prosecution in support of its case examined Guddi, Babu Lal and a large number of other witnesses including the doctors who had examined the prosecutrix. The respondents were examined under Section 313 of Code of Criminal Procedure, 1973 (hereinafter called Cr.P.C.). They simply denied their involvement, however, they did not adduce any evidence in defence. After appreciating the evidence on record, the trial Court convicted the said respondents under Section 376 IPC and Section 376/120B IPC respectively and awarded punishment for 7 years Rigorous Imprisonment and a fine of 5,000/- to each and in default, the accused were ordered to undergo simple imprisonment for 3 months.

4. Aggrieved, both of them preferred appeals before the High Court which have been disposed of by the impugned judgment. The High Court maintained their convictions as awarded by the trial Court. However, their sentences have been reduced as aforementioned. Hence, these appeals.

5. Learned counsel for the State has submitted that in a case of rape, the minimum punishment is 7 years and mandatory requirement under Section 376 IPC is to impose the punishment of imprisonment of either description for a term which shall not be less than 7 years but which may be life or for a term which may extend to 10 years, provided that the court may for adequate and special reasons to be mentioned in the judgment, impose the punishment for a term less than 7 years. In the instant case, the High Court did not record any special and adequate reasons and reduced the punishment

substantially. Therefore, in case the High Court maintained their convictions for the aforesaid offences, there was no justification for reducing their sentences. Thus, the appeals deserve to be allowed.

6. On the contrary, Shri Naresh Kumar, learned Amicus Curiae has submitted that the incident occurred more than a decade ago. The said respondents had already served the sentences awarded by the High Court. Undoubtedly, the High Court has not given any adequate and special reasons for reduction of their sentences, however, it could be the age, their social status, family circumstances which could have swayed the High Court in reducing the sentences. Therefore, the impugned judgment and order does not warrant interference. The appeals are liable to be dismissed.

7. We have considered the rival submissions made by learned counsel for the parties and perused the records.

In the instant case as the respondents have not challenged their order of conviction under Section 376 IPC and Section 376 read with Section 120B IPC respectively, it attained finality. Therefore, the only question remains for consideration is as to whether there could be any justification for the High Court in reduction of sentences and that too without recording any reason.

8. The statutory requirement for awarding the punishment less than seven years is to record adequate and special reasons in writing. Dictionary meanings of the word "adequate" are commensurate in fitness, sufficient, suitable, equal in magnitude and extent, and fully. "Special reasons" means exceptional; particular; peculiar; different from others; designed for a particular purpose, occasion, or person; limited in range; confined to a definite field of action.

Thus, in a case like the instant one, in order to impose the punishment lesser than prescribed in the statute, there must be

exceptional reasons relating to the crime as well as to the criminal.

9. In *Meet Singh v. The State of Punjab,* AIR 1980 SC 1141, this Court while dealing with expression "special reasons" held that it means special to the accused concerned. The court has to weigh reasons advanced in respect of each individual accused whose case is taken up for awarding sentence. The word 'special' has to be understood in contradistinction to word 'general' or 'ordinary'. Thus, anything which is common to a large class governed by the same statute, cannot be said to be special to each of them. Therefore, in the context of sentencing process, special reasons must be 'special' to the accused in the facts and circumstances of the case in which the sentence is being awarded.

10. In *Madhukar Bhaskarrao Joshi v. State of Maharashtra,* AIR 2001 SC 147, this Court examined a similar provision under the Prevention of Corruption Act, 1988 which also contained a provision that accused shall be imposed the punishment which "shall not be less than one year" , however, a lesser punishment may be awarded recording the special reasons. The Court held:

> ".... The proviso is in the form of a rare exception by giving power to the Court for reducing the imprisonment period below one year only when there are "special reasons" and the law required that those special reasons must be recorded in writing by the Court.....
>
> .....Parliament measured the parameters for such condign punishment and in that process wanted to fix a minimum sentence of imprisonment for giving deterrent impact on other public servants who are prone to corrupt deals.....Such a legislative insistence is reflection of Parliament's resolve to meet corruption cases with very strong hand and to give signals of deterrence as the most pivotal feature of sentencing of corrupt public servants.....

> In the present case, how could the mere fact that this case was pending for such a long time be considered as a "special reason"? That is a general feature in almost all convictions under the PC Act and it is not a speciality of this particular case. It is the defect of the system that longevity of the cases tried under the PC Act is too lengthy. If that is to be regarded as sufficient for reducing the minimum sentence mandated by the Parliament the legislative exercise would stand defeated."
>
> (Emphasis added)

11. In *State of Jammu & Kashmir v. Vinay Nanda,* AIR 2001 SC 611, while dealing with a similar issue, this Court held as under:

> ".....Where the mandate of law is clear and unambiguous, the Court has no option but to pass the sentence upon conviction as provided under the statute.....
>
> The mitigating circumstances in a case, if established, would authorise the Court to pass such sentence of imprisonment or fine which may be deemed to be reasonable but not less than the minimum prescribed under an enactment.....
>
> .....For imposing the minimum sentence the Court has to record special reasons. 'Special reasons' have to be distinguished from 'good' or 'other reasons'. The fact that the convict had reached his superannuation is not a special reason. Similarly pendency of criminal case for over a period of time can also not be treated as a special reason....." (Emphasis added)

12. In *State of Karnataka v. Raju,* AIR 2007 SC 3225, this Court dealt with a case of rape of a minor girl below 12 years of age, wherein the High Court reduced the sentence of the accused from seven years to three and a half years. This Court held that the normal sentence in a case where rape is

committed on a child below 12 years of age, is not less than 10 years' rigorous imprisonment, though in exceptional cases "for special and adequate reasons" sentence of less than 10 years' rigorous imprisonment can also be awarded. The Court observed that socio- economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of relevant circumstances in a dispassionate manner by the Court.

A similar view has been taken by this Court in *State of Madhya Pradesh v. Babbu Barkare @ Dalap Singh,* AIR 2005 SC 2846; *Dinesh @ Buddha v. State of Rajasthan,* AIR 2006 SC 1267; *Shailesh Jasvantbhai & Anr. v. State of Gujarat & Ors.,* (2006) 2 SCC 359; and *State of Madhya Pradesh v. Basodi* AIR 2009 SC 3081)

13. In *State of Karnataka v. Krishnappa,* AIR 2000 SC 1470, this Court while dealing with the issue held:

> "The measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused. *It must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of the criminal act.* Crimes of violence upon women need to be severely dealt with. The socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence." (Emphasis supplied)

14. Similarly in *State of Punjab v. Prem Sagar and Ors.,* (2008) 7 SCC 550, this Court observed as under:

> "To what extent should the Judges have discretion to reduce the sentence so prescribed under the statute has remained a vexed question. However, in India, the view always has been that the punishment must be proportionate to the crime. Applicability of the said principle in all situations, however, is open to question. Judicial discretion must be exercised objectively having regard to the facts and circumstances of each case". (Emphasis supplied)

15. In *State of Madhya Pradesh v. Santosh Kumar,* AIR 2006 SC 2648, this Court held that in order to exercise the discretion of reducing the sentence, the statutory requirement is that the court has to record adequate and special reasons in the judgment and not fanciful reasons which would permit the court to impose a sentence less than the prescribed minimum. The reason has not only to be adequate but also special. What is adequate and special would depend upon several factors and no straitjacket formula can be indicated. (See also: *Harbans Singh v. State of Punjab,* AIR 1984 SC 1594; *State of Andhra Pradesh v. Vasudeva Rao,* AIR 2004 SC 960; *State of M.P. v. Babulal,* AIR 2008 SC 582; and *State of Rajasthan v. Gajendra Singh,* (2008) 12 SCC 720)

16. In *Kamal Kishore etc. v. State of Himachal Pradesh,* AIR 2000 SC 1920, this Court held that the expression "adequate and special reasons" indicates that it is not enough to have special reasons, nor adequate reasons disjunctively. There should be a conjunction of both for enabling the court to invoke the discretion. Reasons which are general or common in many cases cannot be regarded as special reasons. (See also: *Bhupinder Sharma v. State of Himachal Pradesh,* AIR 2003 SC 4684; and *State of Andhra Pradesh v. Polamala Raju @ Rajarao,* AIR 2000 SC 2854)

17. In *State of M.P. v. Bala @ Balaram,* AIR 2005 SC 3567, this Court while dealing with the issue observed:

> "The crime here is rape. It is a particularly heinous crime, a crime against society, a crime against human dignity, one that reduces a man to an animal. The penal statute has prescribed a maximum and a minimum punishment for an offence under Section 376 IPC. To view such an offence once it is proved, lightly, is itself an affront to society. Though the award of maximum punishment may depend on the circumstances of the case, the award of the minimum punishment, generally, is imperative. The provisos to Sections 376(1) and 376(2) IPC give the power to the court to award a sentence lesser than the minimum for adequate and special reasons. The power under the proviso is not to be used indiscriminately or routinely. It is to be used sparingly and only in cases where special facts and circumstances justify a reduction. The reasons must be relevant to the exercise of such discretion vested in the court. The reasons must be set out clearly and cogently. The mere existence of a discretion by itself does not justify its exercise. The long pendency of the criminal trial or the offer of the rapist to marry the victim are not relevant reasons. Nor is the age of the offender by itself an adequate reason. It is true that reformation as a theory of punishment is in fashion but under the guise of applying such theory, the courts cannot forget their duty to society and to the victim. The court has to consider the plight of the victim in a case involving rape and the social stigma that may follow the victim to the grave and which in most cases, practically ruins all prospects of a normal life for the victim." (Emphasis supplied)

18. In *Ravji @ Ram Chandra v. State of Rajasthan,* AIR 1996 SC 787, this Court held that it is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The

court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should respond to the society's cry for justice against the criminal.

19. Awarding punishment lesser than the minimum prescribed under Section 376 IPC, is an exception to the general rule. Exception clause is to be invoked only in exceptional circumstances where the conditions incorporated in the exception clause itself exist. It is a settled legal proposition that exception clause is always required to be strictly interpreted even if there is a hardship to any individual. Exception is provided with the object of taking it out of the scope of the basic law and what is included in it and what legislature desired to be excluded. The natural presumption in law is that but for the proviso, the enacting part of the Section would have included the subject matter of the proviso, the enacting part should be generally given such a construction which would make the exceptions carved out by the proviso necessary and a construction which would make the exceptions unnecessary and redundant should be avoided. Proviso is used to remove special cases from the general enactment and provide for them separately. Proviso may change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable. (Vide: *S. Sundaram Pillai, etc. v. V.R. Pattabiraman,* AIR 1985 SC 582; *Union of India & Ors. v. M/s. Wood Papers Ltd. & Anr.,* AIR 1991 SC 2049; *Grasim Industries Ltd. & Anr. v. State of Madhya Pradesh & Anr.,* AIR 2000 SC 66; *Laxminarayan R. Bhattad & Ors. v. State of Maharashtra & Anr.,* AIR 2003 SC 3502; *Project Officer, ITDP & Ors. v. P.D. Chacko,* AIR 2010 SC 2626; and *Commissioner*

of Central Excise, New Delhi v. Hari Chand Shri Gopal & Ors., (2011) 1 SCC 236).

20. Thus, the law on the issue can be summarised to the effect that punishment should always be proportionate/ commensurate to the gravity of offence. Religion, race, caste, economic or social status of the accused or victim are not the relevant factors for determining the quantum of punishment. The court has to decide the punishment after considering all aggravating and mitigating factors and the circumstances in which the crime has been committed. Conduct and state of mind of the accused and age of the sexuallyassaulted victim and the gravity of the criminal act are the factors of paramount importance. The court must exercise its discretion in imposing the punishment objectively considering the facts and circumstances of the case. The power under the proviso is not to be used indiscriminately in a routine, casual and cavalier manner for the reason that an exception clause requires strict interpretation. The legislature introduced the imposition of minimum sentence by amendment in the IPC w.e.f. 25.12.1983, therefore, the courts are bound to bear in mind the effect thereof.

The court while exercising the discretion in the exception clause has to record "exceptional reasons" for resorting to the proviso. Recording of such reasons is sine qua non for granting the extraordinary relief. What is adequate and special would depend upon several factors and no straight jacket formula can be laid down.

21. In the instant case, the High Court recorded the submissions advanced on behalf of the parties to the extent that none of the convicts wanted to press his appeal on merits as it was not possible to succeed in view of the statement of the prosecutrix Guddi (PW.1), recorded by the trial court and her statement recorded by the Magistrate under Section 164 Cr.P.C. on 5th September, 2002. Thus, they pleaded only for reduction of punishment.

The Public Prosecutor vehemently opposed the prayer for reduction of punishment.

In spite of the fact that the learned counsel for the appellants before the High Court did not press their appeal on merits, the High Court affirmed the findings insofar as the rape is concerned, recorded by the trial Court. The High Court held:

> "So far as commission of offence of rape with her is concerned, I find that the same is fully proved from her statement and other prosecution evidence, and I am of the view that the learned trial Court has considered the prosecution evidence in detail and has rightly convicted the accused persons and both the learned counsel are right in not pressing their appeal on merits."

After affirming the conviction for rape for both the accused, the High Court observed that Heera Lal accused did not commit rape himself but had only accompanied Vinod Kumar. The High Court further observed as under:

> *"I do not want to discuss the evidence, in detail,* but I certainly find his case to be a fit one to reduce the sentence of imprisonment to a period of 11 months and 25 days, already undergone by him. So far as accused Vinod Kumar is concerned, I find his case to be a fit one to reduce the sentence of imprisonment looking to the whole statement of the prosecutrix." (Emphasis added)

Thus, it is evident from the aforesaid discussion that the learned counsel for the appellants before the High Court did not argue the case on merit but the High Court affirmed the findings on commission of rape making reference to the evidence, however, further made observation that the court did not want to discuss the evidence in detail. We fail to understand as how the findings on commission of rape have been affirmed without discussing the evidence on record. It was not necessary at all as the counsel for those parties did not argue the appeals on merit.

22. The Court further took note that awarding punishment lesser than the minimum sentence of 7 years was permissible only for adequate and special reasons. However, no such reasons have been recorded by the court for doing so, and thus, the court failed to ensure compliance of such mandatory requirement but awarded the punishment lesser than the minimum prescribed under the IPC. Such an order is violative of the mandatory requirement of law and has defeated the legislative mandate. Deciding the case in such a casual manner reduces the criminal justice delivery system to mockery.

23. Thus, in the facts and circumstances of the case, the appeals are allowed. Sentences awarded by the High Court are set aside and seven years R.I. awarded by the trial court is restored.

Respondents are directed to surrender before the concerned court within a period of four weeks from today and shall undergo their remaining part of sentences. In case the respondents fail to surrender within the said period, the Chief Judicial Magistrate, Jaipur (City) is directed to take them into custody and send them to jail. A copy of the order be sent to learned Chief Judicial Magistrate, Jaipur (City), Rajasthan.

R.P. Appeals allowed.

STATE OF RAJASTHAN
v.
DARSHAN SINGH @ DARSHAN LAL
(Criminal Appeal No. 870 of 2007)

MAY 21, 2012

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Evidence Act, 1872 - ss. 119 and 118 - Deaf and dumb witness - Evidentiary value - Held: Deaf and dumb person is a competent witness - If oath can be administered to him/her, it should be done by the court - If such a witness is able to read and write, it is desirable to record his statement giving him questions in writing and seeking answers in writing - In case the witness is not able to read and write, his statement can be recorded in sign language with the aid of interpreter who should be a person of the same surrounding but should not have any interest in the case and he should be administered oath - On facts, though trial court convicted the respondent for offence punishable u/s. 302 on basis of the evidence of sole eye-witness, who was deaf and dumb, but the High Court rightly set aside the acquittal - Sole eye-witness and her father who acted as interpreter when her statement was recorded, were not administered oath - Sufficient material on record that sole eye-witness was able to read and write and said fact was stood proved in the trial court - But her statement was not recorded in writing - She was not given the questions in writing and an opportunity to reply the same in writing - Her statement was recorded with the help of her father as an interpreter, who was an interested witness - Thus, evidence was unreliable and the High Court rightly gave benefit of doubt and acquitted the respondent - Oaths Act, 1969 - ss. 4 and 5 - Penal Code, 1860 - s. 302.

Code of Criminal Procedure, 1973 - Order of acquittal - Interference by appellate court - Held: Appellate court can

interfere with the order of acquittal where there are compelling circumstances and the judgment under appeal is found to be perverse - Appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence - Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference - On facts, not a fit case to interfere with the order of acquittal.

The trial court convicted the respondent under Section 302 IPC and imposed rigorous imprisonment for life for committing the murder of husband of PW 16. The trial court placed reliance upon the evidence of PW 16 and the various recoveries made. PW 16 was the sole eye-witness of the occurrence and being deaf and dumb, her statement was recorded in sign language with the help of her father PW 1 as an interpreter. Aggrieved, the respondent filed an appeal and the High Court acquitted the respondent. Therefore, the appellant-State filed the appeal.

Dismissing the appeal, the Court

HELD: 1.1 In the instant case, PW.16 had not been administered oath, nor PW.1, her father who acted as interpreter when her statement was recorded in the court were administered oath. In view of provisions of Sections 4 and 5 of the Oaths Act, 1969, it is always desirable to administer oath or statement may be recorded on affirmation of the witness. The main purpose of administering of oath to render persons who give false evidence liable to prosecution and further to bring home to the witness the solemnity of the occasion and to impress upon him the duty of speaking the truth, further such matters only touch credibility and not admissibility. However, in view of the provisions of Section 7 of the Oaths Act, 1969, the omission of administration of oath

or affirmation does not invalidate any evidence. [Para 16] [30-D-G]

Rameshwar s/o Kalyan Singh v The State of Rajasthan **AIR 1952 SC 54 - relied on.**

M.P. Sharma and Ors. v. Satish Chandra, District Magistrate, Delhi and Ors. **AIR 1954 SC 300: 1954 SCR 1077 - referred to.**

1.2 The object of enacting the provisions of Section 119 of the Evidence Act reveals that deaf and dumb persons were earlier contemplated in law as idiots. However, such a view has subsequently been changed for the reason that modern science revealed that persons affected with such calamities are generally found more intelligent, and to be susceptible to far higher culture than one was once supposed. When a deaf and dumb person is examined in the court, the court has to exercise due caution and take care to ascertain before he is examined that he possesses the requisite amount of intelligence and that he understands the nature of an oath. On being satisfied on this, the witness may be administered oath by appropriate means and that also be with the assistance of an interpreter. However, in case a person can read and write, it is most desirable to adopt that method being more satisfactory than any sign language. The law required that there must be a record of signs and not the interpretation of signs. [Para 18] [31-B-D]

Meesala Ramakrishan v. State of A.P. **(1994) 4 SCC 182 - referred to.**

1.3 Language is much more than words. Like all other languages, communication by way of signs has some inherent limitations, since it may be difficult to comprehend what the user is attempting to convey. But a dumb person need not be prevented from being a credible and reliable witness merely due to his/her

physical disability. Such a person though unable to speak may convey himself through writing if literate or through signs and gestures if he is unable to read and write. A case in point is the silent movies which were understood widely because they were able to communicate ideas to people through novel signs and gestures. Emphasised body language and facial expression enabled the audience to comprehend the intended message. [Para 20] [32-A-C]

1.4 A deaf and dumb person is a competent witness. If in the opinion of the Court, oath can be administered to him/her, it should be so done. Such a witness, if able to read and write, it is desirable to record his statement giving him questions in writing and seeking answers in writing. In case the witness is not able to read and write, his statement can be recorded in sign language with the aid of interpreter, if found necessary. In case the interpreter is provided, he should be a person of the same surrounding but should not have any interest in the case and he should be administered oath. [Para 21] [32-D-E]

1.5 In the instant case, there is sufficient material on record that sole eye-witness-PW.16 was able to read and write and this fact stood proved in the trial court when she wrote the telephone number of her father. It cannot be understood as to why her statement could not be recorded in writing, i.e., she could have been given the questions in writing and an opportunity to reply the same in writing. Her statement had been recorded with the help of her father as an interpreter, who for the reasons given by the High Court, being an interested witness who had assisted during the trial, investigation and was examined without administering oath, made the evidence unreliable. In such a fact-situation, the High Court rightly gave the benefit of doubt and acquitted the respondent. [Paras 22, 23] [32-F-H; 33-A]

1.6 In exceptional cases where there are compelling circumstances and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference. [Para 24] [33-B-C]

1.7 On examination of the judgment of the High Court in the light of the said legal position, it is not a fit case to interfere with the order of acquittal. [Para 25] [33-D]

Case Law Reference:

AIR 1952 SC 54	**Relied on**	**Para 16**
1954 SCR 1077	**Referred to**	**Para 17**
(1994) 4 SCC 182	**Referred to**	**Para 19**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 870 of 2007.

From the Judgment and Order dated 29.05.2006 of the High Court of Judicature for Rajasthan at Jodhpur in D.B. Criminal Appeal No. 96 of 2003.

Dr. Manish Singhvi, AAG, Milind Kumar for the Appellant

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This Criminal Appeal has been preferred against the judgment and order dated 29.5.2006 in D.B. Criminal Appeal No. 96 of 2003 passed by the High Court of Judicature for Rajasthan at Jodhpur setting aside the judgment and order dated 15.1.2003 passed by the Additional Sessions Judge (Fast Track) Hanumangarh, convicting the

respondent herein of the offences punishable under Section 302 of Indian Penal Code, 1860 (hereinafter referred as `IPC') and imposing the punishment to suffer rigorous imprisonment for life and to pay a fine of Rs. 500/- in default to further undergo one month simple imprisonment.

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

A. Singh (PW.15) lodged an oral report on 4.5.2001 at 1.00 a.m. at P.S. Hanumangarh, District Hanumangarh stating that on intervening night between 3/4.5.2001 at about 12.15 a.m., Jaswant Singh (PW.1) received a telephone call from Dr. Amarjeet Singh Chawla (PW.4) to the effect that Jaswant Singh's daughter was perturbed and, therefore, he must immediately reach the house of his son-in-law Kaku Singh. Buta Singh (PW.15), informant, also proceeded towards the house of Kaku Singh deceased, alongwith his son Gurmail Singh. They met Jaswant Singh (PW.1) and Geeta (PW.16), his daughter in the lane. The main door of the house was closed but the window of the door was open. They went inside through the window and found two cots lying on some distance where fresh blood was lying covered with sand. They also found the dead body of Kaku Singh in the pool of blood covered by a quilt in the room.

B. On being asked, Geeta (PW.16) (deaf and dumb), wife of Kaku Singh deceased communicated by gestures that Darshan Singh, respondent-accused, had stayed with them in the night. He had given a pill with water to Kaku Singh and thus he became unconscious. Two more persons, accomplice of Darshan Singh came from outside and all the three persons inflicted injuries on Kaku Singh with sharp edged weapons. Geeta (PW.16) got scared and ran outside. The motive for committing the offence had been that one Chhindri Bhatni was having illicit relationship with Kaku Singh, deceased, and about 8-10 months prior to the date of incident Kaku Singh caused burn injuries to Geeta (PW.16) at the instigation of Chhindri

Bhatni. However, because of the intervention of the community people, Kaku Singh, deceased, severed his relationship with Chhindri Bhatni, who became annoyed and had sent her brother Darshan Singh alongwith other persons who killed Kaku Singh.

C. On the basis of the said report FIR No. 262 of 2001 was registered under Sections 449, 302, 201 and 120B IPC against the respondent at P.S Hanumangarh and investigation ensued. The respondent was arrested and during interrogation, he made a voluntary disclosure statement on the basis of which the I.O. got recovered a blood stained Kulhari and clothes the respondent was wearing at the time of commission of offence.

D. After completion of the investigation, the police filed chargesheet against the respondent under Sections 302 and 201 IPC and the trial commenced. During the course of trial, the prosecution examined as many as 23 witnesses and tendered several documents in evidence. However, Geeta (PW.16) was the sole eye-witness of the occurrence, being deaf and dumb, her statement was recorded in sign language with the help of her father Jaswant Singh (PW.1) as an interpreter. After completion of all the formalities and conclusion of the trial, the trial court placed reliance upon the evidence of Geeta (PW.16) and recovery etc., and convicted the respondent vide judgment and order dated 15.1.2003 and imposed the punishment as mentioned here-in-above.

E. Aggrieved, the respondent preferred Criminal Appeal No. 96 of 2003 before the High Court which has been allowed vide impugned judgment and order dated 29.5.2006.

Hence, this appeal.

3. Dr. Manish Singhvi, learned Additional Advocate General, appearing for the appellant-State, has submitted that the prosecution case was fully supported by Geeta (PW.16), Jaswant Singh (PW.1) and Buta Singh (PW.15) which stood fully corroborated by the medical evidence. Dr. Rajendra Gupta

(PW.17) proved the post-mortem report and supported the case of the prosecution. Therefore, the High Court committed an error by reversing the well-reasoned judgment of the trial court. Thus, the appeal deserves to be allowed.

4. Per contra, learned counsel appearing for the respondent has opposed the appeal contending that the deposition of Geeta (PW.16) cannot be relied upon for the reason that she is deaf and dumb and her statement has not been recorded as per the requirement of the provisions of Section 119 of the Evidence Act, 1872. The deposition of Jaswant Singh (PW.1) cannot be relied upon as he was having an eye on the property of Kaku Singh, deceased. The High Court has considered the entire evidence and re-appreciated the same in correct perspective. There are fixed parameters for interfering with the order of acquittal which we do not fit in the facts and circumstances of the case, therefore, the appeal is liable to be dismissed.

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

Undoubtedly, Kaku Singh, deceased, died a homicidal death. Dr. Rajendra Gupta (PW.17), who conducted the post-mortem examination on the dead body of Kaku Singh, found the following injuries:

(i) Incised wound 4-1/2" x 1" bone deep fracture on the right lateral side of face mandible region.

(ii) Incised wound 5-1/2" x 2" bone deep all structure of neck cut wound.

He opined that the cause of death was injury to vessel of neck, trachea due to injury no. 2 which was sufficient in the ordinary course of nature to cause death.

6. The only question that remains for consideration is

whether the respondent could be held responsible for causing the death of Kaku Singh, deceased.

Geeta (PW.16) is the star witness of the prosecution. According to her at 6.30 p.m. on the day of incident, respondent-accused came to her house. The accused and her husband consumed liquor together. The respondent-accused had mixed a tablet in the glass of water and the same was taken by her husband Kaku Singh. She served the food to both of them and subsequently, all the three persons slept on cots in the same room. During the night two persons also joined the respondent-accused. It was at 11.30 p.m., accused Darshan Singh had taken out a kulhari from his bag and gave blows on the neck and cheek of her husband. She raised a cry but accused caught her by the hair and asked to keep quiet otherwise she would also be killed. The dead body was taken by the accused alongwith accompanying persons and was put in a room and locked the same from outside. In the court, Geeta (PW.16) witness indicated that she could read and write and she had written telephone number of her father Jaswant Singh (PW.1). It was on her request that Dr. Amarjeet Singh Chawla (PW.4) informed her father. After sometime, Jaswant Singh (PW.1) came there on scooter and saw the place of occurrence.

7. Jaswant Singh (PW.1) deposed that he reached the place of occurrence after receiving the telephone call from Dr. Amarjeet Singh Chawla (PW.4) and after coming to know about the murder of Kaku Singh, he informed Buta Singh (PW.15), brother of deceased Kaku Singh. Jaswant Singh (PW.1) reached the clinic of Dr. Amarjeet Singh Chawla (PW.4), in the way, he met Buta Singh (PW.15) and his son Gurmail Singh. They came to the house of Kaku Singh, deceased and found the blood covered with sand and also the dead body of Kaku Singh lying on a cot in a room covered with quilt. Geeta (PW.16) informed him through gestures that respondent-accused Darshan Singh had killed him with kulhari while Kaku Singh was

sleeping. She also told Jaswant Singh (PW.1) about the illicit relationship of Chhindri Bhatni with Kaku Singh, deceased and because of the intervention of community persons, Kaku Singh had severed relationship with Chhindri Bhatni. The latter got annoyed and got Kaku Singh killed through her brother Darshan Singh, respondent-accused.

8. Buta Singh (PW.15), brother of deceased Kaku Singh, narrated the incident as had been stated by Jaswant Singh (PW.1).

9. Dr. Rajendra Gupta, (PW.17), who conducted the post-mortem on the said dead body supported the case of the prosecution to the extent that Kaku Singh, deceased, died of homicidal death.

10. Gurtej Singh (PW.2) the recovery witness deposed about the inquest report of the dead body and taking in custody of empty strip of tablet, blood stained soil and simple soil and moulds etc. from the spot.

11. Hari Singh (PW.7), the recovery witness of kulhari (Ext. P-12) at the instance of respondent-accused Darshan Singh supported the prosecution case to the extent of the said recovery.

12. Ramjilal (PW.23), Investigating Officer, gave full details of lodging an FIR at midnight and explained all steps taken during the investigation, recoveries referred to here-in-above, recording of statements of witnesses under Section 161 Cr.P.C., sending the recovered material for FSL report and arrest of Darshan Singh, respondent-accused etc.

13. Dr. Amarjeet Singh Chawla (PW.4) deposed that Geeta (PW.16) had asked him to give a telephone call to her father and he had accordingly informed her father. After sometime, her father Jaswant Singh (PW.1) had arrived on scooter. In the cross-examination, he explained that Geeta (PW.16) was dumb and deaf, however, could read and write

and she had written the telephone number of her father as 55172 and, thus, he could contact her father.

14. The respondent-accused in his examination under Section 313 Cr.P.C., denied all allegations. The trial court found the evidence on record trustworthy and in view thereof, convicted the respondent-accused and sentenced him as referred to hereinabove.

15. The High Court re-appreciated the entire evidence and came to the following conclusions:

(I) There were major contradictions in ocular evidence and medical evidence. As per the statement of Geeta (PW.16), Kaku Singh, deceased and Darshan Singh, respondent-accused had consumed liquor in the evening but this was not corroborated from medical evidence. Dr. Rajendra Gupta (PW.17) has admitted that there was nothing to show that deceased Kaku Singh had consumed liquor. Her version of giving a pill for intoxication of deceased could not be proved by medical evidence. The viscera was sent to Forensic Science Laboratory but the report did not show that any sort of poison had been administered to the deceased.

(II) The version of Geeta (PW.16) did not appear to be trustworthy as she deposed that Darshan Singh accused, Kaku Singh deceased and the witness had slept in the same room. It was natural that a husband and wife would not allow a stranger to sleep with them, even if Darshan Singh, accused, was known to them. In view of the fact that relationship between Geeta and Chhindri Bhatni had never been cordial, it could not be believed that Geeta (PW.16) would permit the brother of Chhindri Bhatni to sleep with them.

(III) Geeta (PW.16) had admitted in her cross-examination that Chhindri Bhatni had 10 brothers and none of them had ever visited her house. Chhindri Bhatni was living in the same house with deceased and Geeta. She further admitted that she had

never seen Darshan Singh, respondent-accused, prior to the date of incident. Even, she could not disclose the features of the accused to the police. In such a fact-situation, the question of sleeping all of them together could not arise.

(IV) There could be no motive for Darshan Singh, respondent-accused, to kill Kaku Singh, deceased for the reason that even as per deposition of Geeta (PW.16), Kaku Singh had severed the relationship with Chhindri Bhatni long ago.

(V) The name of Darshan Singh, respondent-accused, did not find place in the FIR. The accused persons had been mentioned therein as Chhindri Bhatni and her brother.

(VI) So far as the recovery of kulhari (Ext. P-12) is concerned, even if believed, did not lead to any interference for the simple reason that FSL report (Ext. P-64) revealed that there was no human blood found on kulhari. Therefore, the evidence of recovery of kulhari could not be used as incriminating circumstance against the accused.

(VII) The evidence on record revealed that Geeta (PW.16) and Jaswant Singh (PW.1) were apprehending that Kaku Singh deceased would alienate his irrigated land to Chhindri Bhatni and, therefore, it became doubtful whether Darshan Singh, respondent/accused could have any motive to kill Kaku Singh, deceased.

(VIII) The evidence of Geeta (PW.16) was recorded in sign language with the help of her father Jaswant Singh (PW.1). Admittedly, neither she nor her father while acting as her interpreter had been administered oath. The signs have been recorded alongwith its interpretation. There was possibility of misinterpretation of the signs made by her, as her father could do it purposely, the statement of Geeta (PW.16) did not inspire confidence.

(IX) Deposition of Geeta (PW.16) could not be relied upon as it was not safe for the court to embark upon the examination of deaf and dumb witness, on her information without the help of an expert or a person familiar of her mode of conveying ideas to others in day to day life. Further, such a person *should not be an interested person.* In the instant case, Jaswant Singh (PW.1) had participated in the investigation and was an interested person.

16. We have also gone through the entire evidence and concur with the findings recorded by the High Court.

Basic argument which has been advanced by both the parties before us is on the admissibility and credibility of sole eye-witness Geeta (PW.16).

Admittedly, Geeta (PW.16) had not been administered oath, nor Jaswant Singh (PW.1), her father who acted as interpreter when her statement was recorded in the court. In view of provisions of Sections 4 and 5 of the Oaths Act, 1969, it is always desirable to administer oath or statement may be recorded on affirmation of the witness. This Court in *Rameshwar S/o Kalyan Singh v. The State of Rajasthan,* AIR 1952 SC 54, has categorically held that the main purpose of administering of oath to render persons who give false evidence liable to prosecution and further to bring home to the witness the solemnity of the occasion and to impress upon him the duty of speaking the truth, further such matters only touch credibility and not admissibility.

However, in view of the provisions of Section 7 of the Oaths Act, 1969, the omission of administration of oath or affirmation does not invalidate any evidence.

17. In *M.P. Sharma & Ors. v. Satish Chandra, District Magistrate, Delhi & Ors.,* AIR 1954 SC 300, this Court held that a person can "be a witness" not merely by giving oral evidence but also by producing documents or making

intelligible gestures as in the case of a dumb witness (See Section 119 of the Evidence Act) or the like.

18. The object of enacting the provisions of Section 119 of the Evidence Act reveals that deaf and dumb persons were earlier contemplated in law as idiots. However, such a view has subsequently been changed for the reason that modern science revealed that persons affected with such calamities are generally found more intelligent, and to be susceptible to far higher culture than one was once supposed. When a deaf and dumb person is examined in the court, the court has to exercise due caution and take care to ascertain before he is examined that he possesses the requisite amount of intelligence and that he understands the nature of an oath. On being satisfied on this, the witness may be administered oath by appropriate means and that also be with the assistance of an interpreter. However, in case a person can read and write, it is most desirable to adopt that method being more satisfactory than any sign language. The law required that there must be a record of signs and not the interpretation of signs.

19. In *Meesala Ramakrishan v. State of A.P.,* (1994) 4 SCC 182, this Court has considered the evidentiary value of a dying declaration recorded by means of signs and nods of a person who is not in a position to speak for any reason and held that the same amounts to a verbal statement and, thus, is relevant and admissible. The Court further clarified that `verbal' statement does not amount to `oral' statement. In view of the provisions of Section 119 of the Evidence Act, the only requirement is that witness may give his evidence in any manner in which he can make it intelligible, as by writing or by signs and such evidence can be deemed to be oral evidence within the meaning of Section 3 of the Evidence Act. Signs and gestures made by nods or head are admissible and such nods and gestures are not only admissible but possess evidentiary value.

20. Language is much more than words. Like all other languages, communication by way of signs has some inherent limitations, since it may be difficult to comprehend what the user is attempting to convey. But a dumb person need not be prevented from being a credible and reliable witness merely due to his/her physical disability. Such a person though unable to speak may convey himself through writing if literate or through signs and gestures if he is unable to read and write.

A case in point is the silent movies which were understood widely because they were able to communicate ideas to people through novel signs and gestures. Emphasised body language and facial expression enabled the audience to comprehend the intended message.

21. To sum up, a deaf and dumb person is a competent witness. If in the opinion of the Court, oath can be administered to him/her, it should be so done. Such a witness, if able to read and write, it is desirable to record his statement giving him questions in writing and seeking answers in writing. In case the witness is not able to read and write, his statement can be recorded in sign language with the aid of interpreter, if found necessary. In case the interpreter is provided, he should be a person of the same surrounding but should not have any interest in the case and he should be administered oath.

22. In the instant case, there is sufficient material on record that Geeta (PW.16) was able to read and write and this fact stood proved in the trial court when she wrote the telephone number of her father. We fail to understand as to why her statement could not be recorded in writing, i.e., she could have been given the questions in writing and an opportunity to reply the same in writing.

23. Be that as it may, her statement had been recorded with the help of her father as an interpreter, who for the reasons given by the High Court, being an interested witness who had assisted during the trial, investigation and was examined

without administering oath, made the evidence unreliable. In such a fact-situation, the High Court has rightly given the benefit of doubt and acquitted the respondent.

24. We are fully aware of our limitation to interfere with an order against acquittal. In exceptional cases where there are compelling circumstances and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial Court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference.

25. If we examine the judgment of the High Court in light of the aforesaid legal proposition, we do not find it to be a fit case to interfere with the order of acquittal.

The appeal lacks merit and, is accordingly, dismissed.

N.J. Appeal dismissed.

UNION OF INDIA AND OTHERS
v.
S. SRINIVASAN
(Civil Appeal No. 3185 of 2005)

MAY 21, 2012

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Foreign Exchange Management Act, 1999 - ss. 21(1)(b), 2(s), 46 - Appellate Tribunal for Foreign Exchange (Recruitment, Salary and Allowances and other Conditions of Service of Chairperson and Members) Rules, 2000) - r. 5 first and second proviso -Appointment of part time members to the Appellate Tribunal for Foreign Exchange - Held: Part time members cannot be appointed to the Appellate Tribunal for Foreign Exchange - If the object and purpose of the Act is to confer power on the Appellate Tribunal to deal with the issue of economy under the scheme of the Act, it is impossible to conceive of the appointment of a part time Member - It is manifest from s. 2(s) that there is no conception of a part time member under the Scheme of the Act - First proviso to r. 5 stipulates that the number of either full time Members or part time Members shall not exceed two - The introduction of the concept of part time Member, is contrary to the provision contained in the enabling Act - Also, s. 46 nowhere envisages about the part time Members - Further, there is no justification for the introduction of the second proviso to bring in officers from the Indian Legal Service who are qualified to become district judges to be part time Members - If the officer satisfies the requisite qualification, he can be appointed as a Member, thus, the second proviso has been incorporated to bring in only part time Members and once the introduction of part time Members is treated to be ultra vires the Act, the rest part of the Rule is absolutely redundant - High Court rightly held the first and second proviso to r. 5 as ultra vires s. 21(1)(b) and

quashed the appointment of part time Members and the appointment of Chairperson who was a part time Member once - As the appointment of part time Member was quashed, as a logical corollary, such a person could not be allowed to be appointed to the post of Chairperson - Disqualified Member cannot hold the post of a Chairperson as a stop gap arrangement.

Administrative Law - Rule making powers of a delegating authority - When ultra vires - Held: If a rule goes beyond the rule making power conferred by the statute, it has to be declared ultra vires - If a rule supplants any provision for which power has not been conferred, it becomes ultra vires - Basic test is to determine and consider the source of power relatable to the rule - Rule must be in accord with the parent statute as it cannot travel beyond it.

Writ petitions were filed before the High Court seeking issuance of writ of quo warranto that Rule 5 of the Appellate Tribunal for Foreign Exchange (Recruitment, Salary and Allowances and Other Conditions of Service of Chairperson and Members) Rules, 2000 is ultra vires the Foreign Exchange Management Act, 1999; for quashment of certain notifications issued by the Government of India, Ministry of Law, Justice and Company Affairs, appointing part time Members of the Appellate Tribunal; and to quash the appointment of respondent No. 3 to act as the Chairperson as he was a part time Member and also was not eligible to hold the post. The High Court held the first and second proviso to Rule 5 of the Rules as ultra vires Section 21(1)(b) of the Act and quashed the appointments of respondent Nos. 3 and 4 who were appointed as part time Members and further quashed the appointment of respondent No. 3 as the acting Chairperson of the Appellate Tribunal. Therefore, the appellants filed the instant appeals.

Disposing of the appeals, the Court

HELD: 1.1 Rule 2(1)(b) of the Appellate Tribunal for Foreign Exchange (Recruitment, Salary and Allowances and other Conditions of Service of Chairperson and Members) Rules, 2000) is in consonance with the provisions contained in the Act inasmuch as Section 20(1) confers power on the Central Government to constitute the tribunal consisting of one Chairperson and such number of Members. The said fixation of the number is in accord with the Act. Rule 5 provides that there would be one Chairperson and Members not exceeding four. As far as the number is concerned, the Act does not provide the number of Members and, therefore, the Central Government under the Rules has the power to fix the number. There cannot be any kind of cavil over the same. The High Court perceived difficulty in accepting the validity of the two provisos of the said Rule. The first proviso lays a postulate that the number of full time Members or part time Members shall not exceed two. The concept of part time Member has been introduced by the rule making authority. The second proviso states that the part time Members shall be appointed from amongst officers belonging to the Indian Legal Service who fulfil the qualifications prescribed under clause (b) of sub-rule (1) of Rule 2 of the Rules. [Para 14] [48-F-H; 49-A-B]

1.2 As regards the rule making powers of a delegating authority, if a rule goes beyond the rule making power conferred by the statute, the same has to be declared ultra vires. If a rule supplants any provision for which power has not been conferred, it becomes ultra vires. The basic test is to determine and consider the source of power which is relatable to the rule. Similarly, a rule must be in accord with the parent statute as it cannot travel beyond it. [Para 16] [49-G-H]

General Officer Commanding-in-Chief v. Dr. Subhash Chandra Yadav **AIR 1988 SC 876: 1988 (3) SCR 6;**

Additional District Magistrate (Rev.) Delhi Administration v. Shri Ram **AIR 2000 SC 2143: 2000 (3) SCR 1019;** *Sukhdev Singh v. Bhagat Ram* **AIR 1975 SC 1331: 1975 (3) SCR 619;** *State of Karnataka and another v. H. Ganesh Kamath etc.* **AIR 1983 SC 550: 1983 (2) SCR 665;** *Kunj Behari Lal Butail and Ors. v. State of H.P. and Ors.* **AIR 2000 SC 1069: 2000 (1) SCR 1054;** *St. Johns Teachers Training Institute v. Regional Director AIR* **2003 SC 1533: 2003 (1) SCR 975; Global** *Energy Ltd. and Anr. v. Central Electricity Regulatory Commission* **(2009) 15 SCC 570: 2009 (9) SCR 22;** *State of T.N. and Anr. v. P. Krishnamurthy and Ors.* **(2006) 4 SCC 517: 2006 (3) SCR 396;** *Pratap Chandra Mehta v. State Bar Council of Madhya Pradesh and Ors.* **(2011) 9 SCC 573: 2011 (11) SCR 965 - referred to.**

1.3 On a scrutiny of the objects and reasons, the purpose and various provisions of the Act, it is graphically clear that the Appellate Tribunal has been conferred jurisdiction to decide an appeal from the Appellate Tribunal and it has to deal with matters relating to foreign exchange. A fixed tenure has been stipulated for the Chairperson and Members. Section 22 provides that the Chairperson and every other Member shall hold office for a term of five years from the date on which he enters upon office. A Chairperson can continue upto the age of 65 years and the age of retirement of a Member is 62 years. They are entitled to resign subject to certain conditions and they can be removed on proven misbehaviour or incapacity. If the object and purpose of the Act is to confer power on the Appellate Board to deal with the issue of economy under the scheme of the Act, it is well nigh impossible to conceive of the appointment of a part time Member. On the scrutiny of Section 2(s), it is manifest that there is no conception of a part time member under the scheme of the Act. Section 20, the enabling provision, empowers the Central Government to fix such number of persons as the Government may deem

fit. The main part of Rule 5 provides that a tribunal shall have one Chairperson and Members not exceeding four. To that extent, it is in consonance with the Act and it comes within the framework of the provision. [Para 27] [54-F-H; 55-A-B]

1.4 The first proviso stipulates that the number of either full time Members or part time Members shall not exceed two. This proviso introduces the concept of part time Member. There can be no trace of doubt that it travels beyond the enabling provision and is totally inconsistent with it. The rule does not conform to the main enactment. Therefore, the High Court is justified in declaring the said provision as ultra vires. The second proviso is an innovative one. It provides for qualification of a part time Member who can be appointed from amongst officers belonging to the Indian Legal Service who fulfil the qualification prescribed under Clause (b) of sub-rule (1) of Rule 2 of the Rules. Clause (b) of sub-rule (1) of Rule 2 spells out that a person shall not be qualified for appointment as a Member unless he is or has been or is qualified to be a district judge. As far as the word 'is' or 'has been' is concerned, there can be no cavil. The core of the controversy is the qualification associated with part time Member. [Para 28, 29] [55-B-F]

Satya Narian Singh v. High Court of Judicature at Allahabad and Ors. **(1985) 1 SCC 225: 1985 (2) SCR 112;** *Chandra Mohan v.State of Uttar Pradesh* **(1967) 1 SCR 77;** *Rameshwar Dayal v. State of Punjab and Ors.* **AIR 1961 SC 816: 1961 SCR 874;** *Shri Kumar Padma Prasad v. Union of India and Ors.* **(1992) 2 SCC 428: 1992 (2) SCR 109;** *Sushma Suri v. Govt. of National Capital Territory of Delhi and Anr.* **(1999) 1 SCC 330: 1998 (2) Suppl. SCR 187;** *Oma Shanker Sharma v. Delhi Administration* **CWP No. 1961 of 1987 - referred to.**

1.5 Rule 2(1)(b) provides the qualification to be a

Member. The same is in total accord with the Act. The first proviso to Rule 5 introduces part time Member. The said proviso, as far as it introduces the concept of part time Member, is contrary to the provision contained in the enabling Act. Section 46 of the Act nowhere envisages about the part time Members. Once it is held that there cannot be a part time Member, a person who is qualified to be a district judge can be a Member if he meets the criterion laid down in the pronouncements of this Court. They are strictly followed. There is no justification for the introduction of the second proviso to bring in officers from the Indian Legal Service who are qualified to become district judges to be part time Members. If the officer satisfies the requisite qualification, he can be appointed as a Member. Therefore, the second proviso has been incorporated to bring in only part time Members and once the introduction of part time Members is treated to be ultra vires the Act, the rest part of the Rule is absolutely redundant. If the officer belonging to Indian Legal Services is qualified to be a district judge, he can compete and be selected for the post of Member and that qualification is to be in accord with the pronouncements of law of this Court. [Para 33] [59-F-H; 60-A-C]

1.6 The High Court quashed the appointment of part time Members and the appointment of Chairperson who was a part time Member once. As the appointment of part time Member was quashed, as a logical corollary, such a person could not be allowed to be appointed to the post of Chairperson. The disqualified Member cannot hold the post of a Chairperson as a stop gap arrangement. Thus, there is no error in that regard in the judgment passed by the High Court. [Para 34] [60-D-E]

1.7 This Court while issuing notice had granted stay on the operation of the judgment. It has been apprised that the Central Government, at present, has been

scrupulously following the mandate of the Act and only qualified persons are appointed as Members and Chairperson. To avoid any confusion, it is clarified that the judgments and orders passed by the Appellate Tribunal by the Chairperson or Members who were not qualified and whose appointments have been quashed shall not be treated to be null and void. [Para 35] [60-F-H]

Gokaraju Rangaraju v. State of Andhra Pradesh **AIR 1981 SC 1473: 1981 (3) SCR 474;** *M.M. Gupta and Ors. v. M.M. Gupta and Ors. vs. State of J. & K. and Ors.* **AIR 1982 SC 1579: 1983 (1) SCR 593 - relied on.**

State of Maharashtra v. Labour Law Practitioners Association and Ors. **(1998) 2 SCC 688: 1998 (1) SCR 793;** *Union of India and Anr. v. Delhi High Court Bar Association and Ors.* **(2002) 4 SCC 275: 2002 (2) SCR 450 - referred to.**

Case Law Reference:

1998 (1) SCR 793	**Referred to**	**Para 3**
2002 (2) SCR 450	**Referred to**	**Para 4**
1988 (3) SCR 6	**Referred to**	**Para 16**
2000 (3) SCR 1019	**Referred to**	**Para 17**
1975 (3) SCR 619	**Referred to**	**Para 18**
1983 (2) SCR 665	**Referred to**	**Para 19**
2000 (1) SCR 1054	**Referred to**	**Para 20**
2003 (1) SCR 975	**Referred to**	**Para 21**
2009 (9) SCR 22	**Referred to**	**Para 22**
2006 (3) SCR 396	**Referred to**	**Para 24**

2011 (11) SCR 965	**Referred to**	**Para 25**
1985 (2) SCR 112	**Referred to**	**Para 30**
AIR 1966 SC 1987	**Referred to**	**Para 30**
1961 SCR 874	**Referred to**	**Para 30**
1992 (2) SCR 109	**Referred to**	**Para 31**
1998 (2) Suppl. SCR 187	**Referred to**	**Para 32**
1981 (3) SCR 474	**Relied on**	**Para 33**
1983 (1) SCR 593	**Relied on**	**Para 33**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3185 of 2005 etc.

From the Judgment & Order dated 12.04.2004 of the High Court of Delhi at New Delhi in Civil Writ Petition No. 7606 of 2003.

WITH

W.P. (C) No. 127 of 2008 & C.A. No. 3186-3190 of 2005.

R.P. Bhatt, S. Wasim A. Qadri, Rekha Pandey, Zaid Ali, Tamim Qadri, R. Bala., Rohitash Nagar, Anil Katiyar, U. Usha Reddy for the Appellants.

Mahabir Singh, V. Sudeer, Rakesh Dahiya, Gagan Deep Sharma, Ranbir Singh Yadav, Soumyashree Kulkarni, Mathew J. Nedumparara, K. Lingaraja, S. Usha Reddy, B. Krishna Prasad for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Calling in question the legal penetrability of the order dated April 12, 2004 passed by the Division Bench of the High Court of Judicature of Delhi in Writ Petition Nos. 7606 of 2003, 1335, 1336, 1337, 1344 and 1345 of 2004 by a common judgment, the present batch of appeals by way of special leave under Article 136 of the Constitution has been filed.

2. Though prayers in different writ petitions were couched differently, yet the three basic reliefs which were sought before the High Court are - Rule 5 of the Appellate Tribunal for Foreign Exchange (Recruitment, Salary and Allowances and Other Conditions of Service of Chairperson and Members) Rules, 2000 (hereinafter referred to as 'the Rules') is ultra vires the Foreign Exchange Management Act, 1999 (for brevity 'the Act); for quashment of certain notifications issued by the Government of India, Ministry of Law, Justice and Company Affairs, appointing part time Members of the Appellate Tribunal by issue of a writ of quo warranto as they did not satisfy the eligibility criteria as stipulated in the Act; and further to quash the appointment of respondent No. 3 to act as the Chairperson as he was a part time Member and also was not eligible to hold the post.

3. It was urged before the High Court that the Rule travels beyond the scope and ambit of the Act and, in fact, directly runs counter to the provisions in the Act and, therefore, deserves to be declared as ultra vires. It was canvassed that when the Act did not conceive of part time Members, even a person meeting the eligibility criteria could not be appointed as a part time Member. It was further propounded before the High Court that a part time Member who was disqualified to hold the post could not have been allowed to act as the Chairperson as that would destroy the spirit of the Act. To bolster the said submissions, the petitioners before the High Court placed reliance on *Chander Mohan v. State of Uttar Pradesh and others*[1], *Shri Kumar Padma Prasad v. Union of India and others*[2] and *State of Maharashtra v. Labour Law Practitioners' Association and others*[3].

1. (1967) 1 SCR 77.
2. (1992) 2 SCC 428.
3. (1998) 2 SCC 688.

4. The contentions raised by the petitioners before the writ court were resisted by the respondent on the ground that the Members of Indian Legal Services were only required to hold the post of part time Member and, therefore, the rule does not really run counter to the Act in question; that as a stopgap arrangement, a part time Member could be appointed as the Chairperson of the Appellate Tribunal and hence, no facet could be found fault with such an appointment; and that a writ of quo warranto could not be issued as the persons, who were meeting the eligibility criteria had been appointed by a High Level Committee. Reliance was placed on the decision in *Union of India and another v. Delhi High Court Bar Association and others*[4].

5. The High Court declared the first and second proviso to Rule 5 of the Rules as ultra vires Section 21(1)(b) of the Act and quashed the appointments of respondent Nos. 3 and 4 who were appointed as part time Members and further quashed the appointment of respondent No. 3 as the acting Chairperson of the Appellate Tribunal.

6. We have heard Mr. R.P. Bhatt, learned senior counsel appearing for the appellants, and Mr. Mahabir Singh, learned senior counsel appearing for the contesting respondent.

7. The Parliament enacted the Foreign Exchange Management Act, 1999 repealing the Foreign Exchange Regulation Act, 1973 as a result of which the Appellate Board constituted under Section 52 of the 1973 Act stood dissolved. Thereafter, the new Appellate Board was to be constituted and, accordingly, it was constituted. Regard being had to the principal issue whether the Rule runs contrary to the main provision, it is condign to refer to Section 20 of the Act which deals with the composition of the Appellate Tribunal. It reads as under: -

4. (2002) 4 SCC 275.

"20. Composition of Appellate Tribunal.-(1) The Appellate Tribunal shall consist of a Chairperson and such number of Members as the Central Government may deem fit.

(2) Subject to the provisions of this Act, -

(a) the jurisdiction of the Appellate Tribunal may be exercised by Benches thereof;

(b) a Bench may be constituted by the Chairperson with one or more Members as the Chairperson may deem fit;

(c) the Benches of the Appellate Tribunal shall ordinarily sit at New Delhi and at such other places as the Central Government may, in consultation with the Chairperson, notify;

(d) the Central Government shall notify the areas in relation to which each Bench of the Appellate Tribunal may exercise jurisdiction.

(3) Notwithstanding anything contained in sub-section (2), the Chairperson may transfer a Member from one Bench to another Bench.

(4) If at any stage of the hearing of any case or matter it appears to the Chairperson or a Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the Chairperson or, as the case may be, referred to him for transfer, to such Bench as the Chairperson may deem fit."

On a perusal of the aforesaid provision, it is quite clear that the Appellate Tribunal shall consist of Chairperson and such number or Members as the Central Government may deem fit.

8. Section 2(s) defines a Member as follows: -

" "Member" means a Member of the Appellate Tribunal and includes the Chairperson thereof;"

On a studied scrutiny of the aforesaid provision, it is manifest that there is no conception of a part time Member under the scheme of the Act.

9. At this juncture, it is profitable to refer to Section 21 of the Act that provides for qualification for appointment of Chairperson, Member and Special Director (Appeals). Regard being had to the controversy, it is apt to reproduce the provision in entirety: -

"21. Qualifications for appointment of Chairperson, Member and Special Director (Appeals). - (1) A person shall not be qualified for appointment as the Chairperson or a Member unless he -

(a) in the case of Chairperson, is or has been, or is qualified to be, a Judge of a High Court; and

(b) in the case of a Member, is or has been, or is qualified to be, a District Judge.

(2) A person shall not be qualified for appointment as a Special Director (Appeals) unless he -

(a) has been a member of the Indian Legal Service and has held a post in Grade I of that Service; or

(b) has been a member of the Indian Revenue Service and has held a post equivalent to a Joint Secretary to the Government of India."

10. On a scanning of the aforesaid provision, it is quite clear that a person, in order to be qualified for appointment as the Chairperson, is required to be or has been qualified to be a Judge of the High Court and a person to be a Member is required to be or has been qualified to be a district judge and

to be appointed as a Special Director (Appeal), he has to be a member of the Indian Legal Service and is required to have held a post of Grade I or that service or a member of the Indian Revenue Service as a post equivalent to Joint Secretary to the Government of India. Thus, a member of the Indian Legal Service who is qualified as per Section 21 (2) (a) is entitled to be appointed as a Special Director (Appeal).

11. Section 16 of the Act provides for appointment of the Adjudicating Authority. Section 17 provides for appeal to the Special Director (Appeals). Section 18 provides for establishment of the Appellate Tribunal to hear the appeals against the order of the Adjudicating Authorities and the Special Director (Appeals) under the Act. Section 19 provides for appeal to the Appellate Tribunal and lays down the postulates as to what categories of appeals can be preferred. From the aforesaid provisions, it is quite clear that there are three distinctive forums for adjudication and there is a hierarchical system. We have already referred to Section 20 which deals with the composition of the Appellate Tribunal. As is indicated hereinabove, Section 21(1) clearly lays a postulate as to what is the qualification for a Chairperson and that of a Member. Sub-section (2) of Section 21 provides for the qualification of a Special Director (Appeals). At this juncture, we may refer to Section 46 which provides for the rule making power. It stipulates that the Central Government by notification makes rules to carry out the provisions of the Act. Section 46(2) states the nature of the rules to be framed by the Central Government. We think it appropriate to reproduce Section 46 of the Act as under: -

"46. Power to make rules. - (1) The Central Government may, by notification, make rules to carry out the provisions of this Act.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for, --

(a) the imposition of reasonable restrictions on current account transactions under section 5;

(b) the manner in which the contravention may be compounded under sub-section (1) of section 15;

(c) the manner of holding an inquiry by the Adjudicating Authorities under sub-section (1) of section 16;

(d) the form of appeal and fee for filing such appeal under sections 17 and 19;

(e) the salary and allowances payable to and the other terms and conditions of service of the Chairperson and other Members of the Appellate Tribunal and the Special Director (Appeals) under section 23;

(f) the salaries and allowances and other conditions of service of the officers and employees of the Appellate Tribunal and the office of the Special Director (Appeals) under sub-section (3) of section 27;

(g) the additional matters in respect of which the Appellate Tribunal and the Special Director (Appeals) may exercise the powers of a civil court under clause (i) of sub-section (2) of section 28;

(h) the authority or person and the manner in which any document may be authenticated under clause (ii) of section 39; and

(i) any other matter which is required to be, or may be, prescribed."

12. Emphasis has been laid on the rule making power by Mr. Bhatt, learned senior counsel, to build an edifice that there lies the source for framing the rules which has been erroneously declared by the High Court to be ultra vires.

13. At this juncture, we may refer with profit to Rule 2(1)(b) which reads as follows: -

"2. Qualification for recruitment - (1) A person shall not be qualified for appointment as Chairperson or a member unless he : -

a) xx xx xx

b) in the case of a Member, is or has been or is qualified to be a District Judge."

Rule 5 of the Rules reads as follows:-

"Composition - The Appellate Tribunal shall have one Chairperson and Members not exceeding four:

Provided that the number of either full time Members or part time Members shall not exceed two;

Provided further that the part time Members shall be appointed from amongst officers belonging to the Indian Legal Service who fulfil the qualifications prescribed under clause (b) of sub-rule (1) of Rule 2 of these rules."

14. As far as Rule 2(1)(b) is concerned, there can be no trace of doubt that it is in consonance with the provisions contained in the Act inasmuch as Section 20 (1) confers power on the Central Government to constitute the tribunal consisting of one Chairperson and such number of Members. The said fixation of the number is in accord with the Act. Rule 5 provides that there would be one Chairperson and Members not exceeding four. As far as the number is concerned, the Act does not provide the number of Members and, therefore, as we have stated above, the Central Government under the Rules has the power to fix the number. There cannot be any kind of cavil over the same. The High Court has perceived, as we have seen from the impugned judgment, difficulty in accepting the validity of the two provisos of the said Rule. The first proviso

lays a postulate that the number of full time Members or part time Members shall not exceed two. The concept of part time Member has been introduced by the rule making authority. The second proviso states that the part time Members shall be appointed from amongst officers belonging to the Indian Legal Service who fulfil the qualifications prescribed under clause (b) of sub-rule (1) of Rule 2 of these Rules. The submission of Mr. Bhatt, learned senior counsel, is that when Rule 2(1)(b) clearly lays down that a Member is or has been qualified to be a district judge and that has been referred to in the second proviso for the part time Members, the same could not have been declared as ultra vires by the High Court. The learned senior counsel would further submit that the term 'Member' would include a part time Member and for the sake of convenience, the Central Government has framed the Rules to carry out the purposes of the Act.

15. In oppugnation, Mr. Mahabir Singh, learned senior counsel for the respondent, would contend that when the specific meaning has been given to the term 'Member' by the Act and the existence of a part time Member is conceptually absent under the scheme of the Act, the introduction by the rule is totally impermissible. Mr. Singh would further submit that a member of Indian Legal Service can only be appointed as a Special Director (Appeals) and, therefore, the rule providing that a member of Indian Legal Service can be appointed a Member runs counter to the provisions in the Act.

16. At this stage, it is apposite to state about the rule making powers of a delegating authority. If a rule goes beyond the rule making power conferred by the statute, the same has to be declared ultra vires. If a rule supplants any provision for which power has not been conferred, it becomes ultra vires. The basic test is to determine and consider the source of power which is relatable to the rule. Similarly, a rule must be in accord with the parent statute as it cannot travel beyond it. In this context, we may refer with profit to the decision in

General Officer Commanding-in-Chief v. Dr. Subhash Chandra Yadav[5], wherein it has been held as follows:-

> ".....Before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void."

17. In *Additional District Magistrate (Rev.) Delhi Administration v. Shri R am*[6], it has been ruled that it is a well recognised principle that the conferment of rule making power by an Act does not enable the rule making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto.

18. In *Sukhdev Singh v. Bhagat Ram*[7], the Constitution Bench has held that the statutory bodies cannot use the power to make rules and regulations to enlarge the powers beyond the scope intended by the legislature. Rules and regulations made by reason of the specific power conferred by the statute to make rules and regulations establish the pattern of conduct to be followed.

19. In *State of Karnataka and another v. H. Ganesh Kamath etc.*[8], it has been stated that it is a well settled principle of interpretation of statutes that the conferment of rule making power by an Act does not enable the rule-making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto.

20. In *Kunj Behari Lal Butail and others v. State of H.P. and others*[9], it has been ruled thus:-

7. AIR 1975 SC 1331.
8. AIR 1983 SC 550.
9. AIR 2000 SC 1069.

"13. It is very common for the legislature to provide for a general rule making power to carry out the purpose of the Act. When such a power is given, it may be permissible to find out the object of the enactment and then see if the rules framed satisfy the test of having been so framed as to fall within the scope of such general power confirmed. If the rule making power is not expressed in such a usual general form then it shall have to be seen if the rules made are protected by the limits prescribed by the parent act..."

21. In *St. Johns Teachers Training Institute v. Regional Director*[10], it has been observed that a regulation is a rule or order prescribed by a superior for the management of some business and implies a rule for general course of action. Rules and Regulations are all comprised in delegated legislation. The power to make subordinate legislation is derived from the enabling Act and it is fundamental that the delegate on whom such a power is conferred has to act within the limit of authority conferred by the Act. Rules cannot be made to supplant the provisions of the enabling Act but to supplement it. What is permitted is the delegation of ancillary or subordinate legislative functions, or, what is fictionally called, a power to fill up details.

22. In *Global Energy Ltd. and another v. Central Electricity Regulatory Commission*[11], this Court was dealing with the validity of clauses (b) and (f) of Regulation 6-A of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for Grant of Trading Licence and other Related Matters) Regulations, 2004. In that context, this Court expressed thus:-

"It is now a well-settled principle of law that the rule-making power "for carrying out the purpose of the Act" is a general

10. AIR 2003 SC 1533.

11. (2009) 15 SCC 570.

delegation. Such a general delegation may not be held to be laying down any guidelines. Thus, by reason of such a provision alone, the regulation-making power cannot be exercised so as to bring into existence substantive rights or obligations or disabilities which are not contemplated in terms of the provisions of the said Act."

23. In the said case, while discussing further about the discretionary power, delegated legislation and the requirement of law, the Bench observed thus:-

"The image of law which flows from this framework is its neutrality and objectivity: the ability of law to put sphere of general decision-making outside the discretionary power of those wielding governmental power. Law has to provide a basic level of "legal security" by assuring that law is knowable, dependable and shielded from excessive manipulation. In the contest of rule-making, delegated legislation should establish the structural conditions within which those processes can function effectively. The question which needs to be asked is whether delegated legislation promotes rational and accountable policy implementation. While we say so, we are not oblivious of the contours of the judicial review of the legislative Acts. But, we have made all endeavours to keep ourselves confined within the well-known parameters."

24. In this context, it would be apposite to refer to a passage from *State of T.N. and another v. P. Krishnamurthy and others*[12] wherein it has been held thus:-

"16. The court considering the validity of a subordinate legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate legislation conforms to the parent statute. Where a rule is directly inconsistent with a

12. (2006) 4 SCC 517.

mandatory provision of the statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non-conformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the parent Act, the court should proceed with caution before declaring invalidity."

25. In *Pratap Chandra Mehta v. State Bar Council of Madhya Pradesh and others*[13], while discussing about the conferment of extensive meaning, it has been opined that the Court would be justified in giving the provision a purposive construction to perpetuate the object of the Act while ensuring that such rules framed are within the field circumscribed by the parent Act. It is also clear that it may not always be absolutely necessary to spell out guidelines for delegated legislation when discretion is vested in such delegated bodies. In such cases, the language of the rule framed as well as the purpose sought to be achieved would be the relevant factors to be considered by the Court.

26. Keeping in view the aforesaid enunciation of law, we think it appropriate to consider the nature, object and scheme of the enabling Act, the power conferred under the rule, the concept of purposive construction and the discretion vested in the delegated bodies. Before bringing the legislation in the year 1994, a task force was constituted to have an overall look on the subjects relating to foreign exchange and foreign trade to suggest the required changes. Considering the significant developments, namely, substantial increase in the foreign exchange reserve, growth in foreign trade, rationalization of tariffs, current account convertibility, liberalization of Indian investments abroad, increased access to external commercial borrowings by Indian Corporates and participation of foreign institutional investors in our stock markets and the spectrum of world economy, the Act was brought into force to consolidate and amend the law relating to foreign exchange with the

13. (2011) 9 SCC 573.

objective of facilitating external trade and payments and for promoting the orderly development and maintenance of the foreign exchange market in India. To have a balance in the field of economic growth, the Parliament provided the hierarchical system under the Act itself. Section 20 deals with the composition of the Appellate Tribunal, the highest tribunal under the Act. Section 21 deals with the qualification for appointment of Chairperson, Member and Special Director (Appeals). Section 22 provides that the Chairperson and every other Member shall hold office for a term of five years from the date on which he enters upon office. Section 25 deals with resignation and removal. The removal can only take place by order of the Central Government on the ground of proved misbehaviour or incapacity after an inquiry made by such person as the President may appoint for this purpose in which the Chairperson or a Member concerned has been informed of the charges against him and given a reasonable opportunity of being heard in respect of such charges. Section 26 provides the Member to act as a Chairperson in certain circumstances. The senior most Member has been empowered to act as Chairperson until the date on which a new Chairperson is appointed in accordance with the provisions of the Act.

27. On a scrutiny of the objects and reasons, the purpose and various provisions of the Act, it is graphically clear that the Appellate Tribunal has been conferred jurisdiction to decide an appeal from the Appellate Tribunal and it has to deal with matters relating to foreign exchange. A fixed tenure has been stipulated for the Chairperson and Members. A Chairperson can continue upto the age of 65 years and the age of retirement of a Member is 62 years. They are entitled to resign subject to certain conditions and they can be removed on proven misbehaviour or incapacity. Thus, if the object and purpose of the Act is to confer power on the Appellate Board to deal with the issue of economy under the scheme of the Act, it is well nigh impossible to conceive of the appointment of a part time Member. Section 20, the enabling provision, empowers the

Central Government to fix such number of persons as the Government may deem fit. The main part of Rule 5 provides that a tribunal shall have one Chairperson and Members not exceeding four. To that extent, it is in consonance with the Act and it comes within the framework of the provision.

28. The first proviso stipulates that the number of either full time Members or part time Members shall not exceed two. This proviso introduces the concept of part time Member. There can be no trace of doubt that it travels beyond the enabling provision and is totally inconsistent with it. The rule does not conform to the main enactment. Therefore, in our opinion, the High Court is justified in declaring the said provision as ultra vires.

29. The second proviso, if we allow ourselves to say so, is an innovative one. It provides for qualification of a part time Member who can be appointed from amongst officers belonging to the Indian Legal Service who fulfil the qualification prescribed under Clause (b) of sub-rule (1) of Rule 2 of the Rules. Clause (b) of sub-rule (1) of Rule 2 spells out that a person shall not be qualified for appointment as a Member unless he is or has been or is qualified to be a district judge. As far as the word 'is' or 'has been' is concerned, there can be no cavil. The core of the controversy is the qualification associated with part time Member. Article 233 of the Constitution deals with the appointment of district judges. It provides for the qualification to be a district judge. It reads as follows:-

"233. *Appointment of district judges*

(1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment."

30. To understand the real purport of the said Article in the present context, it is appropriate to refer to the decision in *Satya Narian Singh v. High Court of Judicature at Allahabad and Others.*[14] In the said case, a contention was advanced before a three-Judge Bench that there was no constitutional inhibition against members of any Subordinate Judicial Service seeking to be appointed as district judges by direct recruitment provided that they had completed 7 years' practice at the bar. It was also urged that if a construction is placed on Article 233 of the Constitution which would render a member of Subordinate Judicial Service ineligible for appointment to the Higher Judicial Service because of the additional experience gained by him as a Judicial Officer, the same would be both unjust and paradoxical. Their Lordships referred to Article 233 and came to hold that the first clause of Article 233 deals with "appointment of persons to be, and the posting and promotion of, district judges in any State" while the second clause is confined in its application to persons "not already in the service of the Union or of the State". The Bench opined that the service of the Union or of the State has been interpreted to mean "Judicial Service". It was further stated therein in the case of candidates who are not members of Judicial Service that they must be advocates and pleaders for not less than 7 years and they have to recommended by the High Court before they may be appointed as district judges, while in the case of candidates who are members of Judicial Service, the seven years' rule has no application but there has to be consultation with the High Court. Thereafter, the Bench referred to the decisions in *Chandra Mohan v. State of Uttar Pradesh*[15] and *Rameshwar Dayal v. State of Punjab*[16] and eventually held as follows:-

14. (1985) 1 SCC .

15. AIR 1966 SC 1987.

16. AIR 1961 SC 816.

5. Posing the question whether the expression "the service of the Union or of the State" meant any service of the Union or of the State or whether it meant the judicial Service of the Union or of the State, the learned Chief Justice emphatically held that the expression "the service" in Article 233(2)could only mean the Judicial Service. But he did not mean by the above statement that persons who' are already in the service, on the recommendation by the High Court can be appointed as District Judges, overlooking the claims of all other Seniors in the Subordinate Judiciary contrary to Article 14and Article 16 of the Constitution."

31. In *Shri Kumar Padma Prasad v. Union of India and Others*[17], a three-Judge Bench adverted to the concept of Judicial Service and observed as follows:-

"Article 236(b) defines 'judicial service' to mean District Judges and Judges subordinate thereto. Under Article 234 the Governor of the State makes appointments of persons other than District Judges to the judicial service in accordance with the Rules made by him in consultation with the High Court. Article 235 vests control over district courts and courts subordinate thereto in the High Court. The judicial service whether at the level of district courts or courts subordinate thereto is under the control of the High Court in all respects. The subordinate judiciary which means the courts subordinate to the district courts consists of judicial officers who are recruited in consultation with the High Court. The district judges are recruited from amongst the members of the bar and by promotion from the subordinate judiciary. The judicial service in a State is distinct and separate from the other services under the executive. The members of the judicial service perform exclusively judicial functions and are responsible for the administration of justice in the State.

17. (1992) 2 SCC 428.

Thereafter, their Lordships referred to Articles 233, 235, 236 and further referred in extenso to the Constitution Bench Judgment in *Chandra Mohan* (supra) and ultimately proceeded to state thus:-

"This court has thus authoritatively laid down that the appointment of district judges under Article 233 (2) can only be from the judicial service of the State as defined under Article 236 (b) of the Constitution."

32. In *Sushma Suri v. Govt. of National Capital Territory of Delhi and Another*[18], a three-Judge Bench was dealing with the issue about the eligibility of a person who is on the roll of any bar council and engaged either by the employer or otherwise of the Union or the State to be considered for the post of district judge as provided under Article 233 (2) of the Constitution. The Bench referred to the Rules framed by the High Court, the decisions in *Chandra Mohan* (supra) and *Satya Narain Singh* (supra). Section 2 (a) of the Advocates' Act and Rule 49 of the Rules framed by the Bar Council and posed the issue as follows:-

"If a person on being enrolled as an advocate ceases to practise law and takes up an employment, such a person can by no stretch of imagination be termed as an advocate. However, if a person who is on the rolls of any Bar Council is engaged either by employment or otherwise of the Union or the State or any corporate body or person practises before a court as an advocate for and on behalf of such Government, corporation or authority or person, the question is whether such a person also answers the description of an advocate under the Act. That is the precise question arising for our consideration in this case."

Eventually, the Bench did not accept the view taken by the Delhi High Court in *Oma Shanker Sharma v. Delhi*

18. (1999) 1 SCC 330.

Administration in CWP No. 1961 of 1987 and affirmed by this Court in SLP (C) 3088 of 1988 decided on 13.1.1988 and ruled thus :-

> "An advocate employed by the Government or a body corporate as its law officer even on terms of payment of salary would not cease to be an advocate in terms of Rule 49 if the condition is that such advocate is required to act or plead in courts on behalf of the employer. The test, therefore, is not whether such person is engaged on terms of salary or by payment of remuneration, but whether he is engaged to act or plead on its behalf in a court of law as an advocate. In that event the terms of engagement will not matter at all. What is of essence is as to what such law officer engaged by the Government does - whether he acts or pleads in court on behalf of his employer or otherwise. If he is not acting or pleading on behalf of his employer, then he ceases to be an advocate. "

Thereafter, their Lordships opined that the expression used "from the bar" would only mean from the class or group of advocates practising in the courts of law. It does not have any other attribute.

33. We have referred to the aforesaid pronouncements to highlight who could be a person to be qualified to be a district judge. Rule 2 (1) (b) provides the qualification to be a Member. Needless to say, the same is in total accord with the Act. The first proviso to Rule 5 introduces part time Member. We have held that the said proviso, as far as it introduces the concept of part time Member, is contrary to the provision contained in the enabling Act. Section 46 of the Act nowhere envisages about the part time Members. The second proviso, we have already mentioned, is an innovative one. Thereafter, we have at length referred to the qualifications for a person to be a Member who is eligible to be a district judge. Once we have held that there cannot be a part time Member, a person who is qualified to be a district judge can be a Member if he meets

the criterion laid down in the pronouncements of this Court. They are strictly followed. We really perceive no justification for the introduction of the second proviso to bring in officers from the Indian Legal Service who are qualified to become district judges to be part time Members. If the officer satisfies the requisite qualification, he can be appointed as a Member. Therefore, in our consideration, the second proviso has been incorporated to bring in only part time Members and once the introduction of part time Members is treated to be ultra vires the Act, the rest part of the Rule is absolutely redundant. To repeat at the cost of repetition, if the officer belonging to Indian Legal Services is qualified to be a district judge, he can compete and be selected for the post of Member and that qualification is to be in accord with the pronouncements of law of this Court.

34. The High Court, as we find, had quashed the appointment of part time Members and the appointment of Chairperson who was a part time Member once. As the appointment of part time Member was quashed, as a logical corollary, such a person could not be allowed to be appointed to the post of Chairperson. To elaborate; the disqualified Member cannot hold the post of a Chairperson as a stop gap arrangement. Thus, we do not find any error in that regard in the judgment passed by the High Court.

35. At this juncture, we are obliged to clarify the position further. This Court while issuing notice had granted stay on the operation of the judgment. We have been apprised by Mr. Bhatt that the Central Government, at present, has been scrupulously following the mandate of the Act and only qualified persons are appointed as Members and Chairperson. To avoid any confusion, we clarify that the judgments and orders passed by the Appellate Tribunal by the Chairperson or Members who were not qualified and whose appointments have been quashed shall not be treated to be null and void. In this regard we may refer with profit the decisions in *Gokaraju Rangaraju v. State*

of Andhra Pradesh[19] and *M.M. Gupta and others v. State of J. & K. and others*[20] wherein this Court, while quashing the appointments of the respondents, had clarified that the orders and judgments delivered by them during the period they had continued to function as district judges on the basis of invalid appointments could not be rendered as legally invalid and void. In the larger interest of justice, they are treated as valid and binding. Relying on the said dictum, we clarify the position accordingly.

36. The appeals stand disposed of without any order as to costs.

N.J. Appeals disposed of.

19. AIR 1981 SC 1473.

20. AIR 1982 SC 1579.

ROHTASH
v.
STATE OF HARYANA
(Criminal Appeal No.878 of 2010)

MAY 22, 2012

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Penal Code, 1860 : ss.302, 498A - Dowry death - Prosecution case that the victim-deceased committed suicide by taking pills/poison as she was harassed by appellant-husband and in-laws - Trial court found material inconsistencies in the deposition of the prosecution witnesses and acquitted all the accused of all the charges - High court upheld acquittal of in-laws, however, reversed order of acquittal of husband - On appeal, held : The version given by the prosecution witnesses regarding demand of dowry by the appellant did not find mention in the statement u/s.161 Cr.P.C. of either of the witnesses - FSL report did not support the case of the prosecution, rather leaned towards the defence taken by the appellant - In such a fact-situation, defence taken by the appellant in his statement u/s.313 Cr.P.C. plausible - Appellant entitled to benefit of doubt and acquitted of all the charges.

Appeal: Appeal against acquittal - Scope of interference - Held: The appellate court can interfere with the order of the acquittal only in exceptional cases where there are compelling circumstances and the judgment in appeal is found to be perverse - The appellate court should bear in mind the presumption of innocence of the accused and further that acquittal by trial court bolsters the presumption of innocence - Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference.

The prosecution case was that the daughter of PW.1 aged about 21 years committed suicide by taking poison as she was harassed by her husband and accused in-laws for bringing insufficient dowry. The case of defence was that the deceased was suffering from fits as a result of which she died. The trial court found material inconsistencies in the deposition of the prosecution witnesses and acquitted all the accused of all the charges. The High Court held that there was no evidence to show that the deceased died of fits or was suffering from fits and there was sufficient evidence to show demand of dowry by the appellant from his father-in-law and torture caused to the deceased on the ground of inadequate dowry. The High Court convicted the appellant under Section 304-B IPC and imposed the punishment of 7 years rigorous imprisonment, further under Section 498-A IPC imposed the punishment of six months RI. In respect of other accused the order of acquittal passed by the trial court was maintained. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD: 1. PW.1-complainant deposed that her daughter had complained against the ill-treatment given to her by her husband, his parents and his elder brother; they even taunted her that she belonged to "Bhukha-Nanga" family and that her father had not given adequate dowry. The appellant also visited him and asked him to give Rs. 10,000/- so that he could settle himself in some business. Six months after the marriage, he gave Rs.10,000/- to the appellant after selling his house. Her in-laws still continued to ill-treat her and raised a further demand of Rs.5,000/- on the pretext that they wanted to settle the elder brother of appellant in some business. On the fateful day of incident, 'GC' and 'RK' of Village

Mandora came to him and told that his daughter had consumed poisonous tablets and died. He was confronted with his statement under Section 161 Cr.P.C. in respect of demand of Rs.10,000/- by appellant as no such fact was stated by him to the I.O. Even for the demand of Rs.5,000/- for the elder brother of the appellant, he was confronted with his statement under Section 161 Cr.P.C. as no such fact had been mentioned therein. He was also confronted with his statement under Section 161 Cr.P.C. as he had not stated before the I.O. that he had been informed about the death of his daughter by 'GC' and 'RK'. Regarding the sale of the house to PW.2 for fulfilling the demand of dowry, PW.1 has admitted that land belonged to the Wakf Board and, therefore, he could not execute any registered sale-deed in respect of the same. PW.2 also deposed that he had purchased the house from PW.1, complainant, for Rs. 12,000/-, however, no sale-deed could be executed in his favour as the land belonged to the Wakf Board. PW.3 deposed that he had been told by PW.1 that he was under a great pressure to pay Rs.10,000/- to the appellant to buy peace for his daughter and he had given Rs.10,000/- to the appellant. He was confronted with his statement under Section 161 Cr.P.C. where he did not tell the I.O. about this transaction. PW.6, Investigating Officer, deposed that he went to the cremation ground and collected ashes and bones in presence of witnesses and sent it for chemical analysis. In his cross-examination, he has stated that no independent witness was ready to involve himself in the case becoming a prosecution witness as it was a family matter for the accused persons. So far as the statement of the appellant under Section 313 Cr.P.C. was concerned, he replied that the facts and circumstances put to him were not correct. The said depositions would make it crystal clear that the version given by the prosecution witnesses regarding demand of Rs.10,000/- by the appellant did not find mention in the

statement under Section 161 Cr.P.C. of either of the witnesses. The facts regarding the sale of house by PW.1 to PW.2 also did not inspire confidence as the land belonged to Wakf Board. More so, the demand of Rs.5,000/- for establishment of a business of the appellant's brother was made by the in-laws of the deceased and not by the appellant, who had been acquitted by both the courts below. [Paras 6-11] [70-D-H; 71-A-G; 72-C-E]

Appasaheb v. State of Maharasthra **(2007) 1 SCC 721;** *Bachni Devi v. State of Maharashtra* **(2011) 4 SCC 427: 2011 (2) SCR 627 - relied on.**

2. There was ample evidence on record and it was specifically mentioned by the prosecution witnesses, particularly, PW.1, PW.3 and I.O., (PW.6), that some broken pieces of bangles had been collected by the I.O. from the place of occurrence and broken bones and articles were collected from the cremation site and sent for chemical analysis to Forensic Science Laboratory. Unfortunately, none of the courts below took note of the FSL report. The said reports did not support the case of the prosecution, rather leaned towards the defence taken by the appellant. [Para 14] [73-D-F; 74-A]

3. The High Court interfered with the order of acquittal recorded by the trial court. The law of interfering with the judgment of acquittal is well-settled. It is to the effect that only in exceptional cases where there are compelling circumstances and the judgment in appeal is found to be perverse, the appellate court can interfere with the order of the acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for

interference. In instant case, there were major improvements/embellishments in the prosecution case and demand of Rs.10,000/- by the appellant did not find mention in the statements under Section 161 Cr.P.C. More so, even if such demand was there, it may not necessarily be a demand of dowry. Further, the chemical analysis report falsified the theory of suicide by deceased taking any pills. In such a fact-situation, the defence taken by the appellant in his statement under Section 313 Cr.P.C. could be plausible. The appellant is given the benefit of doubt and the impugned judgment of the High Court is set aside. The appellant is acquitted of all the charges. [Paras 15, 16] [74-B-H]

State of Rajasthan v. Talevar & Anr. **AIR 2011 SC 2271: 2011 (6) SCR 1050;** *Govindaraju @ Govinda v. State by Srirampuram Police Station & Anr.* **(2012) 4 SCC 722 - relied on.**

Case Law Reference:

(2007) 1 SCC 721	**relied on**	**Para 12**
2011 (2) SCR 627	**relied on**	**Para 13**
2011 (6) SCR 1050	**relied on**	**Para 15**
(2012) 4 SCC 722	**relied on**	**Para 15**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 878 of 2010.

From the Judgment and Order dated 11.01.2007 of the High Court of Punjab & Haryana at Chadigarh in Criminal Appeal No. 146 DB of 1994.

K.K. Koul, Daya Krishan Sharma for the Appellant.

Sanjiv, Kamal Mohan Gupta for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This criminal appeal has been filed against the judgment and order dated 11.1.2007 passed by the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 146-DB of 1994, wherein the High Court has reversed the judgment and order of the Sessions Court in Session Case No. 44 of 1989 dated 3.8.1993, by which the appellant has been acquitted of the charges under Sections 304-B and 498-A of the Indian Penal Code, 1860 (hereinafter referred as `IPC').

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

A. On 4.7.1989 at 8.00 p.m., Jiwan (PW.1) made a statement (Ext.PC) before the police at Rohtak Chowk, Kharkohda to the effect that his daughter Indro, aged about 21 years, was married to appellant Rohtash about one year back and in the said marriage he had given sufficient dowry according to his capacity. However, her husband and parents-in-law were not satisfied with the dowry. They always made taunts for not bringing sufficient dowry. His son-in-law made various demands and the complainant had to give him a sum of Rs.10,000/-. He had received information through Gopi Chand and Ram Kishan that his daughter had died by consuming poisonous tablets and her dead body had been cremated in the morning. On the basis of the said statement, FIR was recorded in P.S. Kharkhoda on 14.7.1989 at about 8.10 p.m. under Sections 304, 201 and 498-A of the IPC. S.I. Inder Lal accompanied Jiwan, complainant (PW.1) to village Mandora and went to the house of the accused persons. The accused persons, namely, Smt. Brahmo Devi, Rajbir and Dharampal were found present. He made the inquiries from them and, thereafter, came back to the police station and added the offence under Section 304-B IPC. The said accused as well as the appellant were arrested. The I.O. went to the cremation ground and took into possession the ashes and bones in presence of Jiwan (PW.1), complainant and other witnesses

and after putting them under sealed cover sent the same for FSL report. He lifted broken pieces of glass bangles and prepared a recovery memo in presence of the witnesses. He further recorded the statement of witnesses under Section 161 of Code of Criminal Procedure, 1973 (hereinafter called Cr.P.C.). After completing the investigation, the I.O. submitted the chargesheet and trial commenced for the offences under Section 304-B and 498-A IPC.

B. The prosecution in support of its case examined Jiwan (PW.1) complainant, Suresh (PW.2), Fateh Singh (PW.3), Inder Lal (PW.4) and other formal witnesses, however, gave up certain witnesses like Gopi Chand on the apprehension that he had been won over by the accused persons.

C. Under Section 313 Cr.P.C., the accused made the statement that they had been falsely implicated in the case. Appellant was leading a happy married life and never ill-treated his wife for not bringing enough dowry. Deceased was suffering from fits, as a result of which she died. Accused persons had informed her parents through Rajbir accused and cremation was done after arrival of Jiwan (PW.1) complainant and his other relatives.

D. After appreciating the evidence and considering the documents on record, the trial court reached the conclusion that there were material inconsistencies in the depositions of Jiwan (PW.1), complainant, Suresh (PW.2) and Fateh Singh (PW.3), particularly on the issue of demand of dowry as they could not exactly point out the amount of demand and payment. Suresh (PW.2), though deposed that he had purchased the house of the complainant for a sum of Rs.12,000/-, however, no document could be produced in respect of the same as land under the house belonged to Wakf Board. The prosecution case has been that the complainant has been forced to sell his house to meet the demand of dowry.

The trial court also drew adverse inference for withholding

material witnesses, particularly, Gopi Chand who had informed the complainant about the death of his daughter. The trial court vide judgment and order dated 3.8.1993 acquitted all the accused persons of all the charges.

3. Aggrieved, the State preferred Criminal Appeal No. 146-DB of 1994 before the High Court. The High Court reappreciated the entire evidence and came to conclusion that there was nothing on record to show that Indro, deceased, died of fits; no medical evidence had been produced to show that she had been suffering from fits. There was sufficient evidence on record to show demand of dowry by the appellant from his father-in-law. The appellant had been making taunts and caused torture to the deceased on the ground of inadequate dowry. The demand by the appellant had been fully supported by Suresh (PW.2) who purchased the house of the complainant for a sum of Rs.12,000/-. Indro died within a period of one and a half years of marriage. The High Court convicted the appellant under Section 304-B IPC and imposed the punishment of 7 years rigorous imprisonment, further under Section 498-A IPC imposed the punishment of six months RI. In respect of other persons the order of acquittal passed by the trial court was maintained.

Hence, this appeal.

4. Shri K.K. Kaul, learned counsel appearing for the appellant, has submitted that there has been no demand of dowry by the appellant. The High Court did not appreciate the evidence in correct perspective. There had been material contradictions in the deposition of the prosecution witnesses. Suresh (PW.2) could not purchase the house of the complainant as admittedly the land belonged to the Wakf Board and no document had ever been produced in the court to show the sale. Fateh Singh (PW.3) has no direct relationship with the family. He has supported the prosecution case merely because he belonged to the village of the complainant. Appellant had furnished a satisfactory explanation while making his statement

under Section 313 Cr.P.C., thus, the appeal deserves to be allowed.

5. Per contra, Shri Sanjiv, learned counsel appearing for Shri Kamal Mohan Gupta, Advocate, for the State, has vehemently opposed the appeal, contending that the Indro, deceased, died within a short span of one and a half years of her marriage. No evidence has been produced by the appellant to show that she had been suffering from fits. There has been persistent demand of dowry as stood proved from the depositions of Jiwan (PW.1), Suresh (PW.2) and Fateh Singh (PW.3), thus, appeal lacks merit and is liable to be dismissed.

6. We have considered the rival submission made by learned counsel for the parties and perused the records.

It may be pertinent to make reference to the relevant part of the deposition of witnesses. Jiwan (PW.1), complainant, deposed that her daughter had complained against the ill-treatment given to her by her husband, his parents and his elder brother Rajbir; they even taunted her that she belonged to "Bhukha-Nanga" family and that her father had not given adequate dowry. Rohtash accused also visited him and asked him to give Rs. 10,000/- so that he could settle himself in some business. Six months after the marriage, he gave Rs.10,000/- to Rohtash accused after selling his house. Her in-laws still continued to ill-treat her and raised a further demand of Rs.5,000/- on the pretext that they wanted to settle Rajbir, elder brother of Rohtash, in some business. On the fateful day of incident, Gopi Chand and Ram Kishan of Village Mandora came to him and told that his daughter Indro had consumed poisonous tablets and died.

He was confronted with his statement under Section 161 Cr.P.C. in respect of demand of Rs.10,000/- by appellant Rohtash as no such fact had been stated by him to the I.O. Even for the demand of Rs.5,000/- for Rajbir, he was confronted with his statement under Section 161 Cr.P.C. as no such fact had

been mentioned therein.

He was also confronted with his statement under Section 161 Cr.P.C. as he had not stated before the I.O. that he had been informed about the death of his daughter by Gopi Chand and Ram Kishan. Regarding the sale of the house to Suresh (PW.2), he has admitted that land belonged to the Wakf Board and, therefore, he could not execute any registered sale-deed in respect of the same.

7. Suresh (PW.2) deposed that he had purchased the house from Jiwan (PW.1), complainant, for Rs. 12,000/-, however, no sale-deed could be executed in his favour as the land belonged to the Wakf Board.

8. Fateh Singh (PW.3) deposed that he had been told by Jiwan (PW.1) that he was under a great pressure to pay Rs.10,000/- to the appellant to buy peace for his daughter and he had given Rs.10,000/- to the appellant. He was confronted with his statement under Section 161 Cr.P.C. where he has not told the I.O. about this transaction.

9. S.I., Inder Lal (PW.6), Investigating Officer, deposed that he went to the cremation ground and collected ashes and bones in presence of witnesses and sent it for chemical analysis. In his cross-examination he has stated that no independent witness was ready to involve himself in the case becoming a prosecution witness as it was a family matter for the accused persons.

10. So far as the statement of the appellant under Section 313 Cr.P.C. is concerned, he replied that the facts and circumstances put to him were not correct. In reply to Question No. 10, he stated that his wife Indro did not commit suicide and the allegation of suicide was concocted version. In reply to para 21, he stated as under:

"The deceased Smt. Indro was leading a happy married

life with me and we never ill-treated her, much less on account of any dowry. The deceased was suffering from fits as a result of which she had died. We had informed the parents of the deceased through Rajbir accused and after Jiwan P.W. and his other relations had come to our village, we had cremated the dead body of the deceased in their presence in our village. There was no question of our demanding any dowry, much less ill-treating the deceased on that account because our financial position is very sound."

11. The aforesaid depositions make it crystal clear that the version given by the prosecution witnesses regarding demand of Rs.10,000/- by the appellant did not find mention in the statement under Section 161 Cr.P.C. of either of the witnesses. The facts regarding the sale of house by Jiwan (PW.1) to Suresh (PW.2) does not also inspire confidence as the land belonged to Wakf Board. More so, the demand of Rs.5,000/- for establishment of a business of Rajbir was made by the in-laws of the deceased Indro, and not by the appellant, who had been acquitted by both the courts below, therefore, that issue cannot be considered by us.

Only question remains for our consideration is as to whether there was a dowry demand by the appellant and for that purpose the deceased Indro had been ill-treated to the extent that she had to take a drastic step of committing suicide.

12. This Court in *Appasaheb v. State of Maharasthra,* (2007) 1 SCC 721, while dealing with the similar issue and definition of the word `dowry' held as under:

"A demand for money on account of some financial stringency or for meeting some urgent domestic expenses or for purchasing manure cannot be termed as a demand for dowry as the said word is normally understood."

13. The aforesaid judgment was reconsidered by this

Court in *Bachni Devi v. State of Maharashtra,* (2011) 4 SCC 427, wherein this Court held that the aforesaid judgment does not lay down a law of universal application. Each case has to be decided on its own facts and merit. If a demand for property or valuable security, directly or indirectly, has nexus with marriage, such demand would constitute demand for dowry. The cause of raising of such demand remains immaterial.

14. In view of above, we have to examine as to whether the demand by the appellant for establishment of his tailoring business could be held to be a demand for dowry and further whether for that demand, the ill-treatment given by the appellant to his wife was so grave that she had been driven to the extent that she has to commit suicide.

The prosecution case has been that Indro, deceased, committed suicide by taking pills/poison. There is ample evidence on record and it has specifically been mentioned by the prosecution witnesses, particularly, Jiwan (PW.1), Fateh Singh (PW.3) and S.I., Inder Lal, I.O., (PW.6), that some broken pieces of bangles had been collected by the I.O. from the place of occurrence and broken bones and articles were collected from the cremation site and sent for chemical analysis to Forensic Science Laboratory. Unfortunately, none of the courts below has taken note of the FSL report though the documents had been marked as Ext.PH and Ext. PH1. The first document is report No. FSL(H) dated 29.5.1990 by the Forensic Science Laboratory, Haryana, Madhuban, Karnal, wherein the result of examination of bones and ashes is as under:

> Ext.1 - some burnt bones alongwith ash (Approximately 1 Kg.)
>
> Result of the examination - *no common metallic poison could be detected in Ext. 1.*
>
> Ext. PH1 dated 16.8.1989 revealed that the fragments of bones in Ext. PH1 were identified that they belonged to

> human individual.
>
> The aforesaid reports do not support the case of the prosecution, rather leans towards the defence taken by the appellant.

15. The High Court interfered with the order of acquittal recorded by the trial court. The law of interfering with the judgment of acquittal is well-settled. It is to the effect that only in exceptional cases where there are compelling circumstances and the judgment in appeal is found to be perverse, the appellate court can interfere with the order of the acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference. (Vide: *State of Rajasthan v. Talevar & Anr.,* AIR 2011 SC 2271; and *Govindaraju @ Govinda v. State by Srirampuram Police Station & Anr.,* (2012) 4 SCC 722).

16. In view of above, we are of the considered opinion that in the instant case there had been major improvements/ embellishments in the prosecution case and demand of Rs.10,000/- by the appellant does not find mention in the statements under Section 161 Cr.P.C. More so, even if such demand was there, it may not necessarily be a demand of dowry. Further, the chemical analysis report falsifies the theory of suicide by deceased taking any pills. In such a fact-situation, the defence taken by the appellant in his statement under Section 313 Cr.P.C. could be plausible.

Thus, appeal succeeds and is allowed. The appellant is given the benefit of doubt and the impugned judgment of the High Court dated 11.1.2007 is set aside. The appellant is acquitted of all the charges.

D.G. Appeal allowed.

SMT. BADAMI (DECEASED) BY HER L.R.
v.
BHALI
(Civil Appeal No. 1723 of 2008)

MAY 22, 2012.

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

SUIT:

Fraudulent suit - Suits for permanent injunction and possession - Based on an earlier compromise decree - Held: All facets of fraud get attracted to the case at hand - A rustic and illiterate woman is taken to court by a relation on the plea of creation of a lease deed and magically in a hurried manner the plaint is presented, written statement is drafted and filed, statement is recorded and a decree is passed within three days - It not only gives rise to a doubt but indicates that there is some kind of foul play - However, the trial judge who decreed the first suit on 27.11.1973 did not look at these aspects as also the requirement of O. 10, r.1, CPC - The judgment is vitiated by fraud - When the subsequent suits were filed, the courts below routinely followed the principles relating to consent decree and did not dwell deep to find out how the fraud was manifestly writ large - The foundation was a family arrangement, which was not bona fide - No iota of evidence has been brought on record that the plaintiff had given anything to the defendant in the arrangement - It is a matter of record that the possession was not taken over and inference has been drawn that possibly there was an implied agreement that the decree would be given effect to after her death - All these reasonings are absolutely non-plausible and common sense does not even remotely give consent to them - The whole thing was buttressed on the edifice of fraud - The impugned judgments and decrees are set aside - As a natural corollary, the judgment and decree dated 27.11.1973 is also

set aside - Code of Civil Procedure, 1908 - O.10, r. 1 and O. 15, r. 1.

DEEDS AND DOCUMENTS:

Family arrangement - Held: Though, a family arrangement need not be construed narrowly and it need not be registered, but it must prima facie appear to be genuine which is not so in the case at hand - That apart, there was no reason to exclude the daughter and the son-in-law - It is impossible to perceive any dispute over any property or the possibility of it in future - On the contrary, in this so called family settlement the whole property of the defendant is given to the plaintiff - It cannot be accepted to be a bona fide settlement.

The plaintiff and the original defendant's late husband were the descendants of a common ancestor. In a prior arrangement, the said defendant got a share in the ancestral property. The plaintiff, on 24.11.1973 filed suit No. 1422 of 1973 stating that the defendant, under a family settlement dated 1.6.1972 gave her whole share to the plaintiff and also handed over the possession thereof to him, but since the revenue entries continued to be in her name and there was interference with plaintiff's possession over the suit land, the suit for declaration and permanent injunction was filed. On the date of presentation of the plaint itself, the written statement was filed admitting the plaint averment to be correct and praying for decree of the suit. The suit was decreed on 27.11.1973. It was the case of the plaintiff that the revenue entries continued to be in the name of the defendant and she remained in possession of the suit property. He filed Civil Suit No. 401 of 1984 for permanent injunction against the defendant restraining her from alienating the suit land. He also filed Civil Suit No. 784 of 1984 for possession. The defendant contested both the suits but her stand that the decree dated 27.11.1973 was obtained by fraud was

not accepted and the suits were decreed. Her appeals were also dismissed. During the pendency of the second appeals filed by the original defendant, she died and the name of her daughter was substituted. The second appeals were also dismissed holding that the original defendant had failed to discharge the onus that the initial decree dated 27.11.1973 was obtained by fraud. Aggrieved, the daughter of the original defendant filed the appeal.

Allowing the appeal, the Court

HELD: 1.1. Rule 1 of O. 10 of the Code of Civil Procedure, 1908 provides for ascertainment whether allegations in pleadings are admitted or denied. It stipulates that "at the first hearing" of the suit the court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The court is required to record such admissions and denials. Use of the term 'first hearing of the suit' in r. 1 has its own signification. Order 15, r. 1 lays a postulate that where "at the first hearing" of the suit it appears that the parties are not at issue on any question of law or of fact, the court may at once pronounce the judgment. [Para 12] [86-E-H]

Kanwar Singh Saini v. High Court of Delhi **2012 (4) SCC 307 - relied on.**

1.2. Keeping in view the pronouncement of law relating to the procedure and the lapses committed by the trial court in the case at hand, the stand of the original defendant, the predecessor-in-interest of the appellant, gets fructified. All facets of fraud get attracted to the case

at hand. A rustic and illiterate woman is taken to court by a relation on the plea of creation of a lease deed and magically in a hurried manner the plaint is presented, written statement is drafted and filed, statement is recorded and a decree is passed within three days. On a perusal of the decree it is manifest that there is no reference of any kind of family arrangement and there is total non-application of mind. It only mentions there is consent in the written statement and hence, suit has to be decreed. Be it noted, it was a suit for permanent injunction. There was an allegation that the defendant was interfering with the possession of the plaintiff. What could have transpired that the defendant would go with the plaintiff and accede to all the reliefs. It not only gives rise to a doubt but on a first look one can feel that there is some kind of foul play. However, the trial judge who decreed the first suit on 27.11.1973 did not look at these aspects. [para 13 and 25] [88-F; 95-F-G; 96-A-D]

Santosh v. Jagat Ram and another **2010 (2) SCR 429 = 2010 (3) SCC 251- relied on.**

1.3. It is a matter of grave anguish that in the first suit the court had not applied its mind to the real nature of the family arrangement. It has been submitted on behalf of the appellant that there was no need for a family settlement because the defendant had got a part of the property in an earlier family arrangement. She had a daughter and a son-in-law and she had no cavil with plaintiff. She had also to support herself. Though, a family arrangement need not be construed narrowly and it need not be registered but it must prima facie appear to be genuine which is not so in the case at hand. [para 13] [89-D-E]

Krishna Beharilal (dead) by his legal representatives v. Gulabchand and others **1971 Suppl. SCR 27= 1971 AIR 1041;** *Kale and others v. Deputy Director of Consolidation*

and others **1976 (2) SCR 202 = 1976 AIR 807;** *Maturi Pullaiah and another v. Maturi Narasimham and others* **1966 AIR 1836;** *S. Shanmugam Pillai & others v. K. Shanmugam Pillai & others.* **1973 (1) SCR 570 = 1972 AIR 2069 - referred to.**

1.4. If the factual matrix of the case in hand is tested on the anvil of the decisions of this Court, the family arrangement does not remotely appear to be a bona fide. The plaintiff had no semblance of right in the property. All rights had already been settled and the defendant was the exclusive owner in possession. It is difficult to visualise such a family settlement. More so, it is absolutely irrational that the defendant would give everything to the plaintiff in lieu of nothing and suffer a consent decree. That apart, there was no reason to exclude the daughter and the son-in-law. It is well nigh impossible to perceive any dispute over any property or the possibility of it in future. On the contrary in this so-called family settlement the whole property of the defendant is given to the plaintiff. It cannot be accepted to be a bona fide settlement. [para 17] [93-B-E]

1.5. It is, therefore, clear as crystal that the judgment and decree passed in civil suit No. 1422 of 1973 on 27.11.1973 are fundamentally fraudulent. It is a case which depicts a picture that the delineation by the trial Judge was totally ephemeral. The judgement is vitiated by fraud. [para 18] [93-F]

S. B. Noronah v. Prem Kumari Khanna **1980 (1) SCR 281 =1980 AIR 193;** *S. P. Chengalvaraya Naidu (dead) by L.Rs. v. Jagannath (dead) by L.Rs. and others* **1993 (3) Suppl. SCR 422 = 1994 AIR 853;** *Smt. Shrist Dhawan v. M/s. Shaw* **1991 (3) Suppl. SCR 446 = Brothers 1992 AIR 1555** *Roshan Deen v. Preeti Lal* **2001 (5) Suppl. SCR 23 = AIR 2002 SC 33;** *Ram Preeti Yadav v. U. P. Board of High School and Intermediate Education and other* **2003 (3) Suppl. SCR 352**

= (2003) 8 SC 311; and *Ram Chandra Singh v. Savitri Devi and others* **2003 (4) Suppl. SCR 543 = (2003) 8 SCC 319;** *State of Andhra Pradesh and another v. T. Suryachandra Rao* **2005 (1) Suppl. SCR 809 =AIR 2005 SC 3110;** *Hamza Haji v. State of Kerala & Anr.* **2006 (4) Suppl. SCR 604 = AIR 2006 SC 3028 - referred to.**

Halsbury's Laws of England, **Vol. 16 Fourth Edition para 1553 - referred to.**

2.1. When the second suit was filed in 1984 for title and the third suit was filed for possession thereafter, the courts below had routinely followed the principles relating to consent decree and did not dwell deep to find out how the fraud was manifestly writ large. It was too obvious to ignore. The courts below have gone by the concept that there was no adequate material to establish that there was fraud, though it was telltale. That apart the foundation was the family arrangement, which was not bona fide. [para 25] [96-D-E]

2.2. No iota of evidence has been brought on record that the plaintiff had given anything to the defendant in the arrangement. It is easily perceivable that the rustic woman was also not old. Though the decree was passed in 1973 wherein it was alleged that the defendant was already in possession, she lived up to 1992 and expired after 19 years. It is a matter of record that the possession was not taken over and inference has been drawn that possibly there was an implied agreement that the decree would be given effect to after her death. All these reasonings are absolutely non-plausible and common sense does not even remotely give consent to them. The whole thing was buttressed on the edifice of fraud. The impugned judgments and decrees are set aside. As a corrolary the judgment and decree dated 27.11.1973 is also set aside. [para 25-26] [96-G-H; 97-A, C-D]

Case Law Reference:

2010 (2) SCR 429	**relied on**	**para 10**
2012 (4) SCC 307	**relied on**	**para 12**
1971 Suppl. SCR 27	**referred to**	**para 14**
1976 (2) SCR 202	**referred to**	**para 15**
1966 AIR 1836	**referred to**	**para 16**
1973 (1) SCR 570	**referred to**	**para 16**
1980 (1) SCR 281	**referred to**	**para 18**
1993 (3) Suppl. SCR 422	**referred to**	**para 20**
1991 (3) Suppl. SCR 446	**referred to**	**para 22**
2001 (5) Suppl. SCR 23	**referred to**	**para 22**
2003 (3) Suppl. SCR 352	**referred to**	**para 22**
2003 (4) Suppl. SCR 543	**referred to**	**para 22**
2005 (1) Suppl. SCR 809	**referred to**	**para 22**
2006 (4) Suppl. SCR 604	**referred to**	**para 24**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1723 of 2008.

From the Judgment & Order dated 1.9.2006 of the High Court of Punjab & Haryana at Chandigarh in R.S.A. No. 2001 and 2002 of 1988.

V.K. Jhanji, Jyoti Mendiratta, Deeksha Ladi for the Appellant.

Neeraj Kr. Jain, Sanjay Singh, Pratham Kant, Ugra Shankar Prasad for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. The singular question that arises for consideration in this appeal by way of special leave under Article 136 of the Constitution of India is whether the judgment and decree dated 27.11.1973 passed by the learned sub-Judge, Kaithal in Civil Suit No. 1422 of 1973 is to be declared as a nullity being vitiated by fraud and manifest illegality being writ large and thereby the claim of right, title and interest and possession based on the said judgment and decree by the respondent-plaintiff in the subsequent suits, namely, Civil Suit No. 401 of 1984 and Civil Suit No. 784 of 1984 which have been decreed and got affirmance by a composite order passed by the Additional District Judge, Kurukshetra in Civil Appeal No. 19/13 of 1987 and Civil Appeal No. 18/13 of 1986 and further gained concurrence by the learned single Judge of the High Court of Punjab and Haryana at Chandigarh in R.S.A. Nos. 2001 of 1988 and 2002 of 1988, is bound to collapse and founder.

2. To appreciate the controversy, it is incumbent to travel to the year 1973 as to how the original suit was instituted, proceeded and eventually decreed. For the said purpose it is necessary to note that one Dai Ram was the common ancestor. He had two sons, namely, Dinda and Rachna. Dinda had one son, namely, Roora and Rachna had one son, namely, Ram Chand. Badami was the widow of Roora and Bhali is the son of Ram Chand. Risali is the daughter of Roora and Badami. Bhali, respondent herein, instituted Civil Suit No. 1422 of 1973 on 24.11.1973 alleging that Badami was the owner of 1894/9549 share of the ancestral land and had received it at a prior arrangement. When she was in possession, there was a family settlement on 1.6.1972 and in that family settlement the defendant gave her whole share to the plaintiff-Bhali and the possession of the same was also handed over in pursuance of that settlement. As pleaded, the defendant-Badami agreed that he would get the revenue entries of the suit land corrected in favour of the plaintiff but the name of the defendant continued as owner in the revenue records and despite the request of the

plaintiff therein not to interfere with the possession there was interference. Hence, he had been compelled to file a suit for declaration and for permanent injunction.

3. On the date of presentation of the plaint, the defendant in the suit, Badami, filed the written statement admitting the assertions in the plaint to be correct and, in fact, prayed for decree of the suit. The learned sub-Judge, Kaithal on 27.11.1973 decreed the suit.

4. As the facts would reveal, in spite of the said consent decree the record of entries stood in the name of Badami and she remained in possession and enjoyed the same. The respondent- Bhali, thereafter, initially instituted Civil Suit No. 401 of 1984 seeking permanent injunction against her restraining from alienating the land in any manner. The learned trial Judge relied on the earlier judgment and decree dated 27.11.1973, did not accept the stand put forth by the defendant that the said decree was obtained by fraud and passed a decree for permanent injunction restraining the defendant from alienating the suit land to anyone in any manner.

5. In the second suit for possession, the learned trial Judge framed two vital issues, namely, whether the plaintiff was owner of the suit land and whether the impugned decree dated 27.11.1973 is null, void and not binding on the rights of the defendants and, thereafter, came to hold that factual matrix would show that the decree was passed three days after and Badami had appeared in the court, and hence, the decree was validly passed. On appeals being preferred, the learned Additional District Judge affirmed the said findings further elaborating the reasoning that Badami had appeared in court, made a statement and given the thumb mark and further she had not been able to discharge the onus that the decree was obtained by fraud. The appellate court gave credence to the family settlement and also took note of the fact that the parties were related and hence, there was no reason to discard the family settlement; and that it was a common phenomenon that

a member of a family is given property out of love and affection. The learned appellate Judge opined that though after the decree dated 27.11.1973 the possession was with the appellant and the revenue entry had not been corrected, that was possibly due to an implied understanding between the parties that the arrangement under the decree would be worked out only after the death of the appellant, i.e., Badami. Being of this view, the learned appellate Judge dismissed both the appeals.

6. Being aggrieved, Badami, the original defendant, preferred two Regular Second Appeals, namely, R.S.A. Nos. 2001 of 1988 and 2002 of 1988. During the pendency of the appeals, she expired and Risali, her daughter, was substituted by order dated 21.2.1992 in both the appeals. The learned single Judge who dealt with the appeals by the impugned judgment dated 1st September, 2006 referred to the issues framed by the learned trial Judge, the analysis made by the courts below and came to hold that original defendant No. 1 had failed to discharge the onus that the initial decree dated 27.11.1973 was obtained by fraud inasmuch as she had given a statement in court and put the thumb impression and that the conclusion drawn by the courts below were justified being based on facts and did not warrant any interference as no substantial question of law was involved.

7. We have heard learned counsel for the parties and perused the records.

8. To appreciate the controversy, it is appropriate to refer to para 3 of the plaint presented on 24.11.1973. It reads as follows:-

> "3. That the parties entered into a family settlement on 1/6/72 and in that family settlement the defendant gave her whole share to the plaintiff and the possession of the same was also handed over to the plaintiff in pursuance of that family settlement, the defendant also agreed that he would

get the revenue entries of the suit land corrected in favour of the plaintiff, but the name of the defendant is still continuing as owner in the revenue records."

9. From the perusal of the averments made in the plaint, it is obvious that emphasis was laid on the family settlement and handing over of possession. It is interesting to note that the first appellate court had opined that the possession remained with Badami and the revenue entries were not corrected and continued possibly due to implied understanding but the plaintiff was compelled to file the second suit when there was interference. It has come out on the testimony of evidence of Badami that she was absolutely illiterate. The only ground on which the courts have proceeded that there was a consent decree and allegation of fraud had not been established.

10. In this context, we may usefully refer to the decision in *Santosh v. Jagat Ram and another*[1] wherein this Court was dealing with a situation almost similar to the present nature. In the said case the day the plaint was presented, on the same day written statement was also filed, evidence of the plaintiff and the defendant was recorded and the judgment was also made ready along with a decree on the same day. In that context, this Court observed as follows: -

"This, by itself, was sufficient to raise serious doubts in the mind of the courts. Instead, the appellate court went on to believe the evidence of Dharam Singh (DW 1), record keeper, who produced the files of the summons. One wonders as to when was the suit filed and when did the Court issue a summons and how is it that on the same day, the written statement was also ready, duly drafted by the other side lawyer S.K. Joshi (DW 3)."

The Bench further proceeded to observe as follows: -

"We are anguished to see the attitude of the Court, who

1. (2010) 3 SCC 251.

passed the decree on the basis of a plaint and a written statement, which were filed on the same day. We are also surprised at the observations made by the appellate court that such circumstance could not, by itself, prove the fraudulent nature of the decree.

A fraud puts an end to everything. It is a settled position in law that such a decree is nothing, but a nullity."

11. From the aforesaid decision it becomes quite clear that this Court expressed a sense of surprise the way the suit in that case proceeded with and also expressed its anguish how the court passed a decree on the foundation of a plaint and a written statement that were filed on the same day.

12. ` It is seemly to note that the Code of Civil Procedure provides how the court trying the suit is required to deal with the matter. Order IV Rule 1 provides for suit to be commenced by plaint. Order V Rule 1(1) provides when the suit has been duly instituted, a summon may be issued to defendant to appear and answer the claim on a day to be therein specified. As per the proviso to Order V Rule 1 no summon need be issued if the defendant appears and admits the claim of the plaintiff. Order X deals with the examination of parties by the court. Rule 1 of Order X provides for ascertainment whether allegations in pleadings are admitted or denied. It stipulates that "at the first hearing" of the suit the court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The court is required to record such admissions and denials. Use of the term 'first hearing of the suit' in Rule 1 has its own signification. Order XV Rule 1 lays a postulate that where "at the first hearing" of the suit it appears that the parties are not at issue on any question of law or of fact, the court may at once pronounce the judgment. Recently,

this Court in *Kanwar Singh Saini v. High Court of Delhi*[2], while dealing with the concept of first hearing, speaking through one of us (Dr. B.S. Chauhan, J) has opined thus: -

> "12. The suit was filed on 26-4-2003 and notice was issued returnable just after three days i.e. on 29-4-2003 and on that date the written statement was filed and the appellant appeared in person and the statement was recorded. Order 10 Rule 1 CPC provides for recording the statement of the parties to the suit at the "first hearing of the suit" which comes after the framing of the issues and then the suit is posted for trial i.e. for production of evidence. Such an interpretation emerges from the conjoint reading of the provisions of Order 10 Rule 1, Order 14 Rule 1(5) and Order 15 Rule 1 CPC. The cumulative effect of the aboverffered provisions of CPC comes to that the "first hearing of the suit" can never be earlier than the date fixed for the preliminary examination of the parties and the settlement of issues. On the date of appearance of the defendant, the court does not take up the case for hearing or apply its mind to the facts of the case, and it is only after filing of the written statement and framing of issues, the hearing of the case commences. The hearing presupposes the existence of an occasion which enables the parties to be heard by the court in respect of the cause. Hearing, therefore, should be first in point of time after the issues have been framed.
>
> 13. The date of "first hearing of a suit" under CPC is ordinarily understood to be the date on which the court proposes to apply its mind to the contentions raised by the parties in their respective pleadings and also to the documents filed by them for the purpose of framing the issues which are to be decided in the suit. Thus, the question of having the "first hearing of the suit" prior to determining the points in controversy between the parties

2. (2012) 4 SCC 307.

> i.e. framing of issues does not arise. The words "first day of hearing" do not mean the day for the return of the summons or the returnable date, but the day on which the court applies its mind to the case which ordinarily would be at the time when either the issues are determined or evidence is taken. (Vide *Ved Prakash Wadhwa v. Vishwa Mohan*[3], *Sham Lal v. Atme Nand Jain Sabha*[4], *Siraj Ahmad Siddiqui v. Prem Nath Kapoor*[5] and *Mangat Singh Trilochan Singh v. Satpal*[6]."

After so stating, it has been further observed as follows: -

> "From the above fact situation, it is evident that the suit was filed on 26-4-2003 and in response to the notice issued in that case, the appellant-defendant appeared on 29.4.2003 in person and filed his written statement. It was on the same day that his statement had been recorded by the court. We failed to understand as to what statutory provision enabled the civil court to record the statement of the appellant-defendant on the date of filing the written statement. The suit itself has been disposed of on the basis of his statement within three weeks of the institution of the suit."

13. Keeping in view the aforesaid pronouncement of law relating to the procedure and the lapses committed by the trial court in the case at hand, the stand of the original defendant, the predecessor-in-interest of the present appeal gets fructified. From the evidence brought on record, it is perceptible that Badami was a rustic and an illiterate woman; that she had one daughter who was married and there was no animus between them to exclude her from the whole property; and that the concept of family arrangement is too farfetched to give any kind

3. (1981) 3 SCC 667 : AIR 1982 SC 816.
4. (1987) 1 SCC 22 : AIR 1987 SC 197.
5. (1993) 4 SCC 406 : AIR 1993 SC 2525.
6. (2003) 8 SCC 357 : AIR 2003 SC 4300.

of credence. That apart, the filing of written statement, the recording of statement and taking the thumb impression in a hurried manner further nurtures the stance that the defendant was totally unaware as to what had happened. The averments in the plaint show that the plaintiff was put in possession but as she was going to alienate the property because of record of rights reflected name of Badami, the suit was filed for permanent injunction restraining her from alienating in any manner and the defendant conceded to the same. The averments in the plaint show that the defendant had refused the request of the plaintiff on 11.11.1973 not to interfere with the possession yet she accompanied him to suffer a consent decree. It is worth noting that there is evidence on record that she was brought to the court premises to execute the lease deed for a period of two years and she had faith in Bhali. It is a matter of grave anguish that in the first suit the court had not applied its mind to the real nature of the family arrangement. The learned counsel for the appellant has submitted that there was no need for a family settlement because Badami had got a part of the property in an earlier family arrangement. She had a daughter and a son-in-law and she had no cavil with plaintiff. She had also to support herself. He fairly submitted that the family arrangement need not be construed narrowly and it need not be registered but it must prima facie appear to be genuine which is not so in the case at hand.

14. In this regard we may refer with profit to certain authorities of this Court. In *Krishna Beharilal (dead) by his legal representatives v. Gulabchand and others*[7] a compromise decree had come into existence, on the basis of a compromise deed which specifically stated that the properties given to one Pattobai were to be enjoyed by her as "Malik Mustakil". This Court referred to certain decisions in the field and opined that the circumstances under which the compromise was entered into as well as the language used in the deed did not in any manner go to indicate that the estate given to

7. AIR 1971 SC 1041.

Pattobai was anything other than an absolute estate. The High Court had treated the compromise decree to be illegal on the basis that a Hindu widow could not have enlarged her own rights by entering into a compromise in a suit. This Court observed that this was not a compromise entered into with third parties. It was a compromise entered into with the presumptive reversioners and in that case the issue would be totally different. Further, the question arose whether there could have been any family settlement. In that context, this Court held as follows:-

> "8……It may be noted that Lakshmichand and Ganeshilal who along with Pattobai were the principal parties to the compromise were the grand-children of Parvati who was the aunt of Bulakichand. The parties to the earlier suit were near relations. The dispute between the parties was in respect of a certain property which was originally owned by their common ancestor namely Chhedilal. To consider a settlement as a family arrangement, it is not necessary that the parties to the compromise should all belong to one family. As observed by this Court in *Ram Charan Das v. Girija Nandini Devi*[8], the word "family" in the context of the family arrangement is not to be understood in a narrow sense of being a group of persons who are recognised in law as having a right of succession or having a claim to a share in the property in dispute. If the dispute which is settled is one between near relations then the settlement of such a dispute can be considered as a family arrangement- see *Ramcharan Das's* case, 1965-3 SCR 841=(AIR 1966 SC 323) (supra).
>
> 9. The Courts lean strongly in favour of the family arrangements to bring about harmony in a family and do justice to its various members and avoid in anticipation future disputes which might ruin them all."

8. (1965) 3 SCR 841 = AIR 1966 SC 323.

15. In *Kale and others v. Deputy Director of Consolidation and others*[9], it has been held that the object of the arrangement is to protect family from filing long drawn litigation or perpetual strifes which mar the unity and solidarity of the family and create hatred and bad blood between the various members of the family. Their Lordships opined that the family is to be understood in the wider sense so as to include within its fold not only close relations or legal heirs but even those persons who may have some sort of antecedent title, a semblance of claim or even if they have a spes successionis so that future disputes are sealed forever and litigation are avoided. What could be the binding effect and essentials for a family settlement were expressed thus:-

> "10. In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions:
>
> (1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;
>
> (2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;
>
> (3) The family arrangements may be even oral in which case no registration is necessary;
>
> (4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the

9. AIR 1976 SC 807.

> record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of Section 17(2) (sic) (Sec. 17 (1) (b)?) of the Registration Act and is, therefore, not compulsorily registrable;
>
> (5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the Courts will find no difficulty in giving assent to the same;
>
> (6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement."

16. We may note that the principles stated in *Maturi Pullaiah and another v. Maturi Narasimham and others*[10] were reiterated in *S. Shanmugam Pillai & others v. K. Shanmugam Pillai & others*[11]. in the following terms:-

> "In *Maturi Pullaiah v. Maturi Narasimham,* AIR 1966 SC 1836 this Court held that although conflict of legal claims in praesenti or in futuro is generally a condition for the validity of family arrangements, it is not necessarily so. Even bona fide disputes present or possible, which may not involve legal claims would be sufficient. Members of a

10. AIR 1966 SC 1836.

11. AIR 1972 SC 2069.

joint Hindu family may, to maintain peace or to bring about harmony in the family, enter into such a family arrangement. If such an agreement is entered into bona fide and the terms thereto are fair in the circumstances of a particular case, the Courts would more readily give assent to such an agreement than to avoid it."

17. If the present factual matrix tested on the anvil of the aforesaid decisions, the family arrangement does not remotely appear to be a bona fide. Bhali had not semblance of right in the property. All rights had already been settled and she was the exclusive owner in possession. It is difficult to visualise such a family settlement. More so, it is absolutely irrational that Badami would give everything to Bhali in lieu of nothing and suffer a consent decree. That apart, there was no reason to exclude the daughter and the son-in-law. Had there been any likely possibility of any future legal cavil between the daughter and Bhali the same is understandable. It is well nigh impossible to perceive any dispute over any property or the possibility of it in future. On the contrary in this so called family settlement the whole property of Badami is given to Bhali. We are unable to accept it to be a bona fide settlement.

18. From the aforesaid analysis it is clear as crystal that the judgment and decree passed in civil suit No. 1422 of 1973 on 27.11.1973 are fundamentally fraudulent. It is a case which depicts a picture that the delineation by the learned Judge was totally ephemeral. The judgement is vitiated by fraud.

19. Presently, we shall refer as to how this Court has dealt with concept of fraud. In *S. B. Noronah v. Prem Kumari Khanna*[12] while dealing with the concept of estoppel and fraud a two-Judge Bench has stated that it is an old maxim that estoppels are odious, although considerable inroad into this maxim has been made by modern law. Even so, "a judgment obtained by fraud or collusion, even, it seems a judgment of

12. AIR 1980 SC 193.

the House of Lords, may be treated as a nullity". (See Halsbury's Laws of England, Vol. 16 Fourth Edition para 1553). The point is that the sanction granted under Section 21, if it has been procured by fraud or collusion, cannot withstand invalidity because, otherwise, high public policy will be given as hostage to successful collusion.

20. In *S. P. Chengalvaraya Naidu (dead) by L.Rs. v. Jagannath (dead) by L.Rs. and others*[13] this court commenced the verdict with the following words:-

> ""Fraud-avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decree - by the first court or by the highest court - has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."

21. In the said case it was clearly stated that the courts of law are meant for imparting justice between the parties and one who comes to the court, must come with clean hands. A person whose case is based on falsehood has no right to approach the Court. A litigant who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If a vital document is withheld in order to gain advantage on the other side he would be guilty of playing fraud on court as well as on the opposite party.

22. In *Smt. Shrist Dhawan v. M/s. Shaw Brothers*[14] it has been opined that fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. It has been defined as an act of trickery or deceit. The

13. AIR 1994 SC 853.

14. AIR 1992 SC 1555.

aforesaid principle has been reiterated in *Roshan Deen v. Preeti Lal*[15], *Ram Preeti Yadav v. U. P. Board of High School and Intermediate Education and other*[16] and *Ram Chandra Singh v. Savitri Devi and others.*[17]

23. In *State of Andhra Pradesh and another v. T. Suryachandra Rao*[18] after referring to the earlier decision this court observed as follows:-

> "In *Lazaurs Estate Ltd. v. Beasley*[19] Lord Denning observed at pages 712 & 713, "No judgment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything." In the same judgment Lord Parker LJ observed that fraud vitiates all transactions known to the law of however high a degree of solemnity. "

24. Yet in another decision *Hamza Haji v. State of Kerala & Anr.*[20] it has been held that no court will allow itself to be used as an instrument of fraud and no court, by way of rule of evidence and procedure, can allow its eyes to be closed to the fact it is being used as an instrument of fraud. The basic principle is that a party who secures the judgment by taking recourse to fraud should not be enabled to enjoy the fruits thereof.

25. It would not be an exaggeration but on the contrary an understatement if it is said that all facets of fraud get attracted to the case at hand. A rustic and illiterate woman is taken to court by a relation on the plea of creation of a lease deed and magically in a hurried manner the plaint is presented, written

15. AIR 2002 SC 33.
16. (2003) 8 SC 311.
17. (2003) 8 SCC 319.
18. AIR 2005 SC 3110.
19. (1956) 1 QB 702.
20. AIR 2006 SC 3028

statement is drafted and filed, statement is recorded and a decree is passed within three days. On a perusal of the decree it is manifest that there is no reference of any kind of family arrangement and there is total non-application of mind. It only mentions there is consent in the written statement and hence, suit has to be decreed. Be it noted, it was a suit for permanent injunction. There was an allegation that the respondent was interfering with the possession of the plaintiff. What could have transpired that the defendant would go with the plaintiff and accede to all the reliefs. It not only gives rise to a doubt but on a first look one can feel that there is some kind of foul play. However, the learned trial Judge who decreed the first suit on 27.11.1973 did not look at these aspects. When the second suit was filed in 1984 for title and the third suit was filed for possession thereafter, the courts below had routinely followed the principles relating to consent decree and did not dwell deep to find out how the fraud was manifestly writ large. It was too obvious to ignore. The courts below have gone by the concept that there was no adequate material to establish that there was fraud, though it was telltale. That apart, the foundation was the family arrangement. We have already held that it was not bona fide, but, unfortunately the courts below as well as the High Court have held that it is a common phenomenon that the people in certain areas give their property to their close relations. We have already indicated that by giving the entire property and putting him in possession she would have been absolutely landless and would have been in penury. It is unimaginable that a person would divest herself of one's own property in entirety in lieu of nothing. No iota of evidence has been brought on record that Bhali, the respondent herein, had given anything to Badami in the arrangement. It is easily perceivable that the rustic woman was also not old. Though the decree was passed in 1973 wherein it was alleged that the defendant was already in possession, she lived up to 1992 and expired after 19 years. It is a matter of record that the possession was not taken over and inference has been drawn that possibly there was an implied agreement that the decree

would be given effect to after her death. All these reasonings are absolutely non-plausible and common sense does not even remotely give consent to them. It is fraudulent all the way. The whole thing was buttressed on the edifice of fraud and it needs no special emphasis to state that what is pyramided on fraud is bound to decay. In this regard we may profitably quote a statement by a great thinker:

> "Fraud generally lights a candle for justice to get a look at it; and rogue's pen indites the warrant for his own arrest."

26. Ex consequenti, the appeal is allowed and the judgment and decree of the High Court in the Second Appeal as well as the judgments and decrees of the courts below are hereby set aside and as a natural corollary the judgment and decree dated 27.11.1973 is also set aside. There shall be no order as to costs.

R.P. Appeal allowed.

UNION OF INDIA & ANR.
v.
SHASHANK GOSWAMI & ANR.
(Civil Appeal No. 6224 of 2008)

MAY 23, 2012

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Service Law - Appointment - Compassionate appointment - Held: Cannot be claimed as a matter of right - Appointment on compassionate ground is not another source of recruitment but merely an exception to the requirement of taking into consideration the fact of the death of the employee while in service leaving his family without any means of livelihood - Applicant cannot claim appointment in a particular class/group of post - Appointments on compassionate ground have to be made in accordance with the rules, regulations or administrative instructions taking into consideration the financial condition of the family of the deceased - On facts, the Compassionate Scheme provided that in case the family gets more than Rs. 3 lakhs, the dependent of the deceased would not be eligible for employment on compassionate ground - Retiral/terminal benefits have been received by the family exceeding Rs.3 lakhs, thus, respondent not eligible to be considered for the Group 'C' post.

Govind Prakash Verma v. Life Insurance Corporation of India & Ors. **(2005) 10 SCC 289;** *Punjab National Bank & Ors. v. Ashwini Kumar Taneja* **(2004) 7 SCC 265: 2004 (3) Suppl. SCR 597;** *General Manager (D&PB) & Ors. v. Kunti Tiwari & Anr.* **(2004) 7 SCC 271;** *Mumtaz Yunus Mulani (Smt.) v. State of Maharashtra & Ors.* **(2008) 11 SCC 384: 2008 (5) SCR 241- referred to.**

Case Law Reference:

(2005) 10 SCC 289	**Referred to.**	**Para 10**
2004 (3) Suppl. SCR 597	**Referred to.**	**Para 11**
(2004) 7 SCC 271	**Referred to.**	**Para 11**
2008 (5) SCR 241	**Referred to.**	**Para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6224 of 2008.

From the Judgment and Order dated 23.5.2006 of the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 28535 of 2006.

S.P. Singh, Sushma Suri, B. Sunita Rao, D.S. Mahara for the Appellants.

The Order of the Court was delivered

ORDER

1. This appeal has been preferred against the impugned judgment and order dated 23.5.2006 passed by the High Court of Judicature at Allahabad in C.M.W.P. No.28535 of 2006 directing the appellants herein to reconsider application of respondent no.1 on compassionate grounds.

2. Facts and circumstances giving rise to this appeal are that one Anand Kishore Gautam working as Senior Accountant in the office of the Accountant General, Allahabad died on 19.3.2001 in harness, leaving behind two sons aged about 20 and 19 years and a daughter, aged about 17 years and Smt. Rashmi Gautam, ?his widow.

3. Respondent No. 1 filed an application for appointment on compassionate grounds, which came to be rejected by the appellants on 28.1.2004 in view of the prevailing scheme for appointments on compassionate grounds. Under the scheme,

vacancies could be filled up on compassionate grounds only upto 5% of the cadre strength falling under direct recruitment quota during a year in Group ‘C ' and 'D ' posts.

The scheme further lays down that the total income of the family from all sources including terminal benefits after death, excluding G.P.F., should be taken into consideration. So far as the post of Group 'C' is concerned, the scheme provides that in case the family gets more than Rs.3 lakhs, the dependent of the deceased would not be eligible for employment on compassionate ground.

4. Respondent No.1 could not be offered appointment on the ground that excluding G.P.F. amount, his family had received a sum of Rs.4,40,908/- in addition to family pension of Rs.3,100/- per month granted to Mrs. Rashmi Gautam. She was entitled to get the said family pension at least for seven years and thereafter, the family pension would be Rs.1,860/- per month plus ?other reliefs admissible on pension

5. Aggrieved, respondent No.1 challenged the order dated 28.1.2004 rejecting his claim, before Central Administrative Tribunal, Allahabad vide Original Application No. 728 of 2004, wherein the Tribunal by judgment and order dated 7.12.2005 quashed the order dated 28.1.2004 and directed the appellants herein to reconsider the case of respondent No.1.

6. Aggrieved by the order of the Tribunal, the appellants preferred CMWP No.28535 of 2006 before the High Court which has been dismissed vide impugned judgment. Hence this appeal.

7. We have heard Mr. S.P. Singh, learned senior counsel appearing for the appellants.

In spite of notice, the respondents did not enter appearance.

The appeal is pending for the last four years before this Court.

8. Learned senior counsel appearing for the appellants has submitted that the appellants had to consider the applications for employment on compassionate grounds only within the parameters and terms and conditions incorporated in the scheme laid down for that purpose. The scheme makes a person ineligible for the post in Group 'C', in case, on the ?death of the incumbent on the post, the family gets retiral benefits/terminal benefits exceeding Rs. 3 lakhs.

9. There can be no quarrel to the settled legal proposition that the claim for appointment on compassionate ground is based on the premises that the applicant was dependent on the deceased employee. Strictly, such a claim cannot be upheld on the touchstone of Article 14 or 16 of the Constitution of India. However, such claim is considered as reasonable and permissible on the basis of sudden crisis occurring in the family of such employee who has served the State and dies while in service. Appointment on compassionate ground cannot be claimed as a matter of right. As a rule public service appointment should be made strictly on the basis of open invitation of applications and merit. The appointment on compassionate ground is not another source of recruitment but merely an exception to the aforesaid requirement taking into consideration the fact of the death of the employee while in service leaving his family without any means of livelihood. In such cases the object is to enable the family to get over sudden financial crisis and not to confer a status on the family. Thus, applicant cannot claim appointment in a particular class/group of post. Appointments on compassionate ground have to be made in accordance with the rules, regulations or administrative instructions taking into consideration the financial condition of the family of the deceased.

10. This Court in *Govind Prakash Verma v. Life Insurance Corporation of India & Ors.,* (2005) 10 SCC 289 while dealing

with a similar issue i.e. whether payment of terminal/retiral benefits to the family can be taken into consideration, held as under:

> "In our view, it was wholly irrelevant for the departmental authorities ….. to take into consideration the amount which was being paid as family pension to the widow of the deceased ….. and other amounts paid on account of terminal benefits under the Rules. . ….. Therefore, compassionate appointment cannot be refused on the ground that any member of the family received the amount admissible under the Rules."

11. This Court in *Punjab National Bank & Ors. V. Ashwini Kumar Taneja*, (2004) 7 SCC 265, placing reliance upon the earlier judgment in *General Manager (D&PB) & Ors. V. Kunti Tiwari & Anr.,* (2004) 7 SCC 271, held that compassionate appointment has to be made in accordance with the Rules, Regulations or administrative instructions taking into consideration the financial condition of the family of the deceased. Whereas the scheme provides that in case the family of the deceased gets the retrial/ terminal benefits exceeding a particular ceiling, the dependant of such deceased employee, would not be eligible for compassionate appointment.

12. In *Mumtaz YunusMulani (Smt.) v. State of Maharashtra & Ors.,* (2008) 11 SCC 384, this Court examined the scope of employment on compassionate ground in a similar scheme making the dependant of an employee ineligible for the post in case the family receives terminal/ retiral benefits above the sealing limit and held that the judgment in *Govind Prakash* (supra) had been decided without considering earlier judgments which were binding on the Bench. The Court further held that that the appointment has to be made considering the terms of the scheme and in case the scheme lays down a criterion that if the family of the deceased employee gets a particular amount as retiral/terminal benefits, dependent of the

deceased employee would not be eligible for employment on compassionate grounds.

13. In the instant case, office of the Comptroller and Auditor General of India, New Delhi issued a Circular dated 19.2.2003 explaining the scope of such appointments. Relevant part of the same reads as under:

> "With a view to bring uniformity in our offices regarding parameters for compassionate appointment of a family member in the case of death of a government servant in harness, it has been decided that the total income of the family from all sources including terminal benefits after death, excluding G.P.F., should be taken into account. If the resultant computation works out to a figure less than the parameters given below such cases can be considered for compassionate appointment subject to fulfilment of all other conditions. The limits are given below:
>
> Group 'B' Rs. Five lakhs
>
> Group 'C' Rs. Three lakhs
>
> Group 'D' Rs. Two lakhs."
>
> .....

14. The case of the respondent was rejected by the appellants in view of the fact that the family of the deceased Anand Kishore Gautam had been given the following terminal benefit excluding the G.P.F.

1. DCRG	Rs.2,48,248.00
2. Leave Encashment	Rs.88,660.00
3. CGEIS	Rs.44,000.00
4. DLIS	Rs.60,000.00
Total:	Rs.4,40,908.00

In addition to above, family pension @ 3100/- per month has been authorised to Smt. Rashmi Gautam for a period of 7 years and thereafter @ 1860/- per month plus admissible relief on pension.

15. In view of the fact that, in the instant case the retiral/ terminal benefits have been received by the family exceeding Rs.3 lakhs, respondent No.1 is not eligible to be considered for the Group 'C' post.

16. In view of the above, the appeal succeeds and is allowed. The impugned judgments/orders stand set aside.

N.J. Appeal allowed.

RAM KISHUN AND ORS.
v.
STATE OF U.P. AND ORS.
(Civil Appeal No. 6204 of 2009)

MAY 24, 2012

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Contract Act, 1872 - s.128 - Guarantor - Liability of - Held: Liability of the guarantor/surety is co-extensive with that of the debtor - The surety has no right to restrain execution of the decree against him until the creditor has exhausted his remedy against the principal debtor.

Contract Act, 1872 - s.146 - Co-surety - Liability of - Held: Co-sureties are liable to contribute equally - In case there are more than one surety/guarantor, they have to share the liability equally unless the agreement of contract provides otherwise.

Financial institutions - Recovery of loans - Held: Financial institutions cannot be permitted to behave like property dealers and further to dispose of the secured assets in any unreasonable or arbitrary manner in flagrant violation of statutory provisions - A person cannot be deprived of his property except in accordance with the provisions of statute.

Public auction - Auction sale for recovery of loans - Valuation and reserve price - Duty to sell only such property or portion thereof as necessary - Held: Valuation is a question of fact and valuation of the property is required to be determined fairly and reasonably - There must be an application of mind by the authority concerned while approving/accepting the report of the approved valuer and fixing the reserve price, as failure to do so may cause substantial injury to the borrower/guarantor and that would amount to material irregularity and ultimately vitiate the

subsequent proceedings - Law requires a proper valuation report, its acceptance by the authority concerned by application of mind and then fixing the reserve price accordingly and acceptance of the auction bid taking into consideration that there was no possibility of collusion of the bidders - The authority is duty bound to decide as to whether sale of part of the property would meet the outstanding demand.

Public auction - Auction sale - Setting aside of, after confirmation - Held: Once the sale has been confirmed it cannot be set aside unless a fundamental procedural error has occurred or sale certificate had been obtained by mis-representation or fraud.

Public auction - Auction sale for recovery of loans - Appellants' land sold for three times the amount which was to be recovered - Held: In the facts and circumstances of this case, instead of putting the whole land, the sale of 1/3rd of this land could have served the purpose - Therefore, there had been material irregularity in putting the entire property to auction - Since the auctioning authority had received Rs.25,000/- as sale consideration, after adjusting the outstanding dues of Rs.8,500/-, the balance amount of Rs.16,500/- ought to have been paid to the appellants - Nothing on record to show that authorities had ever adopted such a course - In view of the above, the auction sale stood vitiated and all the consequential proceedings liable to be quashed - However, the buyer(respondent no.4) had been put in possession of the land more than two decades ago and he had made improvements - Such a possession should not be disturbed at this belated stage - Nevertheless, the appellants permitted to move application before the Collector/concerned authority for recovery of the excess amount that had not been paid to them.

One 'G' had taken bank loan for which the appellants' father had stood as the guarantor. Since the

loan amount was not cleared during the lifetime of 'G' and the appellants, the bank initiated recovery proceedings and sent the matter to the District Collector who in turn issued a citation/recovery certificate. In order to make the recovery, land belonging to 'G' was put to auction which fetched certain sum. For recovery of the balance loan amount, proceedings were initiated against the appellants. Their land was put to auction. Respondent No. 4 purchased the land. The sale was confirmed and sale certificate was issued by the Collector in favour of respondent No.4 and he was put in possession. Appellants raised various objections thereagainst before the Commissioner, but their objections were rejected on the ground of inordinate delay. The order was upheld by the Board of Revenue as also by the High Court.

In appeal to this Court, the appellants contended that no recovery could have been made from them as 'G' had left huge movable/ immovable properties and other livestocks which could satisfy the demand of the bank loan; that more so, there were two guarantors and father of the appellants was not the only guarantor and thus, the entire liability of the remaining unpaid amount could not have been fastened upon them; that the properties of the appellants were worth rupees two lakhs which were sold in auction at a throw-away price of Rs.25,000/-, that too, without following the procedure prescribed by law; and that for recovery of the balance amount of loan, putting only a part of the property to auction would have been enough.

Dismissing the appeal, the Court

HELD:1.1. In view of the provisions of Section 128 of the Indian Contract Act, 1872, the liability of the guarantor/ surety is co-extensive with that of the debtor. Therefore, the creditor has a right to obtain a decree against the surety and the principal debtor. The surety has no right

to restrain execution of the decree against him until the creditor has exhausted his remedy against the principal debtor for the reason that it is the business of the surety/ guarantor to see whether the principal debtor has paid or not. The surety does not have a right to dictate terms to the creditor as how he should make the recovery and pursue his remedies against the principal debtor at his instance. [Para 5] [119-B-D]

The Bank of Bihar Ltd. v. Dr. Damodar Prasad & Anr. **AIR 1969 SC 297: 1969 SCR 620;** *Maharashtra State Electricity Board,Bombay v. The Official Liquidator, High Court, Ernakulam & Anr.* **AIR 1982 SC 1497: 1983 (1) SCR 561;** *Union Bank of India v. Manku Narayana,* **AIR 1987 SC 1078: 1987 (2) SCC 335 and** *State Bank of India v. Messrs. Indexport Registered & Ors.* **AIR 1992 SC 1740: 1992 (2) SCR 1031;** *State Bank of India v. M/s. Saksaria Sugar Mills Ltd. & Ors.* **AIR 1986 SC 868: 1986 (1) SCR 290;** *Industrial Investment Bank of India Ltd. v. Biswasnath Jhunjhunwala* **(2009) 9 SCC 478: 2009 (13) SCR 391 and** *United Bank of India v. Satyawati Tondon & Ors.* **AIR 2010 SC 3413: 2010 (9) SCR 1 - relied on.**

1.2. Section 146 of the Contract Act provides that co-sureties are liable to contribute equally. Thus, in case there is more than one surety/guarantor, they have to share the liability equally unless the agreement of contract provides otherwise. [Para 7] [119-G-H]

RECOVERY OF PUBLIC DUES:

1.3. Public money should be recovered and recovery should be made expeditiously. But it does not mean that the financial institutions which are concerned only with the recovery of their loans, can be permitted to behave like property dealers and be permitted further to dispose of the secured assets in any unreasonable or arbitrary manner in flagrant violation of statutory provisions. The

right to hold property is a constitutional right as well as a human right. A person cannot be deprived of his property except in accordance with the provisions of a statute. Thus, the condition precedent for taking away someone's property or disposing of the secured assets, is that the authority must ensure compliance with the statutory provisions. In case the property is disposed of by way of private treaty without adopting any other mode provided under the statutory rules etc., there may be a possibility of collusion/fraud and even when public auction is held, the possibility of collusion among the bidders cannot be ruled out. It becomes a legal obligation on the part of the authority that property be sold in such a manner that it may fetch the best price. Thus essential ingredients of such sale remain a correct valuation report and fixing the reserve price. In case proper valuation has not been made and the reserve price is fixed taking into consideration the inaccurate valuation report, the intending buyers may not come forward treating the property as not worth purchase by them, as a moneyed person or a big businessman may not like to involve himself in small sales/deals. [Paras 8, 9, 10 and 12] [120-A-F; 121-B-D]

Lachhman Dass v. Jagat Ram & Ors. **(2007) 10 SCC 448: 2007 (2) SCR 980;** *Narmada Bachao Andolan v. State of Madhya Pradesh & Anr.* **AIR 2011 SC 1589 and** *Haryana Financial Corporation & Anr. v. Jagdamba Oil Mills & Anr.* **AIR 2002 SC 834: 2002 (1) SCR 621 - relied on.**

The State of Orissa & Ors. v. Harinarayan Jaiswal & Ors. **AIR 1972 SC 1816: 1972 (3) SCR 784;** *Chairman andManaging Director, SIPCOT Madras & Ors. v. Contromix Pvt. Ltd. by its Director (Finance) Seeetharaman, Madras & Anr.,* **AIR 1995 SC 1632: 1995 (1) Suppl. SCR 415 - referred to.**

VALUATION & RESERVE PRICE :

1.4. The word 'value' means intrinsic worth or cost or price for sale of a thing/property. The concept of the reserve price is not synonymous with valuation of the property. These two terms operate in different spheres. An invitation to tender is not an offer. It is an attempt to ascertain whether an offer can be obtained with a margin. The valuation is a question of fact, it should be fixed on relevant material. The difference between the 'valuation' and 'reserve price' is that, fixation of an upset price may be an indication of the probable price which the property may fetch from the point of view of intending bidders. Fixation of the reserve price does not preclude the claimant from adducing proof that the land had been sold for a low price. There must be an application of mind by the authority concerned while approving/accepting the report of the approved valuer and fixing the reserve price, as failure to do so may cause substantial injury to the borrower/ guarantor and that would amount to material irregularity and ultimately vitiate the subsequent proceedings. [Paras 13, 15, 17] [121-E, H; 122-A-B, F]

Union of India & Ors. v. Bombay Tyre International Ltd.& Ors. **(1984) 1 SCC 467: 1984 (1) SCR 347;** *Gurbachan Singh & Anr. v. Shivalak Rubber Industries & Ors.* **AIR 1996 SC 3057: 1996 (2) SCR 997;** *Desh Bandhu Gupta v. N. L. Anand & Rajinder Singh* **(1994) 1 SCC 131: 1993 (2) Suppl. SCR 346;** *Gajadhar Prasad & Ors. v. Babu Bhakta Ratan & Ors.* **AIR 1973 SC 2593: 1974 (1) SCR 372;** *S.S. Dayananda v. K.S. Nagesh Rao & Ors.* **(1997) 4 SCC 451: 1997 (2) SCR 208;** *D.S. Chohan & Anr. v. State Bank of Patiala* **(1997) 10 SCC 65 and** *Gajraj Jain v. State of Bihar & Ors.* **(2004) 7 SCC 151: 2004 (2) Suppl. SCR 677 - relied on.**

State of U.P. v. Shiv Charan Sharma & Ors. **AIR 1981 SC 1722: 1981 Suppl. SCC 85;** *Anil Kumar Srivastava v.*

State of U.P. & Anr. **AIR 2004 SC 4299: 2004 (3) Suppl. SCR 675 and** *Duncans Industries Ltd. v. State of U.P. & Ors.* **AIR 2000 SC 355: 2000 (1) SCC 633 - referred to.**

DECISION TO SELL WHOLE OR PART OF THE SECURED ASSETS:

1.5. The law requires a proper valuation report, its acceptance by the authority concerned by application of mind and then fixing the reserve price accordingly and acceptance of the auction bid taking into consideration that there was no possibility of collusion of the bidders. The authority is duty bound to decide as to whether sale of part of the property would meet the outstanding demand. Valuation is a question of fact and valuation of the property is required to be determined fairly and reasonably. [Para 19] [123-B-D]

Ambati Narasayya v. M. Subba Rao & Anr. **AIR 1990 SC 119: 1989 (1) Suppl. SCR 451;** *Takkaseela Pedda Subba Reddi v. Pujari Padmavathamma & Ors.* **AIR 1977 SC 1789: 1977 (3) SCR 692 and** *S. Mariyappa (Dead) By LRs. & Ors. v. Siddappa & Anr.* **(2005) 10 SCC 235 - relied on.**

SETTING ASIDE AUCTION SALE - AFTER CONFIRMATION:

1.6. Once the sale has been confirmed it cannot be set aside unless a fundamental procedural error has occurred or sale certificate was obtained by mis-representation or fraud. [Para 23] [124-G]

Navalkha and Sons v. Sri Ramanya Das and Ors. **AIR 1970 SC 2037: 1970 (3) SCR 1;** *M/s. Kayjay Industries (P) Ltd. v. M/s. Asnew Drums (P) Ltd. & Ors.* **AIR 1974 SC 1331: 1974 (3) SCR 678;** *Union Bank of India v. Official Liquidator High Court of Calcutta & Ors.* **AIR 2000 SC 3642: 2000 (3)**

SCR 691; *B. Arvind Kumar v. Govt. of India & Ors.* **(2007) 5 SCC 745;** *M/s. Transcore v. Union of India & Anr***. AIR 2007 SC 712: 2006(9) Suppl. SCR 785;** *Divya Manufacturing Co. (P) Ltd. & Anr. v.Union Bank of India & Ors.* **AIR 2000 SC 2346: 2000 (1) Suppl. SCR 474 and** *Valji Khimji and Company v. Official Liquidator of Hindustan Nitro Product (Gujarat) Ltd. and Ors.* **(2008) 9 SCC 299: 2008 (12) SCR 1 - relied on.**

FCS Software Solutions Ltd. v. La Medical Devices Ltd. & Ors. **(2008) 10 SCC 440: 2008 (10) SCR 479 - referred to.**

2.1. In the instant case, the father of the appellants stood guarantor when 'G' took loan from the bank. Though there are some documents to show that there were two guarantors, who the other guarantor was, is not evident from the record, nor was such a plea had ever been taken by the appellants before the courts below. As the appellants had inherited the estate of the guarantor, they are liable to meet the liability of the unpaid amount. The appellants' land admeasuring 1 bigha and 10 biswas was sold for Rs.25,000/-. It cannot be held, even by any stretch of imagination, that the land was sold at a cheaper rate, for the reasons, that the land belonging to 'G' (principal debtor) measuring 3 bighas and 2 biswas in the same village in a close proximity of time had been sold for a sum of Rs.6,000/- only. More so, the elder brother of appellant no.1 had participated in the auction and put up a bid of Rs.20,000/- for the land in dispute. In view of the above, it cannot be said that property worth Rs.2,00,000/- had been sold at a throw away price of Rs.25,000/-. Also, no fundamental procedural error has been pointed out which would vitiate the order of confirmation of sale and issuance of sale certificate. [Paras 24, 25] [125-B-F]

2.2. The total amount of loan sanctioned in favour of 'G' was Rs.8,425/-. The Collector issued citation for recovery of Rs.10,574/- on 13.1.1986 and the total amount to be recovered including principal amount, interest, collection charges etc. came to Rs.14,483.15P. The property of 'G' had been sold for a sum of Rs.6,000/-. So, the total amount to be recovered remained about Rs.8,500/-. The appellants' land had been sold for Rs.25,000/- i.e., three times the amount which was to be recovered. In the facts and circumstances of this case, instead of putting this whole land admeasuring 1 bigha and 10 biswas, the sale of 1/3rd of this land could have served the purpose. Therefore, there has been material irregularity in putting the entire property to auction. [Para 26] [125-G-H; 126-A-B]

2.3. In case, the auctioning authority had received Rs.25,000/- from the respondent no.4 as a sale consideration after adjusting the outstanding dues of Rs.8,500/-, the balance amount of Rs.16,500/- ought to have been paid to the appellants. There is nothing on record to show that authorities had ever adopted such a course. [Para 27] [126-C]

2.4. In view of the above, the auction sale stands vitiated and all the consequential proceedings are liable to be quashed. However, for the reasons best known to the appellants, they have neither impleaded the Bank (creditor) nor any of the legal heirs of 'G' (principal debtor). In such a fact-situation, it becomes difficult to proceed with the case any further. [Para 28] [126-D-E]

2.5. Respondent No.4 had been put in possession of the land more than two decades ago and he had made improvements. Such - possession should not be disturbed at a belated stage for the reason that such a person would have spent his whole life savings in improving the land and making developments thereon

which may include the construction of residences etc. [Para 29] [126-F-G]

State of Gujarat v. Patel Raghav Natha & Ors. **AIR 1969 SC 1297: 1970 (1) SCR 335 and** *Brij Lal v. Board of Revenue & Ors.* **AIR 1994 SC 1128 - relied on.**

3. The courts below rejected the case of the appellants only on the ground of delay. Nothing has been pointed out before this Court as to on what basis the aforesaid judgment warrant any interference. However, the appellants may move an application before the Collector/concerned authority, in case the excess amount has not been paid to them, for recovery of the same. If such an application is filed and the authority comes to the conclusion that excess amount has not been paid to them, it shall be refunded within a period of 3 months from the date of making the application with 9% interest. [Para 30] [126-H; 127-A-C]

Case Law Reference:

1969 SCR 620	**relied on**	**Para 5**
1983 (1) SCR 561	**relied on**	**Para 5**
1987 (2) SCC 335	**relied on**	**Para 5**
1992 (2) SCR 1031	**relied on**	**Para 5**
1986 (1) SCR 290	**relied on**	**Para 6**
2009 (13) SCR 391	**relied on**	**Para 6**
2010 (9) SCR 1	**relied on**	**Para 6**
2007 (2) SCR 980	**relied on**	**Para 9**
AIR 2011 SC 1589	**relied on**	**Para 9**
1972 (3) SCR 784	**referred to**	**Para 10**

2002 (1) SCR 621	**relied on**	**Para 11**
1995 (1) Suppl. SCR 415	**referred to**	**Para 11**
1984 (1) SCR 347	**relied on**	**Para 13**
1996 (2) SCR 997	**relied on**	**Para 13**
1981 Suppl. SCC 85	**referred to**	**Para 14**
2004 (3) Suppl. SCR 675	**referred to**	**Para 15**
2000 (1) SCC 633	**referred to**	**Para 15**
1993 (2) Suppl. SCR 346	**relied on**	**Para 16**
1974 (1) SCR 372	**relied on**	**Para 16**
1997 (2) SCR 208	**relied on**	**Para 16**
(1997) 10 SCC 65	**relied on**	**Para 16**
2004 (2) Suppl. SCR 677	**relied on**	**Para 16**
1989 (1) Suppl. SCR 451	**relied on**	**Para 18**
1977 (3) SCR 692	**relied on**	**Para 18**
(2005) 10 SCC 235	**relied on**	**Para 18**
1970 (3) SCR 1	**relied on**	**Para 20**
1974 (3) SCR 678	**relied on**	**Para 20**
2000 (3) SCR 691	**relied on**	**Para 20**
2008 (12) SCR 1	**relied on**	**Para 20**
(2007) 5 SCC 745	**relied on**	**Para 20**
2006 (9) Suppl. SCR 785	**relied on**	**Para 20**
2000 (1) Suppl. SCR 474	**relied on**	**Para 21**
2008 (12) SCR 1	**relied on**	**Para 21**
2008 (10) SCR 479	**referred to**	**Para 22**

1970 (1) SCR 335	**relied on**	**Para 29**
AIR 1994 SC 1128	**relied on**	**Para 29**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6204 of 2009.

From the Judgment & Order dated 20.1.2004 of the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 22420 of 2001.

Dinesh Kumar Garg, B.S. Billowria, Dhanjay Garg for the Appellants.

T.N. Singh, V.K. Singh, Umang Tripathi, Janendra Lal & Co., Vikrant Yadav, Vinay Garg for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against thejudgment and order dated 20.1.2004 in C.M.W.P. No. 22420 of 2001 passed by the High Court of Judicature at Allahabad, by which it has affirmed the judgment and orders passed by the Board of Revenue and other revenue officials in respect of the recovery of bank dues from the appellants as their predecessor-in- interest was the guarantor of bank loan.

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

A. One Ganga Prasad had taken an agricultural loan to the tune of Rs.8,425/- from the Union Bank of India (Banda Branch) on 20.3.1982 and Chuni Lal, father of the appellants stood guarantor. Ganga Prasad, debtor died in 1985 and Chuni Lal died in 1986. Chuni Lal could not pay the loan during his life time. Therefore, the bank initiated the proceedings for recovery and ultimately sent the matter to the District Collector, Banda for realisation of the loan amount as an arrear of land revenue.

B. The Collector issued citation/recovery certificate on 13.1.1986 for an amount of Rs.10,574.45 plus 10% collection charges against Ganga Prasad.

C. In order to make the recovery, land measuring 3 bigha 2 biswas belonging to said Ganga Prasad was put to auction and it could fetch only a sum of Rs.6,000/-. In order to recover the balance amount the proceedings were initiated against the appellants as their father stood guarantor. It is evident from the record that the appellants raised objections that instead of putting their property to auction, the loan amount be recovered from legal heirs of Ganga Prasad as he had left movable/ immovable properties and livestocks and other assets to meet the recovery of the bank loan. Their objections were not accepted and the land of the appellants measuring 1 bigha and 10 biswas was put to auction on 15.3.1993. Respondent No. 4 purchased the said land for Rs.25,000/-. In respect of the same, sale was confirmed and sale certificate was issued by the Collector in favour of respondent No.4 and he was put in possession.

D. Appellants raised various objections under the provisions of U.P. Zamindari Abolition and Land Reforms Act, 1952 before the Commissioner, Jhansi, but their objections stood rejected vide order dated 27.7.1992 only on the ground of delay as the objections were not filed within limitation and no sufficient cause could be shown for inordinate delay.

E. Aggrieved, the appellants approached the Board of Revenue, U.P. by filing Revision No. 2 Cell/92-93. However, the same was dismissed vide order dated 20.3.2001 as the Revisional Authority did not accept the explanation for condonation of delay.

F. Aggrieved, the appellants approached the High Court challenging the said revisional order of the Commissioner by filing Writ Petition No. 22420 of 2001 which has been dismissed vide impugned judgment dated 20.1.2004.

Hence, this appeal.

3. Shri D.K. Garg, learned counsel appearing for the appellants has submitted that no recovery could have been made from the appellants as Ganga Prasad debtor had left huge movable/immovable properties and other livestocks which could satisfy the demand of the bank loan. More so, there were two guarantors and father of the appellants was not the only guarantor. Thus, the entire liability of the remaining unpaid amount could not have been fastened upon them. The properties of the appellants were worth rupees two lakhs which had been sold in auction at a throw-away price of Rs.25,000/- only, that too, without following procedure prescribed by law. For recovery of the balance amount of loan, only a part of the suit land could be sold. The objections filed by the appellants had been rejected by all the authorities/courts below on the ground of delay without considering the same on merit. Hence, the said orders are liable to be set aside and appeal deserves to be allowed.

4. Per contra, Mr. T.N. Singh, learned counsel appearing for respondent No.4 has submitted that the grievance of the appellants that they could not be fastened with the total liability of unpaid loan amount had not been raised before the courts below. The liability of the guarantor is co-extensive with that of debtor. The auction sale has been confirmed and sale certificate has been issued in favour of respondent No.4. He had been put in possession more than two decades ago and since then he has made a lot of developments and improved the land. The auction was held fairly and the property had fetched a fair price. Real brother of the appellant No.1 himself had participated in the auction and given the bid for Rs.20,000/-, though respondent No.4 had purchased it for Rs.25,000/-. Thus, it is not permissible that the appellants should canvass that the auction has not been conducted fairly or appellants had not been given chance to bring the best buyer or a part of the property could be sold to meet the demand. The appeal lacks merit and is liable to be dismissed.

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

There can be no dispute to the settled legal proposition of law that in view of the provisions of Section 128 of the Indian Contract Act, 1872 (hereinafter called the 'Contract Act'), the liability of the guarantor/surety is co-extensive with that of the debtor. Therefore, the creditor has a right to obtain a decree against the surety and the principal debtor. The surety has no right to restrain execution of the decree against him until the creditor has exhausted his remedy against the principal debtor for the reason that it is the business of the surety/guarantor to see whether the principal debtor has paid or not. The surety does not have a right to dictate terms to the creditor as how he should make the recovery and pursue his remedies against the principal debtor at his instance. (Vide: *The Bank of Bihar Ltd. v. Dr. Damodar Prasad & Anr.,* AIR 1969 SC 297; *Maharashtra State Electricity Board, Bombay v. The Official Liquidator, High Court, Ernakulam & Anr.,* AIR 1982 SC 1497; *Union Bank of India v. Manku Narayana,* AIR 1987 SC 1078; and *State Bank of India v. Messrs. Indexport Registered & Ors.,* AIR 1992 SC 1740).

6. In State Bank of I*ndia v. M/s. Sa*ksaria Sugar Mills Ltd. & Ors., AIR 1986 SC 868, this Court while considering the provisions of Section 128 of the Contract Act held that liability of a surety is immediate and is not deferred until the creditor exhausts his remedies against the principal debtor. (See also: *Industrial Investment Bank of India Ltd. v. Biswasnath Jhunjhunwala,* (2009) 9 SCC 478; and *United Bank of India v. Satyawati Tondon & Ors.,* AIR 2010 SC 3413).

7. Section 146 of the Contract Act provides that co-sureties are liable to contribute equally. Thus, in case there are more than one surety/guarantor, they have to share the liability equally unless the agreement of contract provides otherwise.

RECOVERY OF PUBLIC DUES:

8. Undoubtedly, public money should be recovered and recovery should be made expeditiously. But it does not mean that the financial institutions which are concerned only with the recovery of their loans, may be permitted to behave like property dealers and be permitted further to dispose of the secured assets in any unreasonable or arbitrary manner in flagrant violation of statutory provisions.

9. A right to hold property is a constitutional right as well as a human right. A person cannot be deprived of his property except in accordance with the provisions of statute. (Vide: *Lachhman Dass v. Jagat Ram & Ors.,* (2007) 10 SCC 448; and *Narmada Bachao Andolan v. State of Madhya Pradesh & Anr.,* AIR 2011 SC 1589).

Thus, the condition precedent for taking away someone's property or disposing of the secured assets, is that the authority must ensure compliance of the statutory provisions.

10. In case the property is disposed of by private treaty without adopting any other mode provided under the statutory rules etc., there may be a possibility of collusion/fraud and even when public auction is held, the possibility of collusion among the bidders cannot be ruled out. In *The State of Orissa & Ors. v. Harinarayan Jaiswal & Ors.,* AIR 1972 SC 1816, this Court held that a highest bidder in public auction cannot have a right to get the property or any privilege, unless the authority confirms the auction sale, being fully satisfied that the property has fetched the appropriate price and there has been no collusion between the bidders.

11. In *Haryana Financial Corporation & Anr. v. Jagdamba Oil Mills & Anr.,* AIR 2002 SC 834, this Court considered this aspect and while placing reliance upon its earlier judgment in *Chairman and Managing Director, SIPCOT Madras & Ors. v. Contromix Pvt. Ltd. by its Director (Finance) Seeetharaman,*

Madras & Anr., AIR 1995 SC 1632 held that in the matter of sale of public property, the dominant consideration is to secure the best price for the property to be sold. This can be achieved only when there is maximum public participation in the process of sale and everybody has an opportunity of making an offer.

12. Therefore, it becomes a legal obligation on the part of the authority that property be sold in such a manner that it may fetch the best price. Thus essential ingredients of such sale remain a correct valuation report and fixing the reserve price. In case proper valuation has not been made and the reserve price is fixed taking into consideration the inaccurate valuation report, the intending buyers may not come forward treating the property as not worth purchase by them, as a moneyed person or a big businessman may not like to involve himself in small sales/deals.

VALUATION & RESERVE PRICE :

13. The word `value' means intrinsic worth or cost or price for sale of a thing/property. (Vide: *Union of India & Ors., v. Bombay Tyre International Ltd. & Ors.,* (1984) 1 SCC 467; and *Gurbachan Singh & Anr. v. Shivalak Rubber Industries & Ors.,* AIR 1996 SC 3057).

14. In *State of U.P. v. Shiv Charan Sharma & Ors.,* AIR 1981 SC 1722, this Court explained the meaning of "reserve price" explaining that the price with which the public auction starts and the auction bidders are not permitted to give bids below the said price, i.e. the minimum bid at auction.

15. In *Anil Kumar Srivastava v. State of U.P. & Anr.,* AIR 2004 SC 4299, this Court considered the scope of fixing the reserve price and placing reliance on its earlier judgment in *Duncans Industries Ltd. v. State of U.P. & Ors.,* AIR 2000 SC 355, explained that reserve price limits the authority of the auctioneer. The concept of the reserve price is not synonymous with valuation of the property. These two terms operate in

different spheres. An invitation to tender is not an offer. It is an attempt to ascertain whether an offer can be obtained with a margin. The valuation is a question of fact, it should be fixed on relevant material. The difference between the `valuation' and `reserve price' is that, fixation of an upset price may be an indication of the probable price which the property may fetch from the point of view of intending bidders. Fixation of the reserve price does not preclude the claimant from adducing proof that the land had been sold for a low price.

16. In *Desh Bandhu Gupta v. N. L. Anand & Rajinder Singh,* (1994) 1 SCC 131, this Court held that in an auction sale and in execution of the Civil Court's decree, the Court has to apply its mind to the need for furnishing the relevant material particulars in the sale proclamation and the records must indicate that there has been application of mind and principle of natural justice had been complied with. (See also: *Gajadhar Prasad & Ors. v. Babu Bhakta Ratan & Ors.,* AIR 1973 SC 2593; *S.S. Dayananda v. K.S. Nagesh Rao & Ors.,* (1997) 4 SCC 451; *D.S. Chohan & Anr. v. State Bank of Patiala,* (1997) 10 SCC 65; and *Gajraj Jain v. State of Bihar & Ors.,* (2004) 7 SCC 151).

17. In view of the above, it is evident that there must be an application of mind by the authority concerned while approving/accepting the report of the approved valuer and fixing the reserve price, as the failure to do so may cause substantial injury to the borrower/guarantor and that would amount to material irregularity and ultimately vitiate the subsequent proceedings.

DECISION TO SELL WHOLE OR PART OF THE SECURED ASSETS:

18. In *Ambati Narasayya v. M. Subba Rao & Anr.,* AIR 1990 SC 119, this Court dealt with a case where in execution of a money decree for Rs.2,400/- the land was sold for Rs. 17,000/-. The Court set aside the sale observing that there is

a duty cast upon the Court to sell only such property or a portion thereof as necessary to satisfy the decree. (See also: *Takkaseela Pedda Subba Reddi v. Pujari Padmavathamma & Ors.,* AIR 1977 SC 1789 ; and *S. Mariyappa (Dead) By LRs. & Ors. v. Siddappa & Anr.,* (2005) 10 SCC 235).

19. Thus, in view of the above, it is evident that law requires a proper valuation report, its acceptance by the authority concerned by application of mind and then fixing the reserve price accordingly and acceptance of the auction bid taking into consideration that there was no possibility of collusion of the bidders. The authority is duty bound to decide as to whether sale of part of the property would meet the outstanding demand. Valuation is a question of fact and valuation of the property is required to be determined fairly and reasonably.

SETTING ASIDE AUCTION SALE - AFTER CONFIRMATION:

20. In *Navalkha & Sons v. Sri Ramanya Das & Ors.,* AIR 1970 SC 2037, this Court while dealing with the confirmation of sale by Court, held that there must be a proper valuation report, which should be communicated to the judgment debtor and he should file his own valuation report and the sale should be conducted in accordance with law. After confirmation of sale, there should be issuance of sale certificate. Court cannot interfere unless it is found that some material irregularity in the conduct of sale has been committed. The Court further held that it should not be a forced sale. A valuer's report should be as good as the actual offer and the variation should be within limit. Such estimate should be done carefully. The Court further held that unless the Court is satisfied about the adequacy of the price the act of confirmation of the sale would not be a proper exercise of judicial discretion. (See also: *M/s. Kayjay Industries (P) Ltd. v. M/s. Asnew Drums (P) Ltd. & Ors.,* AIR 1974 SC 1331; *Union Bank of India v. Official Liquidator High Court of*

Calcutta & Ors., AIR 2000 SC 3642; *B. Arvind Kumar v. Govt. of India & Ors.,* (2007) 5 SCC 745; and *M/s. Transcore v. Union of India & Anr.,* AIR 2007 SC 712).

21. In *Divya Manufacturing Co. (P) Ltd. & Anr. v. Union Bank of India & Ors.,* AIR 2000 SC 2346, this Court held that a confirmed sale can be set aside on the ground of material irregularity or fraud. The court does not become functus officio after the sale is confirmed. In *Valji Khimji and Company v. Official Liquidator of Hindustan Nitro Product (Gujarat) Ltd. & Ors.,* (2008) 9 SCC 299, the Court held that auction sale should be set aside only if there is a fundamental error in the procedure of auction e.g. not giving wide publication or on evidence that property could have fetched more value or there is somebody to offer substantially increased amount and not only a little over the auction price. Involvement of any kind of fraud would vitiate the auction sale.

22. In *FCS Software Solutions Ltd. v. La Medical Devices Ltd. & Ors.,* (2008) 10 SCC 440, this Court considered a case where after confirmation of auction sale it was found that valuation of movable and immovable properties, fixation of reserve price, inventory of Plant and Machineries had not been made in proclamation of sale, nor disclosed at time of sale notice. Therefore, in such a fact-situation, the sale was set aside after its confirmation.

23. In view of the above, the law can be summarised to the effect that the recovery of the public dues must be made strictly in accordance with the procedure prescribed by law. The liability of a surety is co-extensive with that of principal debtor. In case there are more than one surety the liability is to be divided equally among the sureties for unpaid amount of loan. Once the sale has been confirmed it cannot be set aside unless a fundamental procedural error has occurred or sale certificate had been obtained by mis-representation or fraud.

24. Learned counsel for the parties are not in a position

to point out the specific rules under which the recovery was to be made. Thus, the aforesaid legal principles have been considered on general principles of law as argued by them.

The instant case is required to be examined in the light of the aforesaid settled legal propositions.

Admittedly, the father of the appellants stood guarantor when Ganga Prasad took loan from the bank. Though there are some documents to show that there were two guarantors but who was the other guarantor is not evident from the record, nor such a plea had ever been taken by the appellants before the courts below. As the appellants had inherited the estate of the guarantor, they are liable to meet the liability of unpaid amount.

The appellants' land admeasuring 1 bigha and 10 biswas was sold for Rs.25,000/-. It cannot be held, even by any stretch of imagination, that the land had been sold at a cheaper rate, for the reasons, that the land belonging to Ganga Prasad (principal debtor) measuring 3 bighas and 2 biswas in the same village in a close proximity of time had been sold for a sum of Rs.6,000/- only. More so, elder brother of the appellant no.1 Ram Swaroop had participated in the auction and given the bid of Rs.20,000/- for the land in dispute. In view of the above, the submission made by Shri Garg that property worth Rs.2,00,000/- had been sold at a throw away price of Rs.25,000/- is not worth acceptance.

25. No fundamental procedural error had been pointed out which would vitiate the order of confirmation of sale and issuance of sale certificate.

26. The total amount of loan sanctioned in favour of Ganga Prasad was Rs.8,425/-. The Collector issued citation for recovery of Rs.10,574/- on 13.1.1986 and the total amount to be recovered including principal amount, interest, collection charges etc. came to Rs.14,483.15P. The property of Ganga

Prasad had been sold for a sum of Rs.6,000/-. So, the total amount to be recovered remained about Rs.8,500/-. The appellants' land had been sold for Rs.25,000/- i.e., three times the amount which was to be recovered. In the facts and circumstances of this case, instead of putting this whole land admeasuring 1 bigha and 10 biswas, the sale of 1/3rd of this land could have served the purpose. Therefore, there had been material irregularity in putting the entire property to auction.

27. In case, the auctioning authority had received Rs.25,000/- from the respondent no.4 as a sale consideration after adjusting the outstanding dues of Rs.8,500/-, the balance amount of Rs.16,500/- ought to have been paid to the appellants. There is nothing on record to show that authorities had ever adopted such a course.

28. In view of the above, the auction sale stood vitiated and all the consequential proceedings are liable to be quashed.

However, for the reasons best known to the appellants, they have neither impleaded the Bank (creditor) nor any of the legal heirs of Ganga Prasad (principal debtor). In such a fact-situation, it becomes difficult to proceed with the case any further.

29. Be that as it may, the respondent No.4 had been put in possession of the land more than two decades ago and he had made improvements.

This Court has consistently held that such a possession should not be disturbed at a belated stage for the reason that such a person would have spent his whole life savings in improving the land and making developments thereon which may include the construction of residences etc. (See: *State of Gujarat v. Patel Raghav Natha & Ors.,* AIR 1969 SC 1297; and *Brij Lal v. Board of Revenue & Ors.,* AIR 1994 SC 1128).

30. The courts below have rejected the case of the

appellants only on the ground of delay. Nothing had been pointed out before us as to on what basis the aforesaid judgment and orders warrant any interference. In view of the above, the appeal lacks merit and is accordingly dismissed.

However, the appellants may move an application before the Collector, Banda/concerned authority, in case the excess amount had not been paid to them, for recovery of the same. If such an application is filed and the authority comes to the conclusion that excess amount had not been paid to them, it shall be refunded within a period of 3 months from the date of making the application with 9% interest.

B.B.B. Appeal dismissed.

VIJAY KUMAR KAUL AND OTHERS
v.
UNION OF INDIA AND OTHERS
(Civil Appeal No. 4986-4989 of 2007)

MAY 25, 2012

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

SERVICE LAW: Seniority – Delay in making claim for seniority – Effect of – Held: Claim for seniority is to be put forth within a reasonable period of time – Belated approach is not permissible as in the meantime interest of third parties gets ripened – The acts done during the interregnum are however important factors and should not be lightly brushed aside – It becomes an obligation to take into consideration the balance of equity in entertaining the petition or declining it on the ground of delay and laches – In the case at hand, appellants were appointed w.e.f. 1993 and 1996 respectively on the directions issued by Jammu High Court in 1995 – Another set of employees were granted appointment w.e.f. 1990 by virtue of directions issued in 2001 by Punjab and Haryana High Court – Claim for seniority by appellants on the basis of parity with the other set of employees rejected by courts below – On appeal, held: Appellants neither in their initial rounds before the tribunal nor before the Jammu High Court ever claimed appointment with retrospective effect – Appellants had slept over their rights and eventually approached the tribunal after quite a span of time – In the meantime, the beneficiaries of Punjab and Haryana High Court were promoted to the higher posts – To put the clock back at this stage and disturb the seniority position would be extremely inequitable and hence, the tribunal and the High Court correctly declined to exercise their jurisdiction – Delay and laches – Equity.

The appellants participated in a selection process conducted by Second Field Ordinance Depot (2FOD) in the year 1984 for the post of Lower Division Clerks. However, due to ban on appointments, they were not issued appointment letters. In December 1993, pursuant to the order of the Central Administrative Tribunal (tribunal) of Jammu, appointment letter was issued to appellant no.4. The said appointment was given with prospective effect and appellant no.4 was not granted benefit of back wages and seniority. Appellant no.1 to 3 were given appointments in May, 1996 on the basis of directions issued on 24.7.1995 by the High Court of Jammu and Kashmir.

One 'P' and others whose names had figured in the select list but were not appointed had filed OA before the Chandigarh Bench of the tribunal. The tribunal had allowed the OA directing the competent authority to issue appointment letters to them. The competent authority instead of appointing P and others against the vacancies in 9FOD appointed them against the vacancies of 2FOD w.e.f. 1.1.1992. On their filing OA, the tribunal directed appointment of 'P' and others w.e.f 1.5.1985 and granted benefit of 50% of back wages and consequential benefits. The Punjab and Haryana High Court set aside the order of the tribunal on 12.7.2001 to the extent of grant of back wages but did not interfere with the direction antedating their appointment and other consequential reliefs granted by the tribunal. After the said order of the High Court, the appellant submitted representations to extend to them the similar benefits on the foundation of parity. The said prayer was rejected.

The appellants filed OA before the tribunal contending that grave injustice had been done to them by the competent authority inasmuch as they were not given the equal treatment that was given to similarly

placed employees; and that their seniority position and prospects for promotion had been immensely affected. The stand put forth by the appellants was resisted by the respondents contending, inter alia, that as the appellants were not parties to the application before the Chandigarh tribunal and were not covered by the judgment of Punjab and Haryana High Court, they were not extended the benefit; that only those general category candidates who were placed higher in merit list were appointed prior to them excepting one candidate who belonged to the Scheduled Caste category; that the appellants could not have been appointed as there was a ban and thereafter they were appointed as per the direction of the High Court of Jammu and Kashmir; and that the tribunal while directing appointment of appellant no. 4 had clearly stated that the appointment shall have prospective effect and he would not be entitled to any back wages or seniority and the said order having gone unassailed, the claim put forth by the appellants did not merit consideration.

The tribunal rejected the OA filed by the appellants holding that as far as appellant no.4 was concerned, his case had attained finality and that the decision rendered in the case of 'P' and others could not be treated as judgment in rem but was a judgment in personam and the appellants had been given appointment as per their placement in the merit list regard being had to availability of vacancies and, therefore, could not relate to an earlier date especially when they failed to show that any person junior to them had been given appointment from a retrospective date. Aggrieved, the appellants filed a writ petition before the High Court. The High Court upon perusal of the order passed by the tribunal, the decision rendered by the Punjab and Haryana High Court, and on considering the factum of the delay and laches on the part of the appellants, and that they had not been

superseded as the select list was prepared in order of merit, and appreciating the fact that the appointments had been made strictly in accordance with the merit declined to interfere with the order. The instant appeal were filed challenging the order of the High Court.

Dismissing the appeals, the Court

HELD: 1. The High Court of Jammu and Kashmir, by order dated 24.7.1995 directed the respondents to appoint the appellants. After the decision of the Punjab and Haryana High Court was delivered, the appellants approached the Principal Bench of the tribunal and the tribunal did not accept the prayer which was given the stamp of approval by the High Court. The appellants, neither in their initial rounds before the tribunal nor before the High Court, ever claimed any appointment with retrospective effect. In fact, the direction in respect of appellant No. 4 in the OA preferred by the appellant No. 4 was absolutely crystal clear that it would be prospective. The said order was accepted by the said appellant. However, after the decision was rendered by the Punjab and Haryana High Court wisdom dawned or at least they perceived so, and approached the Principal Bench for grant of similar reliefs. The appellants did not approach the legal forum but awaited for the verdict of the Punjab and Haryana High Court. As far as appellant No. 4 was concerned, there was no justifiable reason on his part to join the other appellants when he had acceded to the first judgment passed in his favour to a limited extent by the tribunal. They approached the tribunal some time only in 2004. The only justification given for the delay was that they had been making representations and when the said benefit was declined by communication dated 31.7.2004, they moved the tribunal. [Para 14-17] [140-B-H, 141-A-B, F-H; 142-A]

2. It is well settled that the claim for the seniority is

to be put forth within a reasonable period of time. A litigant who invokes the jurisdiction of a court for claiming seniority, it is obligatory on his part to come to the court at the earliest or at least within a reasonable span of time. The belated approach is impermissible as in the meantime interest of third parties gets ripened and further interference after enormous delay is likely to usher in a state of anarchy. The acts done during the interregnum are to be kept in mind and should not be lightly brushed aside. It becomes an obligation to take into consideration the balance of justice or injustice in entertaining the petition or declining it on the ground of delay and laches. It is a matter of great significance that at one point of time equity that existed in favour of one melts into total insignificance and paves the path of extinction with the passage of time. In the case at hand, as the factual matrix reveals, the appellants knew about the approach by 'P' and others before the tribunal and the directions given by the tribunal but they chose to wait and to reap the benefit only after the verdict. This kind of waiting is totally unwarranted. [Paras 18, 21-23] [142-B; 143-D-H]

3. In the case at hand it is evident that the appellants had slept over their rights as they perceived waiting for the judgment of the Punjab and Haryana High Court would arrest time and thereafter further consumed time submitting representations and eventually approached the tribunal after quite a span of time. In the meantime, the beneficiaries of Punjab and Haryana High Court were promoted to the higher posts. To put the clock back at this stage and disturb the seniority position would be extremely inequitable and hence, the tribunal and the High Court correctly declined to exercise their jurisdiction. [Para 27] [145-H; 146-A-B]

4. Another aspect needs to be highlighted. Neither

before the tribunal nor before the High Court, 'P' and others were arrayed as parties. There is no dispute over the factum that they are senior to the appellants and were conferred the benefit of promotion to the higher posts. In their absence, if any direction is issued for fixation of seniority, that is likely to jeopardise their interest. When they have not been impleaded as parties such a relief is difficult to grant. There cannot be any trace of doubt that an affected party has to be impleaded so that the doctrine of *audi alteram partem* is not put into any hazard. [Para 28 and 30] [146-C-D; 147-E-F]

K.C. Sharma and others v. Union of India and others **(1997) 6 SCC 721: 1997 (3) Suppl. SCR 87;** *Maharaj Krishan Bhatt and another v. State of Jammu and Kashmir and others* **(2008) 9 SCC 24: 2008 (11) SCR 670;** *State of Karnataka and others v. C. Lalitha* **(2006) 2 SCC 747: 2006 (1) SCR 971 – Distinguished.**

Indu Shekhar Singh & Ors. v. State of U.P. & Ors. **AIR 2006 SC 2432: 2006 (1) Suppl. SCR 497;** *Public Service Commission, Uttaranchal v. Mamta Bisht & Ors.* **AIR 2010 SC 2613: 2010 (7) SCR 289 – relied on.**

Collector of Central Excise, Calcutta v. M/s. Alnoori Tobacco Products and anr. **2004 (6) SCALE 232;** *P.S. Sadasivaswamy v. State of Tamil Nadu* **AIR 1974 SC 2271: 1975 (2) SCR 356;** *Karnataka Power Corporation Ltd. & Anr. v. K. Thangappan & Anr.* **AIR 2006 SC 1581: 2006 (3) SCR 783;** *City Industrial Development Corporation v. Dosu Aardeshir Bhiwandiwala & Ors.* **AIR 2009 SC 571: 2008 (16) SCR 28 – referred to.**

Case Law Reference:

1997 (3) Suppl. SCR 87	**Distinguished**	**Para 11, 24**
2004 (6) SCALE 232	**referred to**	**Para 11**

2006 (1) SCR 971	**Distinguished**	**Para 11, 24**
2008 (11) SCR 670	**Distinguished**	**Paras 11,25**
1975 (2) SCR 356	**referred to**	**Para 18**
2006 (3) SCR 783	**referred to**	**Para 19**
2008 (16) SCR 28	**referred to**	**Para 20**
2006 (1) Suppl. SCR 497	**relied on**	**Para 28**
2010 (7) SCR 289	**referred to**	**Para 29**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4986-4989 of 2012.

From the Judgment & Order dated 8.11.2006 of the High Court of Delhi at New Delhi in Civil Writ Petition Nos. 9130-9133 of 2006.

Ashok Bhan, Purnima Bhat for the Appellant.

R.P. Bhatt, Kiran Bhardwaj, Asha G. Nair, Sailendra Saini, D.S. Mahra for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. The appellants, four in number, participated in a selection process conducted by the Second Field Ordnance Depot (2 FOD) in the year 1984 for the post of Lower Division Clerks (LDCs). Despite their selection for the post in question they were not issued appointment letters on the pretext that there was a ban on appointments. In December 1993, pursuant to the order passed in OA No. 29/jk/92 dated 24.8.1993 by the Chandigarh Bench of the Central Administrative tribunal (for short 'the Tribunal'), respondent No. 4 was issued an appointment letter. The appellant Nos. 1 to 3 were given appointment in May, 1996 on the basis of the directions issued on 24.7.1995 by the High Court of Jammu and Kashmir in SWP No. 1052 of 1991.

2. It is worth noting that Parveen Singh and others, whose names, had figured in the select list, being aggrieved due to non appointment, had preferred OA No. 539-HP of 1986 before the Chandigarh Bench of the tribunal which allowed the OA vide order dated 25.8.1987 directing the respondent herein to issue appointment letters to them. The respondents instead of appointing the said Parveen Singh and others against the vacancies in 9 FOD, where there were ten vacancies of LDCs, appointed them against the vacancies falling in 2 FOD where there were 27 vacancies for LDCs with effect from 1.1.1990.

3. As set forth, said Parveen Singh and others filed second OA No. 1476-pb-1991 before the Chandigarh Bench of the tribunal with a prayer to issue a direction to the respondents to appoint them as LDCs with effect from 1.5.1985 with all consequential benefits including seniority, pay and allowances, etc. on the foundation that similarly situated persons who were selected along with them had been appointed with effect from 1985. The tribunal allowed the application vide order dated 13.10.2000 directing that their appointment shall be treated with effect from 1.5.1985 and they shall be extended the benefit of fifty per cent of back wages and other consequential reliefs.

4. The aforesaid order was called in question by the respondents before the High Court of Punjab and Haryana in CWP No. 1158 of 2001 and a Division Bench of the High Court, as per order dated 12.7.2001, set aside the order of the tribunal to the extent of grant of back wages but did not interfere with the direction ante-dating their date of appointment and other consequential reliefs granted by the tribunal.

5. As has been stated earlier that the appellants had approached the tribunal and were appointed on two different dates sometime in December, 1993 and May, 1996. After the High Court of Punjab and Haryana passed the order, the respondents conferred the benefit on said Parveen Singh and others. Thereafter, the present appellants submitted a series of representations to extend to them the similar benefits on the

foundation of parity. The said prayer was negatived by the respondents by order dated 21.7.2004.

6. Being dissatisfied with the said action of the respondents the appellants knocked at the doors of the Principal Bench of the tribunal in OA No. 2082 of 2004. It was contended before the tribunal that grave injustice had been done to them by the respondents inasmuch as they were not given the equal treatment that was given to similarly placed employees; and that their seniority position and prospects for promotion had been immensely affected. The stance and stand put forth by the appellants was resisted by the respondents contending, inter alia, that as the appellants were not parties to the application before the Chandigarh tribunal and were not covered by the judgment of Punjab and Haryana High Court, they were not extended the benefit; that only those general category candidates who were placed higher in merit list were appointed prior to them excepting one Kalu Ram who belonged to the Scheduled Caste category; that the appellants could not have been appointed as there was a ban and thereafter they were appointed as per the direction of the High Court of Jammu and Kashmir; and that the tribunal in OA No. 29/jk/92 preferred on the question of appointment of the appellant No. 4 had clearly stated that the appointment shall have prospective effect and he would not be entitled to any back wages or seniority and the said order has gone unassailed; and hence, the claim put forth in the petition did not merit consideration.

7. The tribunal adverted to various orders passed by the tribunal at various junctures and the orders passed by the Punjab and Haryana High Court and came to hold that as far as the appellant No. 4 is concerned his case had attained finality; that the decision rendered in the case of Parveen Singh and others could not be treated as judgment *in rem* but a judgment *in personam*; and that the appellants had been given appointment as per their placement in the merit list regard being had to availability of vacancies and hence, it could not

relate to an earlier date, especially when they failed to show that any person junior to them had been given appointment from a retrospective date or extended benefit. Being of this view the tribunal dismissed the Original Application.

8. Aggrieved by the aforesaid order the appellants invoked the jurisdiction of the High Court of Delhi under Articles 226 and 227 of the Constitution of India seeking a writ of certiorari for quashment of the order dated 10.3.2005 passed by the tribunal and also for quashing of the orders by which their representations had been rejected and further pressed for issue of a writ of mandamus commanding the respondents to extend the similar benefits as had been extended to Parveen Singh and others in view of the judgment rendered by Punjab and Haryana High Court.

9. The High Court, upon perusal of the order passed by the tribunal, the decision rendered by the Punjab and Haryana High Court, and on considering the factum of the delay and laches on the part of the appellants, and that they had not been superseded as the select list was prepared in order of merit, and appreciating the fact that the appointments had been made strictly in accordance with the merit declined to interfere with the order.

10. We have heard Mr. Ashok Bhan, learned senior counsel for the appellants and Mr. R.P. Bhatt, learned senior counsel for the respondents.

11. It is submitted by the learned senior counsel for the appellants that the tribunal as well as the High Court have fallen into serious error by expressing the view that the appointments were based on the merit list and, therefore, there was no supersession of the appellants. It is urged by him that neither the original application nor the writ petition could have been dismissed on the ground of delay and laches, in view of the fact that the appellants immediately approached the tribunal after the High Court rendered its judgment on 12.7.2001. It is his

further submission that a serious anomalous situation has cropped up inasmuch as the candidates whose names featured in one select list have been appointed at various times, as a consequence of which their pay-scale, seniority and prospects for promotion, have been put to jeopardy. The last limb of submission of the learned senior counsel for the appellants is that both the forums have failed to appreciate that injustice meted out to the appellants deserved to be remedied applying the doctrine since the doctrine of parity and the orders are vulnerable and deserved to be axed and appropriate direction are to be issued considering similar benefits. The learned senior counsel to bolster his submission has placed reliance on the decisions in *K.C. Sharma and others* v. *Union of India and others*[1], *Collector of Central Excise, Calcutta v. M/s. Alnoori Tobacco Products and anr*[2]., *State of Karnataka and others v. C. Lalitha and Maharaj Krishan Bhatt*[3] and *another v. State of Jammu and Kashmir and others*[4].

12. Mr. Bhatt, learned senior counsel for the respondents supported the order passed by the tribunal as well as by the High Court on the ground that the decisions which have been rendered by the tribunal and the High Court are absolutely impregnable since the appellants had never approached the tribunal at the earliest and only put forth their claims after success of Parveen Singh and others. It is propounded by him that the appellants while filing the various original applications seeking appointment had never claimed the relief of appointment with retrospective effect and, in fact, in the case of the appellant No. 4 the tribunal has categorically stated that his appointment could have prospective effect which has gone unassailed and, therefore, relying on the decision of Parveen Singh and others is of no assistance to the appellants.

1. (1997) 6 SCC 721.
2. 2004 (6) SCALE 232.
3. (2006) 2 SCC 747.
4. (2008) 9 SCC 24.

13. To appreciate the rival submissions raised at the Bar it is appropriate to refer to the various orders passed at various times. Parveen Singh and others approached the tribunal of Chandigarh at Chandigarh Bench in the year 1986. The tribunal, by order dated 25.8.1987, directed to issue appointment letters to the applicants against the vacancies which had not been filled up, regard being had to the merit position in the examination. Thereafter, the said Parveen Singh and others were intimated vide letter dated 15.1.1991 to report at the office for collection of their appointment letters on character verification and eventually they got appointments. Later on Parveen Singh and others had approached the tribunal to extend the monetary benefits from the date of their appointment. The tribunal had directed to extend 50% of the actual monetary benefits from the date of appointment along with other consequential benefits. The Union of India and its authorities preferred writ petition before the High Court of Punjab and Haryana, which passed the following order: -

> "For the reasons recorded above, the writ petition is partly allowed and the order of the tribunal is quashed to the extent it grants 50% back wages. However, we do not find any infirmity in keeping intact the other reliefs granted by the tribunal, namely, ante-dating of appointment of respondent Nos. 1 to 7 and fixation of their pay with all consequential benefits of increments etc. with effect from the date, all other candidates placed on the panel of selected candidates were appointed. No order as to costs."

14. While Parveen Singh and others were proceeding in this manner, appellant No. 4, Ujwal Kachroo, approached the tribunal at Jammu. The tribunal allowed OA and directed to issue appointment letter to the applicant for the post for which he was duly selected in 1984 within a period of six weeks. It proceeded to clarify that the appointment shall have prospective effect and he would not be entitled to any back

wages or seniority for the simple reason that it was neither his case nor anything had been brought on record to show that any person junior to him in the panel had already been appointed. At this juncture, three of the appellants approached the High Court of Jammu and Kashmir and the learned single Judge of the High Court of Jammu and Kashmir, by order dated 24.7.1995, had passed the following order: -

> "I have heard learned counsel for the parties. The respondents have no objection in appointing the petitioners as and when the posts of LDCs become available and also subject to their merit positions in the select list. Since the respondents have not objected in making appointments of the petitioner, I allow this writ petition and direct the respondents that the petitioners shall be appointed as LDCs as and when the posts become available, on their own turn, as per their merit position in the select list."

On the basis of the aforesaid order, the said appellants were given appointment.

15. After the decision of the Punjab and Haryana High Court was delivered the present appellants approached the Principal Bench of the tribunal and the tribunal did not accept the prayer which has been given the stamp of approval by the High Court.

16. In the course of hearing, learned senior counsel for the parties fairly stated that the decision rendered by the High Court of Punjab and Haryana has not been challenged before this Court and, therefore, we refrain from commenting about the legal defensibility of the said decision. However, it is clear as noon day that the appellants, neither in their initial rounds before the tribunal nor before the High Court, ever claimed any appointment with retrospective effect. In fact, the direction of the in respect of appellant No. 4 in the OA preferred by the appellant No. 4 was absolutely crystal clear that it would be

prospective. The said order was accepted by the said appellant. However, as is manifest, after the decision was rendered by the Punjab and Haryana High Court wisdom dawned or at least they perceived so, and approached the Principal Bench for grant of similar reliefs. In the petition before the tribunal, they had stated in their factual portion which are to the following effect: -

> "(n) That since at the time of filing writ by applicant/ petitioner Nos. 1,2 and 3 and an O.A. by applicant/ petitioner No. 4, the issue of entitlement to anti-dating appointment and back wages was under adjudication before the Hon'ble High Court of Punjab and Haryana in the case of Parveen Singh & Ors., the applicants/ petitioners in the present O.A. did not seek such relief in their respective writ and O.A.
>
> (o) That when the High Court upheld the orders of the tribunal in case of Parveen Singh & Ors., that they are entitled to the benefit of anti-dating appointment and the consequential benefits, the applicants/petitioners made individual representations to the respondents seeking the benefit of High Court's judgment dated 12.7.2001 delivered in C.W.P. No. 1156 of 2001. A true photocopy of this judgment is already available as Annexure A-5 at page 22-32 of the O.A."

17. Thus, it is demonstrable that they did not approach the legal forum but awaited for the verdict of the Punjab and Haryana High Court. As far as appellant No. 4 is concerned, we really see no justifiable reason on his part to join the other appellants when he had acceded to the first judgment passed in his favour to a limited extent by the tribunal. This was an ambitious effort but it is to be borne in mind that all ambitions are neither praiseworthy nor have the sanction of law. Be that as it may, they approached the tribunal some time only in 2004. The only justification given for the delay was that they had been making representations and when the said benefit was declined

by communication dated 31.7.2004, they moved the tribunal. The learned senior counsel for the appellants fairly stated that as the doctrine of parity gets attracted, they may only be conferred the benefit of seniority so that their promotions are not affected.

18. It is necessary to keep in mind that claim for the seniority is to be put forth within a reasonable period of time. In this context, we may refer to the decision of this Court in *P.S. Sadasivaswamy* v. *State of Tamil Nadu*[5], wherein a two-Judge Bench has held thus: -

> "It is not that there is any period of limitation for the Courts to exercise their powers under Article 226 nor is it that there can never be a case where the Courts cannot interfere in a matter after the passage of a certain length of time. But it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the courts to put forward stale claims and try to unsettle matters."

19. *In Karnataka Power Corporation Ltd. & Anr. v. K. Thangappan & Anr*[6]*.* this Court had held thus that delay or laches is one of the factors which is to be borne in mind by the High Court when they exercise their discretionary powers under Article 226 of the Constitution. In an appropriate case the High Court may refuse to invoke its extraordinary powers if there is such negligence or omission on the part of the applicant to assert his right as taken in conjunction with the lapse of time and other circumstances, causes prejudice to the opposite party. Even where fundamental right is involved the matter is still within the discretion of the Court as pointed out in Durga

5. AIR 1974 SC 2271.
6. AIR 2006 SC 158.1

Prasad v. Chief Controller of Imports and Exports (AIR 1970 SC 769). Of course, the discretion has to be exercised judicially and reasonably.

20. In *City Industrial Development Corporation v. Dosu Aardeshir Bhiwandiwala & Ors*[7]. this Court has opined that one of the grounds for refusing relief is that the person approaching the High Court is guilty of unexplained delay and the laches. Inordinate delay in moving the court for a Writ is an adequate ground for refusing a Writ. The principle is that courts exercising public law jurisdiction do not encourage agitation of stale claims and exhuming matters where the rights of third parties may have accrued in the interregnum.

21. From the aforesaid pronouncement of law, it is manifest that a litigant who invokes the jurisdiction of a court for claiming seniority, it is obligatory on his part to come to the court at the earliest or at least within a reasonable span of time. The belated approach is impermissible as in the meantime interest of third parties gets ripened and further interference after enormous delay is likely to usher in a state of anarchy.

22. The acts done during the interregnum are to be kept in mind and should not be lightly brushed aside. It becomes an obligation to take into consideration the balance of justice or injustice in entertaining the petition or declining it on the ground of delay and laches. It is a matter of great significance that at one point of time equity that existed in favour of one melts into total insignificance and paves the path of extinction with the passage of time.

23. In the case at hand, as the factual matrix reveals, the appellants knew about the approach by Parveen Singh and others before the tribunal and the directions given by the tribunal but they chose to wait and to reap the benefit only after the verdict. This kind of waiting is totally unwarranted.

7. AIR 2009 SC 571.

24. Presently we shall refer to the authorities commended by the learned senior counsel for the appellants. In *K.C. Sharma* (supra) the factual scenario was absolutely different and thus, distinguishable. In *C. Lalitha* (supra) it has been held that justice demands that a person should not be allowed to derive any undue advantage over other employees. The concept of justice is that one should get what is due to him or her in law. The concept of justice cannot be stretched so as to cause heart-burning to more meritorious candidates. In our considered opinion, the said decision does not buttress the case of the appellants.

25. In *Maharaj Krishan Bhat* (supra), the appellants had made a representation on 8.1.1987. A similar representation was sent by one Abdul Rashid on that date to the Hon'ble Chief Minister of State of Jammu and Kashmir with a request to consider the case for appointment to the post of PSI by granting necessary relaxation in rules against 50% direct recruitment quota. The Director General of Police vide his letter dated 23.1.1987 recommended the name of Hamidullah Dar, one of the applicants, for appointment and he was appointed as PSI vide order dated 1.4.1987. The other appellants were not extended the benefit of appointment. Under those circumstances the High Court of Jammu and Kashmir in SWP No. 351 of 1987 directed the Director General of Police to consider the case of the appellants. Thereafter Abdul Rashid filed a similar petition which was admitted. Pursuant to the direction of the High Court the Director General of Police considered the applications of Mohd. Abbas and Mohd. Amim but rejected the prayer on 13.12.1991. When the matter of Abdul Rashid, the appellant, came up the learned single Judge allowed the writ petition relying on the earlier judgment. The Government of Jammu and Kashmir filed Letters Patent Appeal which was dismissed. In the context, this Court opined that the Division Bench should not have refused to follow the judgment by another Division Bench. Attention was raised that initial violation was committed by the State Government and which

was violative of Articles of 14 and 16 of the Constitution and the said mistake could not be perpetuated. In that context it was held as follows: -

> "21. It was no doubt contended by the learned counsel for the respondent State that Article 14 or 16 of the Constitution cannot be invoked and pressed into service to perpetuate illegality. It was submitted that if one illegal action is taken, a person whose case is similar, cannot invoke Article 14 or 16 and demand similar relief illegally or against a statute."

Thereafter the Bench proceeded to state as follows: -

> "23. In fairness and in view of the fact that the decision in Abdul Rashid Rather had attained finality, the State authorities ought to have gracefully accepted the decision by granting similar benefits to the present writ petitioners. It, however, challenged the order passed by the Single Judge. The Division Bench of the High Court ought to have dismissed the letters patent appeal by affirming the order of the Single Judge. The letters patent appeal, however, was allowed by the Division Bench and the judgment and order of the learned Single Judge was set aside. In our considered view, the order passed by the learned Single Judge was legal, proper and in furtherance of justice, equity and fairness in action. The said order, therefore, deserves to be restored."

26. We respectfully concur with the said observations but we cannot be oblivious of the fact that the fact situation in that case was totally different. Hence, the said decision is not applicable to the case at hand.

27. In the case at hand it is evident that the appellants had slept over their rights as they perceived waiting for the judgment of the Punjab and Haryana High Court would arrest time and thereafter further consumed time submitting representations

and eventually approached the tribunal after quite a span of time. In the meantime, the beneficiaries of Punjab and Haryana High Court, as we have been apprised, have been promoted to the higher posts. To put the clock back at this stage and disturb the seniority position would be extremely inequitable and hence, the tribunal and the High Court have correctly declined to exercise their jurisdiction.

28. Another aspect needs to be highlighted. Neither before the tribunal nor before the High Court, Parveen Singh and others were arrayed as parties. There is no dispute over the factum that they are senior to the appellants and have been conferred the benefit of promotion to the higher posts. In their absence, if any direction is issued for fixation of seniority, that is likely to jeopardise their interest. When they have not been impleaded as parties such a relief is difficult to grant. In this context we may refer with profit to the decision in *Indu Shekhar Singh & Ors. v. State of U.P. & Ors*[8]. wherein it has been held thus: -

> "There is another aspect of the matter. The appellants herein were not joined as parties in the writ petition filed by the respondents. In their absence, the High Court could not have determined the question of inter se seniority."

29. In *Public Service Commission, Uttaranchal v. Mamta Bisht & Ors*[9]. this Court while dealing with the concept of necessary parties and the effect of non-impleadment of such a party in the matter when the selection process is assailed observed thus: -

> "7. ……. In *Udit Narain Singh Malpaharia v. Additional Member, Board of Revenue, Bihar & Anr.,* AIR 1963 SC 786, wherein the Court has explained the distinction between necessary party, proper party and proforma party

8. AIR 2006 SC 2432.
9. AIR 2010 SC 2613.

and further held that if a person who is likely to suffer from the order of the Court and has not been impleaded as a party has a right to ignore the said order as it has been passed in violation of the principles of natural justice. More so, proviso to Order I, Rule IX of Code of Civil Procedure, 1908 (hereinafter called CPC) provide that non-joinder of necessary party be fatal. Undoubtedly, provisions of CPC are not applicable in writ jurisdiction by virtue of the provision of Section 141, CPC but the principles enshrined therein are applicable. (Vide *Gulabchand Chhotalal Parikh v. State of Gujarat;* AIR 1965 SC 1153; *Babubhai Muljibhai Patel v. Nandlal, Khodidas Barat & Ors.,* AIR 1974 SC 2105; and *Sarguja Transport Service v. State Transport Appellate Tribunal, Gwalior & Ors.* AIR 1987 SC 88).

8. In *Prabodh Verma & Ors. v. State of U.P. & Ors.* AIR 1985 SC 167; and *Tridip Kumar Dingal & Ors. v. State of West Bengal & Ors.* (2009) 1 SCC 768 : (AIR 2008 SC (Supp) 824), it has been held that if a person challenges the selection process, successful candidates or at least some of them are necessary parties."

30. From the aforesaid enunciation of law there cannot be any trace of doubt that an affected party has to be impleaded so that the doctrine of *audi alteram partem* is not put into any hazard.

31. Analysed on the aforesaid premised reasons, we do not see any merit in these appeals and, accordingly, they are dismissed with no order as to costs.

D.G. Appeals dismissed.

NARENDER KUMAR
v.
STATE (NCT) OF DELHI
(Criminal Appeal Nos. 2066-67 of 2009)

MAY 25, 2012

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Penal Code, 1860 – s. 376 – Commission of offence under – Conviction and sentence by the courts below on basis of the testimony of the prosecutrix – On appeal, held: When the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial, which may lend assurance to her testimony – On facts, it cannot be said that the prosecutrix was not knowing the appellant prior to the incident – Facts and circumstances, make it crystal clear that if the evidence of the prosecutrix is read and considered in totality of the circumstances alongwith the other evidence on record, in which the offence is alleged to have been committed, her deposition does not inspire confidence – Prosecution did not disclose the true genesis of the crime – Thus, appellant entitled to the benefit of doubt – Judgment and order passed by the courts below convicting the appellant u/s. 376 set aside.

According to the prosecution case, appellant committed rape on PW 1. FIR was lodged. PW 1-prosecutrix was medically examined. Her statement was recorded under Section 164 Cr.P.C. before the Magistrate. The trial court convicted the appellant under Section 376 IPC and imposed rigorous imprisonment for a period of seven years. The High Court upheld the order of the trial court. Therefore, the appellant filed the instant appeals.

Allowing the appeals, the Court

HELD: 1.1. Once the statement of prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial, which may lend assurance to her testimony. [Para 16] [160-D-H]

Vimal Suresh Kamble v. Chaluverapinake Apal S.P. and Anr. **AIR 2003 SC 818;** *Vishnu v. State of Maharashtra* **AIR 2006 SC 508: 2005 (5) Suppl. SCR 474 – relied on.**

1.2. Where evidence of the prosecutrix is found suffering from serious infirmities and inconsistencies with other material, prosecutrix making deliberate improvements on material point with a view to rule out consent on her part and there being no injury on her person even though her version may be otherwise, no reliance can be placed upon her evidence. [Para 17] [161-B]

Suresh N. Bhusare & Ors. v. State of Maharashtra **(1999) 1 SCC 220;** *Jai Krishna Mandal & Anr. v. State of Jharkhand*

(2010) 14 SCC 534; *Rajoo & Ors. v. State of Madhya Pradesh* **AIR 2009 SC 858: 2008 (16) SCR 1078;** *Tameezuddin @ Tammu v. State (NCT of Delhi* **(2009) 5 SCC 566: 2009 (14) SCR 80 – relied on.**

1.3. Even in cases where there is some material to show that the victim was habituated to sexual intercourse, no inference of the victim being a woman of "easy virtues" or a women of "loose moral character" can be drawn. Such a woman has a right to protect her dignity and cannot be subjected to rape only for that reason. She has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. Merely because a woman is of easy virtue, her evidence cannot be discarded on that ground alone rather it is to be cautiously appreciated. [Para 21] [162-C-E]

State of Maharashtra & Anr. v. Madhukar Narayan Mardikar **AIR 1991 SC 207:** *State of Punjab v. Gurmit Singh & Ors.* **AIR 1996 SC 1393;** *State of U.P. v. Pappu @ Yunus & Anr.* **AIR 2005 SC 1248: 2004 (6) Suppl. SCR 585 – relied on.**

1.4. In view of the provisions of Sections 53 and 54 of the Evidence Act, 1872, unless the character of the prosecutrix itself is in issue, her character is not a relevant factor to be taken into consideration at all. [Para 22] [162-F]

1.5. The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of witnesses which are not of a substantial character. However, even in a case of rape, the onus is always on the prosecution

to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witness have falsely implicated the accused. Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. *However* great the suspicion against the accused and *however,* strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt. [Paras 23] [162-G-H; 163-A-D]

Tukaram & Anr. v. The State of Maharashtra **AIR 1979 SC 185: 1979 (1) SCR 810;** *Uday v. State of Karnataka* **AIR 2003 SC 1639: 2003(2) CR 231 – relied on.**

1.6. Prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. Conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix case becomes liable to be rejected. The court must act with sensitivity and appreciate the evidence in totality of the background of the entire case and not in the isolation. Even if the prosecutrix is of easy virtue/unchaste woman

that itself cannot be a determinative factor and the court is required to adjudicate whether the accused committed rape on the victim on the occasion complained of. [Para 24] [163-E-H]

1.7. By any stretch of imagination it cannot be held that the prosecutrix was not knowing the appellant prior to the incident. The given facts and circumstances, make it crystal clear that if the evidence of the prosecutrix is read and considered in totality of the circumstances alongwith the other evidence on record, in which the offence is alleged to have been committed, her deposition does not inspire confidence. The prosecution has not disclosed the true genesis of the crime. In such a fact-situation, the appellant becomes entitled to the benefit of doubt. The judgment and order passed by the High Court of Delhi in Criminal Appeal and that of the trial court are set aside. [Para 25] [164-B-E]

Case Law Reference:

AIR 2003 SC 818	**Relied on.**	**Para 16**
2005 (5) Suppl. SCR 474	**Relied on.**	**Para 16**
(1999) 1 SCC 220	**Relied on.**	**Para 17**
(2010) 14 SCC 534	**Referred to.**	**Para 18**
2008 (16) SCR 1078	**Referred to**	**Para 19**
2009 (14) SCR 80	**Referred to.**	**Para 20**
AIR 1991 SC 207	**Relied on.**	**Para 21**
AIR 1996 SC 1393	**Relied on.**	**Para 21**
2004 (6) Suppl. SCR 585	**Relied on.**	**Para 21**
1979 (1) SCR 810	**Relied on.**	**Para 23**
2003(2) CR 231	**Relied on.**	**Para 23**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2066-2067 of 2009.

From the Judgment & Order dated 25.3.2009 of the High Court of Delhi at New Delhi in Criminal Appeal No. 53 of 2000 and Criminal Misc. Application No. 6749 of 2008.

A. Yakesh Anand, Nimit Mathur (Amicus), Atul Jha, Dharmendra Kumar Sinha for the Appellant.

Rekha Pandey, Gargi Khanna, Anil Katiyar for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. These appeals have been preferred against the impugned judgment and order dated 25.3.2009 passed by the High Court of Delhi at New Delhi in Criminal Appeal No.53 of 2000, by which it has affirmed the judgment and order of the trial Court dated 7.12.1999 passed in Sessions Case No. 77/99, convicting the appellant under Section 376 of Indian Penal Code, 1860 (hereinafter called 'IPC') and awarded the punishment of rigorous imprisonment for a period of 7 years vide order dated 8.12.1999 and imposed a fine of Rs.2000/- .

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

A. Smt. Indira PW.1 (prosecutrix) filed an FIR No.886/98 dated 16.9.1998 to the effect that when she was going from village Khirki to Chirag Delhi on that day at about 8 p.m., the appellant met her near Ganda Nala, he caught hold of her hand and dragged her towards the bushes on the edge of the road and committed rape on her. She could not raise the noise due to fear. After commission of the offence, the appellant left her there and ran away. The prosecutrix went to her husband at his working place and from there went to the police station alongwith her husband to lodge the FIR.

B. The prosecutrix was medically examined. Appellant was arrested on 1.11.1998. Statement of the prosecutrix was recorded under Section 164 of Code of Criminal Procedure, 1973 (hereinafter called 'Cr.P.C.') on 20.11.1998 before the Metropolitan Magistrate, New Delhi. After completion of investigation, charge sheet was filed against the appellant under Section 376 IPC on 21.4.1999. Prosecution examined 11 witnesses in support of its case. The appellant, in addition to his own statement under Section 313 Cr.P.C., also examined 2 witnesses in defence.

C. On conclusion of the trial, the learned Sessions Court vide judgment and order dated 7/8.12.1999 convicted the appellant for the offences under Section 376 IPC and imposed the sentence as referred to hereinabove.

D. Aggrieved, the appellant preferred Criminal Appeal No.53 of 2000 before the High Court which has been dismissed vide impugned judgment and order dated 25.3.2009.

Hence, these appeals.

3. Shri Yakesh Anand, learned Amicus Curiae, has submitted that Indira, prosecutrix (PW.1) cannot be relied upon because there have been material contradictions in her deposition. She had been confronted on large number of issues/facts with her statement under Section 161 Cr.P.C. Embellishments/improvements had been of such a large magnitude that her statement itself became unreliable. The prosecutrix was an unchaste woman, having illicit relationship with many young persons. The courts below erred in not appreciating properly the evidence of the defence witnesses examined by the appellant. The medical evidence, in a case like this where the prosecutrix was married and 25 years of age, is inconsequential. Thus, the appeals deserve to be allowed.

4. Per contra, Smt. Rekha Pandey, learned counsel appearing for the respondent-State has opposed the appeal

vehemently contending that the appellant has rightly been convicted on the sole testimony of the prosecutrix and both the courts below have appreciated the facts in correct perspective. The findings so recorded by the courts below do not warrant any interference. Thus, the appeals are liable to be dismissed.

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

6. The Trial Court as well as the High Court recorded conviction of the appellant merely placing a very heavy reliance on the deposition of the prosecutrix and considering the deposition of Dr. Nisha (PW.9). Admittedly, the defence version taken by the appellant in his statement under Section 313 Cr.P.C. and the deposition of two defence witnesses to the extent that the prosecutrix had developed intimacy with the appellant and some other young persons and Sahib Rao (PW.3) her husband, had raised the grievance in this regard, have not even been referred to by either of the courts below, though the law required the court to appreciate the defence version and decide its veracity in accordance with law.

7. In order to test the veracity of the deposition of Smt. Indira –Prosecutrix (PW.1), it may be relevant to make reference to the same. In her examination-in-chief she stated as under:

> "The accused was not personally known to me prior to the day of incident, except that he had teased me prior to the incident and I lodged the complaint with the parents of the accused and with the police. I have not given any copy of the complaint to the police in this case. It is incorrect to say that the accused had been living in my house about one year prior to the day of the incident."

In cross-examination she could not point out as which part of her Salwar had been torn. Prosecutrix, when in the dock was

confronted on various points with her statement under Section 161 Cr.P.C. and the said contradiction read as under:

> (i) I had also told the police in my statement that I had raised alarm at the time of rape.
>
> (ii) The accused was not personally known to me prior to the date of the incident except that he had teased me prior to the incident and I lodged the complaint with the parents of the accused and with the police.

So far as the "injury on her person" is concerned, she deposed as under:

> "I did not receive any injury except scratches on my **throat** and I had told the doctor about the incident."

8. Sahib Rao (PW.3), husband of the prosecutrix in his cross-examination admitted that he knew the appellant very well as both of them had been the residents of the same village. He further admitted that there used to be quarrel between him and his wife. Sahib Rao (PW.3), was also confronted with his statement under Section 161 Cr.P.C. on various narrations.

9. Dr. Nisha (PW.9) deposed as under:

> "There were nail marks on her *breast* and from that I say that *she might have been raped.* The *nail marks* which were found on the breast of the victim *could have been self-inflicted*….On internal examination of the victim, *it could not be found that she was raped* except seeing her condition that her clothes were torn and there were nail marks on her *breast.*"
>
> (Emphasis added)

10. SI, Lekh Raj (PW.6) who was posted at P.S. Malviya Nagar, New Delhi was examined and he deposed as under:

"On the night intervening 30.10.1998 and 1.11.1998 ,

complainant Indira came to the P.S. at about 11.45 p.m. She told me that the person who had committed rape on her is sitting on a stop of Khirki. Thereafter, I alongwith complainant and Constable Jagat Singh went there and accused present in court was arrested on the pointing out of Indira by me…..The arrest memo of accused Ex.PW.1/F was also prepared…..

…….No public person from the area was called from where the accused was arrested. I did not prepare the site plan of the place from where the accused was arrested. The prosecutrix Indira had come to me on that night in the police station alone. The distance between the house of the prosecutrix and police station is 3 Kms."

11. R.N. Chowdhary (PW.11), Investigating Officer deposed that there was fencing just near the road and there was electricity pole installed at the divider of the road and the electricity was on. The residential houses were at some distance and the road was situated at a distance of about 20 paces from the place of occurrence.

12. The appellant in his statement under Section 313 Cr.P.C. stated as under:

"I was having good relations with family of the prosecutrix and we were staying in the same village. *The prosecutrix desired to keep me in her house,* to which I refused and for that reason, the false case has been planted on me. I am innocent and I have been falsely implicated in this case by police at the instance of the prosecutrix and her husband as I did not accept the proposal of the prosecutrix to live in her house. Her husband has also given severe beatings to the prosecutrix on that account." (Emphasis added)

13. Chandan Singh (DW.1) was examined by the appellant in defence who deposed that he knew Indira (Prosecutrix) and

her husband being their neighbour. The prosecutrix was having intimacy with the appellant for the last 3 years. His house is at a distance of 40 yards from the house of the prosecutrix. There remained quarrel between prosecutrix and her husband. Her husband Sahib Rao (PW.3) did not like the entry of appellant in his house.

14. Surendra Kumar (DW.2) supported the defence version stating as under:

"I know Sahib Rao and his wife Indira. Sahib Rao had been working in my ration shop for last 7 years. Sahib Rao used to tell me that one boy whose name I do not know used to visit the house of Sahib Rao which was not liked by him and for that reason the husband and wife had been quarreling. The said boy, who is present in the court had come to my shop also alongwith Indra."

15. If the evidence on record referred to hereinabove is appreciated, the following picture emerges:

(i) Prosecutrix and appellant were known to each other for a long time and there had been some relationship/intimacy between them.

(ii) Sahib Rao (PW.3), husband of the prosecutrix did not like the said relationship.

(iii) There has been some incident two-three days prior to the actual incident on 16.9.1998 as Indira-prosecutrix had lodged some complaint against the appellant in the police as well as with the parents of the appellant.

(iv) The complaint lodged by the prosecutrix two-three days prior to 16.9.1998 with the police had never been placed on record.

(v) The alleged incident dated 16.9.1998 had occurred on the side of the main road which remains busy and had

sufficient light and in spite of the fact that the prosecutrix raised hue and cry, nobody came to help her.

(vi) There are contradictions on the issue as to whether the prosecutrix went to the working place of her husband and from there she proceeded to police station with him as evidence on record is also to the contrary i.e she straightaway went to the police station and one Constable had gone and called her husband.

(vii) Medical evidence does not **positively** support the case of the prosecution as Dr. Nisha (PW.9) deposed that seeing her condition and torn clothes it could be said that the prosecutrix might had been raped.

(viii) Admittedly, there is a most material contradiction in the medical evidence and ocular evidence. Dr. Nisha (PW.9) had categorically recorded in the report and deposed in the court that the prosecutrix was having nail marks on her **breast** though the case of Indira-prosecutrix had been that she was having nail marks on her **throat.**

(ix) Deposition of Lekh Raj (PW.6), S.I., about the arrest of the appellant between intervening night of 30.10.1998 and 1.11.1998 at about 11.45 p.m., seems to be improbable. According to him, the prosecutrix walked from her house to the police station at a distance of 3 Kms. at midnight to inform the police that the appellant was sitting on the stop of Khirki, Press Enclave. The witness reached there with prosecutrix and police constables. He found the appellant sitting at the said stop and from there he was arrested. The witness did not prepare the arrest memo with the help of any independent witness. If the appellant was sitting at the bus stop at midnight some other persons could have been also there.

(x) The defence version taken by the appellant and depositions of Chandan Singh (DW.1) and Surendra

Kumar (DW.2) in support thereof, have not only been ignored/brushed aside by the courts below rather no reference has been made to the same.

(xi) The contradictions referred to hereinabove and particularly in respect of the nail marks on her body could not be said only to be minor contradictions which did not go to the root of the matter. Some of the contradictions/ embellishments/improvements are of greater magnitude and had serious impact on the case.

(xii) The F.S.L. report dated 6.5.1999 reveal that the blood stains/semen on the prosecutrix kurta/ salwar belonged to the AB blood group though the blood group of the appellant is "O"(+) and thus, the FSL report does not support the case of the prosecution.

16. It is a settled legal proposition that once the statement of prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, *if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence,* direct or substantial, which may lend assurance to her testimony. (Vide: *Vimal Suresh Kamble v.*

Chaluverapinake Apal S.P. & Anr., AIR 2003 SC 818; and *Vishnu v. State of Maharashtra,* AIR 2006 SC 508).

17. Where evidence of the prosecutrix is found suffering from serious infirmities and inconsistencies with other material, prosecutrix making deliberate improvements on material point with a view to rule out consent on her part and there being no injury on her person even though her version may be otherwise, no reliance can be placed upon her evidence. (Vide: *Suresh N. Bhusare & Ors. v. State of Maharashtra,* (1999) 1 SCC 220)

18. In *Jai Krishna Mandal & Anr. v. State of Jharkhand,* (2010) 14 SCC 534, this Court while dealing with the issue held:

> "The only evidence of rape was the statement of the prosecutrix herself and when this evidence was read in its totality, the story projected by the prosecutrix was so improbable that it could not be believed."

19. In *Rajoo & Ors. v. State of Madhya Pradesh,* AIR 2009 SC 858, this Court held that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. The court however, further observed:

> ".....It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication..... there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."

20. In *Tameezuddin @ Tammu v. State (NCT of Delhi),* (2009) 15 SCC 566, this Court held has under:

> **"**It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter."

21. Even in cases where there is some material to show that the victim was habituated to sexual intercourse, no inference of the victim being a woman of "easy virtues" or a women of "loose moral character" can be drawn. Such a woman has a right to protect her dignity and cannot be subjected to rape only for that reason. She has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. Merely because a woman is of easy virtue, her evidence cannot be discarded on that ground alone rather it is to be cautiously appreciated. (Vide: *State of Maharashtra & Anr. v. Madhukar Narayan Mardikar,* AIR 1991 SC 207; *State of Punjab v. Gurmit Singh & Ors.,* AIR 1996 SC 1393; and *State of U.P. v. Pappu @ Yunus & Anr.,* AIR 2005 SC 1248).

22. In view of the provisions of Sections 53 and 54 of the Evidence Act, 1872, unless the character of the prosecutrix itself is in issue, her character is not a relevant factor to be taken into consideration at all.

23. The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of witnesses which are not of a substantial character.

However, even in a case of rape, the onus is always on

the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witness have falsely implicated the accused. Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. *However* great the suspicion against the accused and *however* strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt. (Vide: *Tukaram & Anr. v. The State of Maharashtra,,* AIR 1979 SC 185; and *Uday v. State of Karnataka,* AIR 2003 SC 1639).

24. Prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. Conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix case becomes liable to be rejected.

The court must act with sensitivity and appreciate the evidence in totality of the background of the entire case and not in the isolation. Even if the prosecutrix is of easy virtue/ unchaste woman that itself cannot be a determinative factor and the court is required to adjudicate whether the accused committed rape on the victim on the occasion complained of.

25. The instant case is required to be decided in the light of the aforesaid settled legal propositions.

We have appreciated the evidence on record and reached the conclusions mentioned hereinabove. Even by any stretch of imagination it cannot be held that the prosecutrix was not knowing the appellant prior to the incident. The given facts and circumstances, make it crystal clear that if the evidence of the prosecutrix is read and considered in totality of the circumstances alongwith the other evidence on record, in which the offence is alleged to have been committed, we are of the view that her deposition does not inspire confidence. The prosecution has not disclosed the true genesis of the crime. In such a fact-situation, the appellant becomes entitled to the benefit of doubt.

In view of above, the appeals succeed and are allowed. The judgment and order dated 25.3.2009 passed by the High Court of Delhi in Criminal Appeal No. 53 of 2000 and that of the trial court dated 7.12.1999 are hereby set aside. The appellant is on bail, his bail bond stands discharged.

Before parting with the case, we would like to record our appreciation to Mr. Yakesh Anand, learned Amicus Curiae for rendering commendable assistance to the court. Mr. Anand shall be entitled to Rs. 7,000/- as his fees payable by the State Government.

N.J. Appeals allowed.

NARENDRA CHAMPAKLAL TRIVEDI
v.
STATE OF GUJARAT
(Criminal Appeal No. 97 of 2012)

MAY 29, 2012

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Prevention of Corruption Act, 1988: s.7 – Conviction under – Recovery of tainted money – Held: Mere recovery of the tainted money is not sufficient to record a conviction unless there is evidence that bribe had been demanded or money was paid voluntarily as a bribe – However, there is a statutory presumption u/s.20 of the Act which can be dislodged by the accused by bringing on record some evidence, either direct or circumstantial, that money was accepted by other than the motive or reward as stipulated u/s.7 of the Act – – In the case at hand, the money was recovered from the pockets of the accused-appellants – A presumption u/s.20 of the Act became obligatory – There was no evidence on the basis of which it could be said that the presumption was rebutted – There was nothing to doubt the presence of the shadow witness – All the witnesses supported the case of the prosecution – Therefore, the conviction recorded by the trial court which was affirmed by the High Court did not warrant any interference.

Constitution of India, 1950: Article 142 – Scope of interference with the sentence – Held: The power u/Article 142 of the Constitution is a constitutional power and hence, not restricted by statutory enactments – This power cannot be used to supplant the law applicable to the case – This means that acting under Article 142, the Supreme Court cannot pass an order or grant relief which is totally inconsistent or goes against the substantive or statutory enactments pertaining to the case – In view of that where the minimum sentence is

provided, it would not be at all appropriate to exercise jurisdiction u/Article 142 of the Constitution of India to reduce the sentence on the ground of the so-called mitigating factors as that would tantamount to supplanting statutory mandate – The amount may be small but to curb and repress this kind of proclivity the legislature has prescribed the minimum sentence – Corruption at any level does not deserve either sympathy or leniency – In fact, reduction of the sentence would be adding a premium – The law does not so countenance and, rightly so, because corruption corrodes the spine of a nation and in the ultimate eventuality makes the economy sterile – Sentence/Sentencing.

The allegation against the appellants was that they demanded bribe from the complainant for supplying copies of survey report. The trial court and High Court held the appellants guilty for committing offence punishable under Section 7 of the Prevention of Corruption Act, 1988 and sentenced them to undergo rigorous imprisonment of six months with fine of Rs.5,000/- each and in default of payment of fine, to suffer simple imprisonment for a period of one month and further convicted them under Section 13(2) of the Act and sentenced them to undergo rigorous imprisonment for a period of one year with a fine of Rs.5,000/- each and in default, to suffer simple imprisonment for a period of one month with the stipulation that both the sentences would be concurrent. The instant appeals were filed challenging the order of the High Court.

Dismissing the appeals, the Court

HELD: 1.1. It is the settled principle of law that mere recovery of the tainted money is not sufficient to record a conviction unless there is evidence that bribe had been demanded or money was paid voluntarily as a bribe. In the absence of any evidence of demand and acceptance of the amount as illegal gratification, recovery would not

alone be a ground to convict the accused. It is also settled in law that there is a statutory presumption under Section 20 of the Act which can be dislodged by the accused by bringing on record some evidence, either direct or circumstantial, that money was accepted by other than the motive or reward as stipulated under Section 7 of the Act. It is obligatory on the part of the court to consider the explanation offered by the accused under Section 20 of the Act and the consideration of the explanation has to be on the anvil of preponderance of probability. It is not to be proven beyond all reasonable doubt. It is necessary to state that the prosecution is bound to establish that there was an illegal offer of bribe and acceptance thereof. The same has to be founded on facts. [Paras 12, 13] [175-G-H; 176-A-D]

T. Subramanian v. *The State of Tamil Nadu* **AIR 2006 SC 836: 2006 (1) SCR 180;** *M. Narsinga Rao* v. *State of A.P.* **(2001) 1 SCC 691: 2000 (5) Suppl. SCR 584;** *Madhukar Bhaskarrao Joshi* v. *State of Maharashtra* **(2000) 8 SCC 571: 2000 (4) Suppl. SCR 475;** *Raj Rajendra Singh Seth* v. *State of Jharkhand & Anr.* **AIR 2008 SC 3217: 2008 (11) SCR 66;** *State of Maharashtra* v. *Dnyaneshwar Laxman Rao Wankhede* **(2009) 15 SCC 200: 2009 (11) SCR 513;** *C.M. Girish Babu* v. *C.B.I., Cochin, High Court of Kerala* **AIR 2009 SC 2022: 2009 (2) SCR 1021 – relied on.**

1.2. In the case at hand, the money was recovered from the pockets of the accused-appellants. A presumption under Section 20 of the Act becomes obligatory. It is a presumption of law and casts an obligation on the court to apply it in every case brought under Section 7 of the Act. The said presumption is a rebuttable one. In the instant case, the explanation offered by the accused-appellants was not accepted and rightly so. There was no evidence on the base of which it could be said that the presumption was rebutted. There

was nothing to doubt the presence of the shadow witness. He had given the signal after which the trapping party arrived at the scene and did the needful. All the witnesses supported the case of the prosecution. The currency notes were recovered from the possession of the appellants. In the lengthy cross-examination, nothing was really elicited to doubt their presence and veracity of the testimony. The appellants in their statement under Section 313 of the Code of Criminal Procedure made an adroit effort to explain their stand but they miserably failed to dislodge the presumption. PW-2 categorically stated that the complainant took out Rs.50/- from his pocket and gave it to the accused appellant as directed. Thus, there was no doubt that the accused-appellants had demanded the bribe and accepted the same to provide the survey report. Therefore, the conviction recorded by the trial court which was affirmed by the High Court did not warrant any interference. [Paras 17, 18] [178-C-D; 178-F-H; 179-A-C]

2.As regards the invocation of Article 142 of the Constitution of India, it was held in **Laxmidas Morarji* **that the power under Article 142 of the Constitution is a constitutional power and hence, not restricted by statutory enactments. Though the Supreme Court would not pass any order under Article 142 which would amount to supplanting substantive law applicable or ignoring express statutory provisions dealing with the subject, at the same time these constitutional powers cannot in any way, be controlled by any statutory provisions. However, it is to be made clear that this power cannot be used to supplant the law applicable to the case. This means that acting under Article 142, the Supreme Court cannot pass an order or grant relief which is totally inconsistent or goes against the substantive or statutory enactments pertaining to the case. In view of that where the minimum sentence is provided, it would not be at all appropriate**

to exercise jurisdiction under Article 142 of the Constitution of India to reduce the sentence on the ground of the so-called mitigating factors as that would tantamount to supplanting statutory mandate and further it would amount to ignoring the substantive statutory provision that prescribes minimum sentence for a criminal act relating to demand and acceptance of bribe. The amount may be small but to curb and repress this kind of proclivity the legislature has prescribed the minimum sentence. It should be paramountly borne in mind that corruption at any level does not deserve either sympathy or leniency. In fact, reduction of the sentence would be adding a premium. The law does not so countenance and, rightly so, because corruption corrodes the spine of a nation and in the ultimate eventuality makes the economy sterile. [Paras 22– 23] [180-G; 181-A-G]

Vishweshwaraiah Iron and Steel Ltd. v.Abdul Gani and Ors. **AIR 1998 SC 1895;** *Keshabhai Malabhai Vankar* v. *State of Gujarat* **1995 Supp (3) SCC 704;** **Laxmidas Morarji (Dead) by LRS. v. Behrose Darab Madan* **(2009) 10 SCC 425: 2009 (14) SCR 777 – relied on.**

Case Law Reference:

2006 (1) SCR 180	**relied on**	**Para 12**
2000 (5) Suppl. SCR 584	**relied on**	**Para 13**
2000 (4) Suppl. SCR 475	**relied on**	**Para 13**
2008 (11) SCR 66	**relied on**	**Para 14**
2009 (11) SCR 513	**relied on**	**Para 15**
2009 (2) SCR 1021	**relied on**	**Para 16**
AIR 1998 SC 1895	**relied on**	**Para 20**
1995 Supp (3) SCC 704	**relied on**	**Para 21**
2009 (14) SCR 777	**relied on**	**Para 22**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 97 of 2012.

From the Judgment & Order dated 14.10.2011 of the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 31 of 1999.

WITH

Criminal Appeal No. 98 of 2002.

K.L. Dave, Rashmikumar Manilal Vithlani for the Appellant.

Jesal, Hemantika Wahi for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. The present appeals are directed against the judgment of conviction and order of sentence dated 14.10.2011 passed by the learned Single Judge of the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 31 of 1999 whereby the appellate court has confirmed the judgment and order of conviction and sentence dated 1st of December, 1998 passed by the learned Additional Special Judge, Bhavnagar in Special Case No. 6 of 1994, wherein the learned Additional Special Judge had convicted the appellants for the offence punishable under Section 7 of the Prevention of Corruption Act, 1988 (for brevity 'the Act') and sentenced them to undergo rigorous imprisonment of six months with fine of Rs.5,000/- each, in default of payment of fine, to suffer simple imprisonment for a period of one month and further convicted them under Section 13(2) of the Act and sentenced them to undergo rigorous imprisonment for a period of one year with a fine of Rs.5,000/- each, in default, to suffer simple imprisonment for a period of one month with the stipulation that both the sentences would be concurrent.

2. The broad essential facts of the prosecution case are that the complainant, Gajendra Jagatsinh Jadeja, was residing in Plot No. 1 in Virbhadranagar Society. As in the City Survey Office record, the name of his grandfather stood recorded in respect of the premises in question, the complainant in order to obtain the property card and the sketch of the same, went to the office of the City Survey Office, Bhavnagar on 11th March, 1994, to submit an application for the aforesaid purpose and he was asked by Mr. Jagani, Clerk in the said office to come on 15th of March, 1994. On the said date, the complainant at about 1.30 p.m. went to the City Survey Office and gave the application to Mr. Jagani, who asked him to hand over the application to Narendra Champaklal Trivedi, the appellant in Criminal Appeal No. 97 of 2012, sitting in the opposite room who told him that it would take a week's time to prepare the said copies. The complainant made a request to Shri Jagani to expedite the matter as he had to go to meet his father with the copies and Mr. Jagani replied that it would cost him Rs.50/- to get the copies immediately. As the complainant had no money at that time he was asked by Jagani to meet Trivedi and Harjibhai Devjibhai Chauhan, the appellant in Criminal Appeal No. 98/2012 who told him that the copies would be given to him on payment and he could receive the copies between 4.30 to 4.50 p.m. As the appellant had no intention to make the payment, he approached the office of the Anti Corruption Bureau which was situate on the ground floor of his premises and gave a complaint to the Police Inspector. The concerned inspector sought assistance of two panch witnesses who were made to understand the case and thereafter experiment of U.V. Lamp was carried out with the help of anthrecene powder. Thereafter, the complainant produced the currency notes and necessary instructions were given to the complainant as well as to the witnesses. A preliminary part of the panchnama was drawn and signatures of the panchas were taken and thereafter, the complainant, the panchas and the members of the raiding party proceeded to the City Survey Office.

3. As the narration of the prosecution case proceeds, Jagani asked the complainant to meet said Chauhan and pay the money. Being instructed, they went to the room of said Chauhan and he was directed to pay Rs. 7.10 paise as fees to said Trivedi and obtain the property card and sketch. Thereafter, said Chauhan demanded money from the complaint as decided and on being asked whom to hand over the amount, Chauhan said to give it to Trivedi and Trivedi was asked to accept the amount. Thereafter, the complainant took out the money from his left pocket of the shirt and handed over to Trivedi which was accepted by Trivedi by his right hand. He counted the money by both hands and put the same in the left side pocket of his shirt. As pre-decided, the signal was given to the raiding party which rushed to the place of the incident. Thereafter, the experiment of U.V. Lamp was carried out on the fingers of both the hands and palms of Trivedi and pocket also and thereon light blue fluorescent marks were found. Panch witness No. 1 took out the currency notes from Trivedi. There were two ten rupee notes and one five rupee note. On those currency notes, light blue fluorescent marks were found with the numbers mentioned on the first part of the panchnama. On being asked about the rest of the money, Trivedi had said that he had given it to Chauhan. Experiment of U.V. Lamp was made on the hands and pockets of Trivedi and Chauhan and light blue fluorescent marks of anthrecene powder was found. The currency notes were tallied with the numbers mentioned on the first part of the panchnama. From both the accused-appellants, currency notes were recovered, marks of anthrecene powder were found and the second part of the panchnama was prepared. The Investigating Officer carried out further investigation, recorded the panchnama and after obtaining requisite sanction, he laid the chargesheet before the Competent Court on 25th of August 1994.

4. The learned trial Judge framed charges in respect of the offences that have been mentioned hereinbefore. The appellants pleaded not guilty and sought to be tried.

5. In order to bring home the charges levelled against the appellants, the prosecution examined number of witnesses and produced documentary evidence in support of the case.

6. The accused-appellants in their statements under Section 313 of the Code of Criminal Procedure disputed the charges that they had demanded the amount towards illegal gratification but did not want to adduce any evidence in their defence.

7. The learned trial Judge, appreciating the oral as well as the documentary evidence and taking into consideration the submissions advanced by the parties, found the appellants guilty and convicted them as has been stated hereinabove.

8. The appellants preferred a singular appeal before the High Court. It was contended before the High Court that the learned trial Judge had failed to take into consideration the plea of the defence and the inadequacy of the material brought on record from which it would be graphically clear that the prosecution had miserably failed to prove its case that there was demand of bribe and acceptance thereof and hence, the ingredients of Sections 7 and 13 of the Act had not been established. It was argued that neither the FIR nor the testimony of the complainant remotely establish that there was a demand for bribe and once the said core fact was not proven, the charges levelled against them were bound to collapse like a pack of cards. It was urged that as the office of the Anti Corruption Bureau had been leased out by the complainant, he was able to rope the accused-appellants in a bogus trap and falsely implicate them. It was further contended that the complainant and Panch witness No. 1 had stated in the cross-examination that Trivedi had not made any demand of Rs.50/- from the complainant and the recovery of the trapped amount had also not been proven inasmuch as the panchas are not independent witnesses and their evidence did not merit any acceptance. It was proponed that the learned trial Judge had failed to consider the fact that Jagani who was the main culprit

was not booked under law and, therefore, the prosecution had deliberately severed the link to rope in the appellants and hence, it was a malafide prosecution. It was also submitted that there were other witnesses in the room but the prosecution chose to examine only the interested witnesses and in essence, the judgment of conviction suffered from perversity of approach and deserved to be axed.

9. The learned counsel for the State urged before the High Court that the emphasis laid on Jagani not being arrayed as an accused was totally inconsequential as he had never made any demand from the complainant. He referred to various documents on record and the testimony of the witnesses that the charges levelled against the accused persons had been proven to the hilt and there was nothing on record which would remotely suggest that they had been falsely implicated. The relationship between the complainant and the ACB officer could not be taken into consideration to come to a conclusion that the complaint was false, malafide and the accused persons had been deliberately roped in. It was canvassed by him that the amount had been recovered from the pocket of Trivedi and the demand had been made by the accused Chauhan to handover the amount of illegal gratification to Trivedi. The offence was committed with the consent of both and the same had been established by the oral and documentary evidence. The learned counsel for the State gave immense emphasis on the version of the Panch witnesses, the scientific proof and the testimony of the trapping officer. The principle of presumption was pressed into service and the said contention was edificed by putting forth the stance that the cumulative effect of the evidence on record clearly satisfied the ingredients of Sections 7 and 13(2) read with Section 13(1)(d) of the Act to bring home the charges levelled against the accused persons.

10. The learned single Judge took note of the facts as regards the presence of the accused appellants in the room, the demand made by the appellant No. 2, Chauhan, in the

presence of the Panch witness No. 1, the direction by Chauhan to hand it over to Trivedi which established the consent, the deposition of PW-2 about the involvement and complicity of the appellants in the crime, the absence of enmity between the complainant and the accused persons, the unreproachable aspect of the evidence of the witnesses who stood embedded in their stand, the acceptance and recovery that inspired total credence about the demand and acceptance, and the principle of presumption being attracted, all of which would go a long way to show that the prosecution had proven the case beyond reasonable doubt and further considered the inability of the accused-appellants to rebut the presumption as envisaged under Section 20 of the Act, the unacceptability and farfetchedness of the theory of existence of obligation between the informant and the investigating officer to implicate the accused-appellants in the crime, the failure of the appellants to explain how the amount in question was found from their possession and how anthrecene powder was found on their hands and eventually opined that the cumulative aspect of all the facts and circumstances clearly establish the charges framed against the appellants. Being of this view, the High Court affirmed the judgment of conviction.

11. We have heard the learned counsel of both the parties at length and carefully perused the record.

12. At the outset, we may state that the recovery part has gone totally unchallenged. Though a feeble attempt was made before the High Court and also before us, yet a perusal of the evidence and the test carried out go a long way to show that the amount was recovered from the possession of the accused-appellants. It is the settled principle of law that mere recovery of the tainted money is not sufficient to record a conviction unless there is evidence that bribe had been demanded or money was paid voluntarily as a bribe. Thus, the only issue that remains to be addressed is whether there was demand of bribe and acceptance of the same. Be it noted, in the absence of

any evidence of demand and acceptance of the amount as illegal gratification, recovery would not alone be a ground to convict the accused. This has been so stated in *T. Subramanian v. The State of Tamil Nadu*[1].

13. The demand and acceptance of the amount as illegal gratification is the *sine qua non* for constituting an offence under the Act. It is also settled in law that there is a statutory presumption under Section 20 of the Act which can be dislodged by the accused by bringing on record some evidence, either direct or circumstantial, that money was accepted other than the motive or reward as stipulated under Section 7 of the Act. It is obligatory on the part of the court to consider the explanation offered by the accused under Section 20 of the Act and the consideration of the explanation has to be on the anvil of preponderance of probability. It is not to be proven beyond all reasonable doubt. It is necessary to state here that the prosecution is bound to establish that there was an illegal offer of bribe and acceptance thereof. The same has to be founded on facts. In this context, we may refer with profit to the decision in *M. Narsinga Rao v. State of A.P.*[2] wherein a three-Judge Bench referred to Section 20 of the Act and stated that the only condition for drawing the legal presumption under Section 20 is that during trial it should be proved that the accused has accepted or agreed to accept any gratification. The section does not say that the said condition should be satisfied through direct evidence. Its only requirement is that it must be proved that the accused has accepted or agreed to accept the gratification. Thereafter, the Bench produced a passage from *Madhukar Bhaskarrao Joshi v. State of Maharashtra*[3] with approval. It reads as follows: -

> "The premise to be established on the facts for drawing the presumption is that there was payment or

1. AIR 2006 SC 836.
2. (2001) 1 SCC 691.
3. (2000) 8 SCC 571.

acceptance of gratification. Once the said premise is established the inference to be drawn is that the said gratification was accepted 'as motive or reward' for doing or forbearing to do any official act. So the word 'gratification' need not be stretched to mean reward because reward is the outcome of the presumption which the court has to draw on the factual premise that there was payment of gratification. This will again be fortified by looking at the collocation of two expressions adjacent to each other like 'gratification or any valuable thing'. If acceptance of any valuable thing can help to draw the presumption that it was accepted as motive or reward for doing or forbearing to do an official act, the word 'gratification' must be treated in the context to mean any payment for giving satisfaction to the public servant who received it."

14. In *Raj Rajendra Singh Seth v. State of Jharkhand & Anr.*[4] the principle laid down in *Madhukar Bhaskarrao Joshi* (supra) was reiterated.

15. In *State of Maharashtra v. Dnyaneshwar Laxman Rao Wankhede,*[5] it has been held that to arrive at the conclusion that there had been a demand of illegal gratification, it is the duty of the court to take into consideration the facts and circumstances brought on record in their entirety and for the said purpose, undisputedly, the presumptive evidence as laid down in Section 20 of the Act must also be taken into consideration.

16. In *C.M. Girish Babu* v. *C.B.I., Cochin, High Court of Kerala*,[6] after referring to the decisions in *M.Narsinga Rao* (supra) and *Madhukar Bhaskarrao Joshi* (supra), this Court has held thus: -

4. AIR 2008 SC 3217.

5. (2009) 15 SCC 200.

6. AIR 2009 SC 2022.

"19. It is well settled that the presumption to be drawn under Section 20 is not an inviolable one. The accused charged with the offence could rebut it either through the cross-examination of the witnesses cited against him or by adducing reliable evidence. If the accused fails to disprove the presumption the same would stick and then it can be held by the Court that the prosecution has proved that the accused received the amount towards gratification."

17. In the case at hand, the money was recovered from the pockets of the accused-appellants. A presumption under Section 20 of the Act becomes obligatory. It is a presumption of law and casts an obligation on the court to apply it in every case brought under Section 7 of the Act. The said presumption is a rebuttable one. In the present case, the explanation offered by the accused-appellants has not been accepted and rightly so. There is no evidence on the base of which it can be said that the presumption has been rebutted.

18. The learned counsel for the appellant has submitted with immense force that admittedly there has been no demand or acceptance. To bolster the said aspect, he has drawn inspiration from the statement of the complainant in examination-in-chief. The said statement, in our considered opinion, is not to be read out of context. He has clarified as regards the demand and acceptance at various places in his examination and the cross-examination. The shadow witness has clearly stated that there was demand of bribe and giving of the same. Nothing has been brought on record to doubt the presence of the shadow witness. He had given the signal after which the trapping party arrived at the scene and did the needful. All the witnesses have supported the case of the prosecution. The currency notes were recovered from the possession of the appellants. In the lengthy cross-examination nothing has really been elicited to doubt their presence and veracity of the testimony. The appellants in their statement under

Section 313 of the Code of Criminal Procedure have made an adroit effort to explain their stand but we have no hesitation in stating that they miserably failed to dislodge the presumption. PW-2 has categorically stated that the complainant took out Rs.50/- from his pocket and gave it to the accused appellant as directed. Thus analysed and understood, there remains no shadow of doubt that the accused-appellants had demanded the bribe and accepted the same to provide the survey report. Therefore, the conviction recorded by the learned trial Judge which has been affirmed by the learned single Judge of the High Court, does not warrant any interference.

19. The learned counsel for the appellants had, in the course of arguing the appeal, submitted that the appellants have suffered enough as they have lost their jobs and the amount is petty, the said aspects should be considered as mitigating factors for reduction of the sentence. Sympathy has also been sought to be drawn on the foundation that the occurrence had taken place almost 18 years back and the amount is paltry. On a perusal of Section 7(1) of the Act, it is perceptible that when an offence is proved under the said section, the public servant shall be punished with imprisonment which shall not be less than six months but which may extend to five years and shall also be liable to fine. Section 13(2) of the Act postulates that any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to fine. As is demonstrable from the impugned judgment, the learned trial court has imposed the minimum sentence and the High Court has affirmed the same.

20. The submission of the learned counsel for the appellants, if we correctly understand, in essence, is that power under Article 142 of the Constitution should be invoked. In this context, we may refer with profit to the decision of this Court in *Vishweshwaraiah Iron and Steel Ltd. V. Abdul Gani and Ors*[7].

7. AIR 1998 SC 1895.

wherein it has been held that the constitutional powers under Article 142 of the Constitution cannot, in any way, be controlled by any statutory provision but at the same time, these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in any statute dealing expressly with the subject. It was also made clear in the said decision that this Court cannot altogether ignore the substantive provisions of a statute.

21. In *Keshabhai Malabhai Vankar v. State of Gujarat,*[8] it has been held as follows: -

> "6. It is next contended that this Court in exercise of power under Article 142 of the Constitution has plenary power to reduce the sentence. We are afraid that we cannot ignore the statutory object and reduce the minimum sentence prescribed under the Act. Undoubtedly under Article 142 the Supreme Court has the power untrammelled by any statutory limits but when penal offences have been prescribed for violation of statutory regulations for production, equitable supply and distribution of essential commodities at fair prices, it was done in the social interest which this Court would keep in mind while exercising power under Article 142 and respect the legislative policy to impose minimum sentence. Amendment to the Act was made to stamp out the statutory violations with impunity. Thus we find that it is not a fit case warranting interference. The appeal is accordingly dismissed."

22. In *Laxmidas Morarji (Dead) by LRS. v. Behrose Darab Madan,*[9] it has been ruled thus: -

> "Article 142 being in the nature of a residuary power based on equitable principles, the Courts have thought it advisable to leave the powers under the article undefined.

8. 1995 Supp (3) SCC 704.

9. (2009) 10 SCC 425.

The power under Article 142 of the Constitution is a constitutional power and hence, not restricted by statutory enactments. Though the Supreme Court would not pass any order under Article 142 of the Constitution which would amount to supplanting substantive law applicable or ignoring express statutory provisions dealing with the subject, at the same time these constitutional powers cannot in any way, be controlled by any statutory provisions. However, it is to be made clear that this power cannot be used to supplant the law applicable to the case. This means that acting under Article 142, the Supreme Court cannot pass an order or grant relief which is totally inconsistent or goes against the substantive or statutory enactments pertaining to the case."

23. In view of the aforesaid pronouncement of law, where the minimum sentence is provided, we think it would not be at all appropriate to exercise jurisdiction under Article 142 of the Constitution of India to reduce the sentence on the ground of the so-called mitigating factors as that would tantamount to supplanting statutory mandate and further it would amount to ignoring the substantive statutory provision that prescribes minimum sentence for a criminal act relating to demand and acceptance of bribe. The amount may be small but to curb and repress this kind of proclivity the legislature has prescribed the minimum sentence. It should be paramountly borne in mind that corruption at any level does not deserve either sympathy or leniency. In fact, reduction of the sentence would be adding a premium. The law does not so countenance and, rightly so, because corruption corrodes the spine of a nation and in the ultimate eventuality makes the economy sterile.

24. The appeals, being *sans substratum*, stand dismissed.

D.G. Appeals dismissed.

THE SECRETARY, MIN.OF DEFENCE & ORS.
v.
PRABHASH CHANDRA MIRDHA
(Civil Appeal No. 2333 of 2007)

MAY 29, 2012

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Service Law – Misconduct – Disciplinary proceedings – Whether the authority, lower or higher than of the appointing authority, can initiate the proceedings against the delinquent on grounds of alleged misconduct – Held: Removal and dismissal of a delinquent on misconduct must be by the authority not below the appointing authority – However, it does not mean that disciplinary proceedings may not be initiated against the delinquent by the authority lower than the appointing authority – It is permissible for an authority, higher than appointing authority to initiate the proceedings and impose punishment, in case he is not the appellate authority so that the delinquent may not loose the right of appeal – In other case, delinquent has to prove as what prejudice has been caused to him – Constitution of India, 1950 – Article 311.

Sampuran Singh v. State of Punjab **AIR 1982 SC 1407: 1982 (3) SCC 200;** *Surjit Ghosh v. Chairman and Managing Director, United Commercial Bank & Ors.* **AIR 1995 SC 1053: 1995 (2) SCC 474;** *Balbir Chand v. FCI Ltd. & Ors.* **AIR 1997 SC 2229: 1996 (10) Suppl. SCR 156;** *A. Sudhakar v. Postmaster-General Hyderabad & Anr.* **(2006) 4 SCC 348: 2006 (3) SCR 373;** *Inspector General of Police & Anr. v. Thavasiappan* **AIR 1996 SC 1318: 1996 (1) SCR 977;** *Steel Authority of India & Anr. v. Dr. R.K. Diwakar & Ors.* **AIR 1998 SC 2210: 1997 (11) SCC 17;** *State of U.P. & Anr. v. Chandrapal Singh & Anr.* **AIR 2003 SC 4119: 2003 (2) SCR 1062;** *Transport Commissioner, Madras – 5 v. A. Radha Krishna Moorthy* **(1995) 1 SCC 332;** *Director General, ESI &*

Anr. v. T. Abdul Razak etc. **AIR 1996 SC 2292: 1996 (3) Suppl. SCR 80 and** *Chairman-cum-Managing Director, Coal India Limited & Ors. v. Ananta Saha & Ors.* **(2011) 5 SCC 142: 2011 (5) SCR 44 – relied on.**

Service Law – Misconduct – Disciplinary proceedings – Chargesheet – Challenge to – Held: A chargesheet or show cause notice in disciplinary proceedings should not ordinarily be quashed by the Court – Chargesheet cannot generally be a subject matter of challenge as it does not adversely affect the rights of the delinquent unless it is established that the same has been issued by an authority not competent to initiate the disciplinary proceedings – Neither the disciplinary proceedings nor the chargesheet can be quashed at an initial stage as it would be a premature stage to deal with the issues – Proceedings are not liable to be quashed on grounds that proceedings had been initiated at a belated stage or could not be concluded in a reasonable period unless the delay creates prejudice to the delinquent employee – Gravity of alleged misconduct is a relevant factor to be taken into consideration while quashing the proceedings.

The State of Madhya Pradesh v. Bani Singh & Anr. **AIR 1990 SC 1308: 1990 Suppl. SCC 738;** *State of Punjab & Ors. v. Chaman Lal Goyal* **(1995) 2 SCC 570: 1995 (1) SCR 695;** *Deputy Registrar, Cooperative Societies, Faizabad v. Sachindra Nath Pandey & Ors.* **(1995) 3 SCC 134;** *Union of India & Anr. v. Ashok Kacker* **1995 Supp (1) SCC 180;** *Secretary to Government, Prohibition & Excise Department v. L. Srinivasan* **(1996) 3 SCC 157: 996 (2) SCR 737;** *State of Andhra Pradesh v. N. Radhakishan* **AIR 1998 SC 1833: 1998 (2) SCR 693;** *Food Corporation of India & Anr. v. V.P. Bhatia* **(1998) 9 SCC 131;** *Additional Supdt. of Police v. T. Natarajan* **1999 SCC (L&S) 646;** *M.V. Bijlani v. Union of India & Ors.* **AIR 2006 SC 3475: 2006 (3) SCR 896;** *P.D. Agrawal v. State Bank of India & Ors.* **AIR 2006 SC 2064: 2006 (1) Suppl. SCR 454;** *Government of A.P. & Ors. v. V. Appala*

Swamy **(2007) 14 SCC 49: 2007 (2) SCR 19;** *Secretary, Forest Department & Ors. v. Abdur Rasul Chowdhury* **(2009) 7 SCC 305;** *State of U.P. v. Brahm Datt Sharma* **AIR 1987 SC 943: 1987 (2) SCR 444;** *Executive Engineer, Bihar State Housing Board v. Ramesh Kumar Singh & Ors.* **(1996) 1 SCC 327: 1995 (5) Suppl. SCR 543;** *Ulagappa & Ors. v. Div. Commr., Mysore & Ors.* **AIR 2000 SC 3603: 2001 (10) SCC 639;** *Special Director & Anr. v. Mohd. Ghulam Ghouse & Anr.* **AIR 2004 SC 1467: 2004 (1) SCR 399;** *Union of India & Anr. v. Kunisetty Satyanarayana* **AIR 2007 SC 906: 2006 (9) Suppl. SCR 257;** *State of Orissa & Anr. v. Sangram Keshari Misra & Anr.* **(2010) 13 SCC 311 and** *Union of India & Ors. v. Upendra Singh* **(1994) 3 SCC 357 – relied on.**

Case Law Reference:

1982 (3) SCC 200	**relied on**	**Para 5**
1995 (2) SCC 474	**relied on**	**Para 5**
1996 (10) Suppl. SCR 156	**relied on**	**Para 5**
2006 (3) SCR 373	**relied on**	**Para 5**
1996 (1) SCR 977	**relied on**	**Para 6**
1997 (11) SCC 17	**relied on**	**Para 7**
2003 (2) SCR 1062	**relied on**	**Para 7**
(1995) 1 SCC 332	**relied on**	**Para 8**
1996 (3) Suppl. SCR 80	**relied on**	**Para 8**
2011 (5) SCR 44	**relied on**	**Para 8**
1990 Suppl. SCC 738	**relied on**	**Para 9**
1995 (1) SCR 695	**relied on**	**Para 9**
(1995) 3 SCC 134	**relied on**	**Para 9**
1995 Supp (1) SCC 180	**relied on**	**Para 9**

1996 (2) SCR 737	**relied on**	**Para 9**
1998 (2) SCR 693	**relied on**	**Para 9**
(1998) 9 SCC 131	**relied on**	**Para 9**
1999 SCC (L&S) 646	**relied on**	**Para 9**
2006 (3) SCR 896	**relied on**	**Para 9**
2006 (1) Suppl. SCR 454	**relied on**	**Para 9**
2007 (2) SCR 19	**relied on**	**Para 9**
(2009) 7 SCC 305	**relied on**	**Para 10**
1987 (2) SCR 444	**relied on**	**Para 11**
1995 (5) Suppl. SCR 543	**relied on**	**Para 11**
2001 (10) SCC 639	**relied on**	**Para 11**
2004 (1) SCR 399	**relied on**	**Para 11**
2006 (9) Suppl. SCR 257	**relied on**	**Para 11**
(2010) 13 SCC 311	**relied on**	**Para 12**
(1994) 3 SCC 357	**relied on**	**Para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2333 of 2007.

From the Judgment & Order dated 26.2.2004 of the High Court of Judicature of Andhra Pradesh at Hyderabad in Writ Petition No. 14674 of 1997.

R.P. Bhatt, Sunita Sharma, B.V. Balaramdas, R. Bala, Anil Katiyar for the appellants.

The Order of the Court was delivered

O R D E R

1. This appeal has been preferred against the impugned judgment and orders dated 26.2.2004 and 13.8.2004 passed by the High Court of Judicature at Hyderabad in Writ Petition No. 14674 of 1997, and in Review W.P.M.P. No. 18654 of 2004. The issue involved in this case is as to whether the authority, lower or higher than of the appointing authority, can initiate the proceedings against the delinquent on grounds of alleged misconduct.

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

A. Respondent had been working as an Assistant Foreman in the Ordnance Factory, Yeddumailaram, when charge memo dated 8.1.1992 was issued to him on the alleged demand of bribe of Rs.37,000/- and acceptance of Rs.4,150/- on 3.8.1991 in cash from the representative of firm M/s Teela International Limited, Hosur, Bangalore.

B. Aggrieved by the said charge memo, respondent preferred O.A. No. 1641 of 1995 before the Central Administrative Tribunal, Hyderabad (hereinafter called as 'Tribunal') on 23.12.1995 on the ground that the charge memo had been issued to the respondent by the authority not competent to do so, being subordinate to his appointing authority.

C. The said application was allowed vide judgment and order dated 4.1.1996 only on the ground that the officer who had issued the charge memo was subordinate to the appointing authority of the delinquent and thus, had no competence to initiate the disciplinary proceedings.

D. Aggrieved by the said order, a Review Application was filed by the appellants which was dismissed vide order dated 20.3.1997.

E. Aggrieved, the appellants filed the Writ Petition No. 14674 of 1997 before the High Court which has been

dismissed vide impugned judgment and order dated 30.6.2004. Review Application filed by the appellants also stood dismissed vide order dated 13.8.2004.

Hence, this appeal.

3. This Court entertained the appeal vide order dated 30.4.2007 but did not grant any interim relief and in spite of notice to the respondent, he did not enter appearance.

4. The legal proposition has been laid down by this Court while interpreting the provisions of Article 311 of the Constitution of India, 1950 that the removal and dismissal of a delinquent on misconduct must be by the authority not below the appointing authority. However, it does not mean that disciplinary proceedings may not be initiated against the delinquent by the authority lower than the appointing authority.

5. It is permissible for an authority, higher than appointing authority to initiate the proceedings and impose punishment, in case he is not the appellate authority so that the delinquent may not loose the right of appeal. In other case, delinquent has to prove as what prejudice has been caused to him. (Vide: *Sampuran Singh v. State of Punjab,* AIR 1982 SC 1407; *Surjit Ghosh v. Chairman and Managing Director, United Commercial Bank & Ors.,* AIR 1995 SC 1053; *Balbir Chand v. FCI Ltd. & Ors.,* AIR 1997 SC 2229; and *A. Sudhakar v. Postmaster-General Hyderabad & Anr.,* (2006) 4 SCC 348).

6. In *Inspector General of Police & Anr. v. Thavasiappan,* AIR 1996 SC 1318, this Court reconsidered its earlier judgments on the issue and came to the conclusion that there is nothing in law which inhibits the authority subordinate to the appointing authority to initiate disciplinary proceedings or issue charge memo and it is certainly not necessary that charges should be framed by the authority competent to award the punishment or that the inquiry should be conducted by such an authority.

7. In *Steel Authority of India & Anr. v. Dr. R.K. Diwakar & Ors.,* AIR 1998 SC 2210; and *State of U.P. & Anr. v. Chandrapal Singh & Anr.,* AIR 2003 SC 4119, a similar view has been reiterated.

8. In *Transport Commissioner, Madras – 5 v. A. Radha Krishna Moorthy,* (1995) 1 SCC 332, this Court held:

> "Insofar as initiation of enquiry by an officer subordinate to the appointing authority is concerned, it is well settled now that it is unobjectionable. The initiation can be by an officer subordinate to the appointing authority. Only the dismissal/removal shall not be by an authority subordinate to the appointing authority. Accordingly it is held that this was not a permissible ground for quashing the charges by the Tribunal."

(See also: *Director General, ESI & Anr. v. T. Abdul Razak etc.,* AIR 1996 SC 2292; and *Chairman-cum-Managing Director, Coal India Limited & Ors. v. Ananta Saha & Ors.,* (2011) 5 SCC 142).

9. Law does not permit quashing of chargesheet in a routine manner. In case the delinquent employee has any grievance in respect of the chargesheet he must raise the issue by filing a representation and wait for the decision of the disciplinary authority thereon. In case the chargesheet is challenged before a court/tribunal on the ground of delay in initiation of disciplinary proceedings or delay in concluding the proceedings, the court/tribunal may quash the chargesheet after considering the gravity of the charge and all relevant factors involved in the case weighing all the facts both for and against the delinquent employee and must reach the conclusion which is just and proper in the circumstance. (Vide: *The State of Madhya Pradesh v. Bani Singh & Anr.,* AIR 1990 SC 1308; *State of Punjab & Ors. v. Chaman Lal Goyal,* (1995) 2 SCC 570; *Deputy Registrar, Cooperative Societies, Faizabad v. Sachindra Nath Pandey & Ors.,* (1995) 3 SCC 134; *Union of*

India & Anr. v. Ashok Kacker, 1995 Supp (1) SCC 180; *Secretary to Government, Prohibition & Excise Department v. L. Srinivasan,* (1996) 3 SCC 157; *State of Andhra Pradesh v. N. Radhakishan,* AIR 1998 SC 1833; *Food Corporation of India & Anr. v. V.P. Bhatia,* (1998) 9 SCC 131; *Additional Supdt. of Police v. T. Natarajan,* 1999 SCC (L&S) 646; *M.V. Bijlani v. Union of India & Ors.,* AIR 2006 SC 3475; *P.D. Agrawal v. State Bank of India & Ors.,* AIR 2006 SC 2064; and *Government of A.P. & Ors. v. V. Appala Swamy,* (2007) 14 SCC 49).

10. In *Secretary, Forest Department & Ors. v. Abdur Rasul Chowdhury,* (2009) 7 SCC 305, this Court dealt with the issue and observed that delay in concluding the domestic enquiry is not always fatal. It depends upon the facts and circumstances of each case. The unexplained protracted delay on the part of the employer may be one of the circumstances in not permitting the employer to continue with the disciplinary proceedings. At the same time, if the delay is explained satisfactorily then the proceedings should be permitted to continue.

11. Ordinarily a writ application does not lie against a chargesheet or show cause notice for the reason that it does not give rise to any cause of action. It does not amount to an adverse order which affects the right of any party unless the same has been issued by a person having no jurisdiction/ competence to do so. A writ lies when some right of a party is infringed. In fact, chargesheet does not infringe the right of a party. It is only when a final order imposing the punishment or otherwise adversely affecting a party is passed, it may have a grievance and cause of action. Thus, a chargesheet or show cause notice in disciplinary proceedings should not ordinarily be quashed by the Court. (Vide : *State of U.P. v. Brahm Datt Sharma,* AIR 1987 SC 943; *Executive Engineer, Bihar State Housing Board v. Ramesh Kumar Singh & Ors.,* (1996) 1 SCC 327; *Ulagappa & Ors. v. Div. Commr., Mysore & Ors.,*

AIR 2000 SC 3603 (2); *Special Director & Anr. v. Mohd. Ghulam Ghouse & Anr.,* AIR 2004 SC 1467; and *Union of India & Anr. v. Kunisetty Satyanarayana,* AIR 2007 SC 906).

12. In *State of Orissa & Anr. v. Sangram Keshari Misra & Anr.,* (2010) 13 SCC 311, this Court held that normally a chargesheet is not quashed prior to the conclusion of the enquiry on the ground that the facts stated in the charge are erroneous for the reason that correctness or truth of the charge is the function of the disciplinary authority.

(See also: *Union of India & Ors. v. Upendra Singh,* (1994) 3 SCC 357).

13. Thus, the law on the issue can be summarised to the effect that chargesheet cannot generally be a subject matter of challenge as it does not adversely affect the rights of the delinquent unless it is established that the same has been issued by an authority not competent to initiate the disciplinary proceedings. Neither the disciplinary proceedings nor the chargesheet be quashed at an initial stage as it would be a premature stage to deal with the issues. Proceedings are not liable to be quashed on the grounds that proceedings had been initiated at a belated stage or could not be concluded in a reasonable period unless the delay creates prejudice to the delinquent employee. Gravity of alleged misconduct is a relevant factor to be taken into consideration while quashing the proceedings.

14. The instant case requires to be examined in the light of the aforesaid settled legal propositions. The respondent delinquent challenged the chargesheet on the ground that it had been issued by the authority not competent to do so. The Tribunal vide impugned order dated 4.1.1996 quashed the same only on the ground that the Deputy Director General of Ordnance Factory was the appointing authority of the delinquent employee and competent to impose the penalty referred to under the statutory rules. The chargesheet had been issued by

the authority subordinate to him. Thus, the same was not issued by the competent authority.

15. The said judgment and order of the Tribunal shows that the present appellants were not represented nor any argument had been advanced on their behalf as neither name of the counsel for the appellants has been mentioned rather the space is left blank, nor any reference to his argument had been made. The appellants filed a review petition according to which the order had been passed by the Tribunal without giving an opportunity to the appellants to file a detailed counter affidavit and a plea had been taken that the authority which issued the chargesheet had been authorised by the disciplinary authority to serve the charge memo and conduct/conclude the enquiry in the name and under the order of the competent authority. However, the said authority was authorised to impose the punishment.

The review has been rejected by a cryptic order. The High Court concurred with the findings recorded by the Tribunal.

16. Even before us, no order of authorisation in general or any rule permitting the competent authority to delegate its power for conducting the enquiry has been produced. Thus, in such a fact-situation, it is neither desirable nor possible to deal with the issue, rather it is desirable that the issue be left open.

Be that as it may, in case the Tribunal as well as the High Court has permitted the appellants to proceed de novo, we fail to understand why such a course was not adopted though the appellants wasted 20 years in litigation without any purpose.

17. However, in the instant case, the Tribunal has quashed the chargesheet vide order dated 20th March, 1997 in respect of misconduct alleged to have taken place on 31.8.1991. Though the allegations against the delinquent had been very serious i.e. demand and acceptance of bribe, a period of two decades has passed since the alleged incident. Disciplinary

proceedings could not be proceeded further as the chargesheet itself had been quashed. There is nothing on record to show that the respondent delinquent is still in service and that even if the appellants are permitted to proceed with the inquiry, the evidence which was available 21 years ago would be available today.

18. In view of the above, while leaving the question of law open, we do not want to proceed with the appeal further on merit.

The appeal is accordingly disposed of. No order as to costs.

B.B.B. Appeal disposed of.

JUGENDRA SINGH
v.
STATE OF U.P.
(Criminal Appeal No. 82 of 2008)

MAY 29, 2012

[DR. B. S. CHAUHAN AND DIPAK MISRA, JJ.]

Penal Code, 1860:

ss. 302 and 376 read with s. 511 – Accused causing death of a 9 year old girl by strangulation in an attempt to commit rape on her – Acquittal by trial court – Conviction by High Court – Life imprisonment awarded – Held: Medical report clearly says that the death was caused due to asphyxia as a result of throttling – From the evidence of witnesses and the medical evidence, only a singular view is possible that the accused had made an attempt to commit rape and he was witnessed while he was strangulating the child with a shirt – The trial Judge had given unnecessary importance to absolutely minor discrepancies which do not go to the root of the matter and the High Court has correctly treated such analysis to be perverse – Sentence/Sentencing – Appeal against acquittal – Evidence – Minor discrepancies in.

Sentence/Sentencing:

Punishment for attempt to commit rape on a 9 year old girl and causing her death – Held: Rape or an attempt to rape is a crime not only against an individual but a crime which destroys the basic equilibrium of the social atmosphere – The consequential death of a child is more horrendous and has a devastating effect on her family and, in the ultimate, eventuates on the collective at large – The cry of the collective has to be answered and respected and that is what exactly

the High Court has done by converting the decision of acquittal to that of conviction and imposing the sentence as per law.

CODE OF CRIMINAL PROCEDURE, 1908:

Appeal against acquittal – Power of appellate court – Explained.

The accused-appellant was prosecuted for attempt to commit rape on a nine year old girl and causing her death. The prosecution case was that on the day of the incident when the victim and her younger brother, were bathing in a pond near their house, the accused took her to the nearby field. They were followed by the younger brother of the victim. The accused took off the undergarment of the girl and flung her on the ground. The cries of the girl and her brother attracted PW-2 and another, who had seen the accused taking the girl to the field. They rushed to the place. Soon thereafter PW-1, the father of the victim, and his elder son also rushed to the plot and saw the accused pressing the neck of the girl. By the time the witnesses could reach the spot the girl was dead. The accused was apprehended at the spot. The trial court taking note of some discrepancies in the testimony of the witnesses, acquitted the accused. However, the High Court convicted the accused u/s. 302 and s. 376 read with s.511 IPC and sentenced him to imprisonment for life and 10 years RI, respectively, under the two counts.

Dismissing the appeal of the accused, the Court

HELD: 1.1. This Court has consistently taken the view that in an appeal against acquittal, the High Court has full power to review at large all the evidence and to reach the conclusion that upon that evidence the order of acquittal should be reversed. [para 18] [204-C]

Jadunath Singh and Others v. State of U.P. **AIR 1972 SC 116;** *Damodar Prasad Chandrika Prasad and Others v. State of Maharashtra* **1972 (2) SCR 622 = AIR 1972 SC 622;** *State of Bombay v. Rusy Mistry,* **AIR 1960 SC 391;** *Shivaji Sahebrao Bobade and another v. State of Maharashtra* **1974 (1) SCR 489 = AIR 1973 SC 2622;** *State of Karnataka v. K. Gopala Krishna* **AIR 2005 SC 1014;** *Ayodhya Singh v. State of Bihar and others* **(2005) 9 SCC 584;** *Anil Kumar v. State of U.P.* **2004 (4) Suppl. SCR 449 = (2004) 13 SCC 257;** *Girija Prasad (dead) by LRs. v. State of M. P*. **2007 (9) SCR 483 = (2007) 7 SCC 625;** *State of Goa v. Sanjay Thakran* **2007 (3) SCR 507 = (2007) 3 SCC 755;** *State of U. P. v. Ajai Kumar* **2008 (2) SCR 552 = AIR 2008 SC 1269;** *State of Rajasthan v. Sohan Lal* **2004 (1) Suppl. SCR 480 = (2004) 5 SCC 573;** *Chandrappa v. State of Karnataka* **2007 (2) SCR 630 = (2007) 4 SCC 415;** *S. Ganesan v. Rama Raghuraman and others* **2011 (1) SCR 27 = (2011) 2 SCC 83;** *Sunil Kumar Sambhudayal Gupta (Dr.) v. State of Maharashtra* **2010 (15) SCR 452 = (2010) 13 SCC 657;** *Balak Ram v. State of U.P.* **1975 (1) SCR 753 = (1975) 3 SCC 219;** *Budh Singh v. State of U.P.* **2006 (2) Suppl. SCR 715 = (2006) 9 SCC 731;** *Rama Krishna v. S. Rami Reddy* **2008 (6) SCR 1236 = (2008) 5 SCC 535;** *Aruvelu v. State* **2009 (14) SCR 1081 = (2009) 10 SCC 206;** *Babu v. State of Kerala* **2010 (9) SCR 1039 = (2010) 9 SCC 189;** *Ranjitham v. Basvaraj & Ors*. **(2012) 1 SCC 414;** *State of Rajasthan v. Shera Ram @ Vishnu Dutta* **(2012) 1 SCC 602 – relied on.**

1.2. In the instant case, the medical report clearly says that the death was caused due to asphyxia as a result of throttling. PW-4, the surgeon, who conducted the autopsy, stated that the deceased was wearing a shirt. In the FIR, it was clearly mentioned that the accused strangulated the deceased with the help of her shirt. The medical report supports the same. [para 30] [209-E-H]

1.3. The trial Judge has doubted the testimony of PW-2 that he had not seen the children taking the bath. The

High Court has treated PW-2 as a natural and neutral witness and it has also observed that his evidence could not have been thrown overboard on the ground of absence of precise description of distance and the fact that he had not seen the children bathing in the water. As regards the inference by the trial court that when PW-2 and other witnesses had arrived on the scene, the accused could not have been laying on the deceased in their presence, the High Court has found that the reasoning ascribed by the trial court to disbelieve the version of PW-2 is unacceptable. Similarly, with reference to the discrepancies regarding blood seen on the spot, the colour of the underwear of the victim, the time of the lodging of the FIR, the High Court has observed that the said discrepancies, by no stretch of imagination, could be treated as of any significance; and have no bearing on the case of the prosecution. [para 30-33] [210-A-B; 210-D-G; 211-C-F]

State of U.P. v. M.K. Anthony **AIR 1985 SC 48;** *Rammi alias Rameshwar v. State of Madhya Pradesh* **1999 (3) Suppl. SCR 1 = AIR 1999 SC 3544;** *Appabhai and another v. State of Gujarat* **AIR 1988 SC 696 – relied on.**

1.4. The trial Judge had given unnecessary importance to absolutely minor discrepancies which do not go to the root of the matter and the High Court has correctly treated the analysis to be perverse. Besides, it is noticeable from the judgment of the trial court that it has proceeded on a wrong footing by saying that the case of the prosecution was that the accused had committed rape on the deceased, whereas on a perusal of the FIR, it is quite clear that the accused had acted with the intention to commit rape. There can be no doubt that the view taken by the trial Judge was absolutely unreasonable, perverse and on total erroneous appreciation of evidence contrary to the settled principles of law. It can never be treated as a plausible view. In the

considered opinion of this Court, only a singular view is possible that the accused had made an attempt to commit rape and he was witnessed while he was strangulating the child with a shirt. The result was that a nine year old child breathed her last. [para 37-38] [213-C, F-H]

1.5. Nothing has been brought on record to show that there was any kind of enmity between the family of the deceased and that of the accused. There is no reason why the father of the deceased and the other witnesses would implicate the accused in the crime and would spare the real culprit. On the other hand, the accused was apprehended on the spot. There was no motive on the part of any of the witnesses to falsely involve the accused in the crime. Therefore, the High Court was right in its view. [para 38] [214-A-C]

2. Rape or an attempt to rape is a crime not against an individual but a crime which destroys the basic equilibrium of the social atmosphere. The consequential death of a child is more horrendous and has a devastating effect on her family and, in the ultimate, eventuates on the collective at large. When a family suffers in such a manner, the society as a whole is compelled to suffer as it creates an incurable dent in the fabric of the social milieu. The cry of the collective has to be answered and respected and that is what exactly the High Court has done by converting the decision of acquittal to that of conviction and imposing the sentence as per law. [para 39] [214-D-G]

Case Law Reference:

1972 AIR 116	**cited**	**para 18**
1972 (2) SCR 622	**cited**	**para 19**
AIR 1960 SC 391	**cited**	**para 19**
1974 (1) SCR 489	**cited**	**para 20**

2005 AIR 1014	**cited**	**para 21**
2005 (9) SCC 584	**cited**	**para 21**
2004 (4) Suppl. SCR 449	**cited**	**para 22**
2007 (9) SCR 483	**cited**	**para 23**
2007 (3) SCR 507	**cited**	**para 24**
2008 (2) SCR 552	**cited**	**para 24**
2004 (1) Suppl. SCR 480	**cited**	**para 25**
2007 (2) SCR 630	**cited**	**para 26**
2011 (1) SCR 27	**cited**	**para 27**
2010 (15) SCR 452	**cited**	**para 27**
1975 (1) SCR 753	**cited**	**para 27**
2006 (2) Suppl. SCR 715	**cited**	**para 27**
2008 (6) SCR 1236	**cited**	**para 27**
2009 (14) SCR 1081	**cited**	**para 27**
2010 (9) SCR 1039	**cited**	**para 27**
2012 (1) SCC 414	**cited**	**para 27**
2012 (1) SCC 602	**cited**	**para 27**
1985 AIR 48	**relied on**	**para 34**
1999 (3) Suppl. SCR 1	**relied on**	**para 35**
1988 AIR 696	**relied on**	**para 36**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 82 of 2008.

From the Judgment & Order dated 9.8.2005 of the High Court of Allahabad in Government No. 2644 of 1998.

Lav Kumar Agrawal, Rupesh Kumar, Dr. Kailash Chand for the Appellant.

R.K. Dash, Abhisth Kumar, Gaurav Dhingra for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. From the days of yore, every civilised society has developed various kinds of marriages to save the man from the tyranny of sex, for human nature in certain circumstances has the enormous potentiality of exhibiting intrigue, intricacy and complexity, in a way, a labyrinth. Instances do take place where a man becomes a slave to this tyrant and exposes unbridled appetite and lowers himself to an unimaginable extent for gratification of his carnal desire. The case at hand graphically exposes the inferior endowments of nature in the appellant who failed to husband his passion and made an attempt to commit rape on a nine year old girl and the tears of the child failed to have any impact on his emotion and even an iota of compassion did not surface as if it had been atrophied and eventually he pressed her neck which caused instant death of the nervous young girl.

2. Presently, we shall proceed with the narration. The facts as unfolded by the prosecution, in brief, are that on 24.06.1994, Vineshwari along with her brother, Dharam Veer, aged about five years, was having a bath in the water that had accumulated in front of the house of the informant, Pitambar, their father, due to a crack in the nearby canal. Kali Charan and Ganeshi, PW 2, were grazing their cattle in the field situate at a short distance. The accused-appellant, a resident of the village, cajoled Vineshwari to accompany him to the nearby field belonging to one Layak Singh. The younger brother, Dharam Veer, innocently followed them. At that juncture, the appellant took off her undergarment and with the intention to have intercourse flung her on the ground. The young girl cried aloud and her brother, the five year old child, raised an alarm. Kali

Charan and Ganeshi who had seen the accused taking the girl followed by the brother to the field of Layak Singh rushed to the place and shouted for Pitambar, PW-1. Hearing the shout, Pitambar with his elder son Harpal rushed to the spot and witnessed that the accused was pressing the neck of Vineshwari. By the time they could reach the spot, the accused made an effort to run away but he was apprehended. However, unfortunately by that time, the girl had already breathed her last. Leaving the accused in the custody of the villagers, Pitambar went to the police station and lodged an FIR.

3. After the criminal law was set in motion, the accused was arrested and the investigating officer, Balvir Singh, PW 7, reached the spot and carried out the investigation. The dead body of the deceased was sent for post mortem. The Investigating Officer seized the garment of the deceased, the clothes of the accused and certain other articles and prepared the seizure memo. After recording the statements of the witnesses under Section 161 of the Code of Criminal Procedure and completing further investigation, the prosecution submitted the chargesheet under Sections 302 and 376 read with 511 of the Indian Penal Code (for short "the IPC") before the competent court which in turn committed the matter to the Court of Session wherein it was registered as S.T. No. 1098 of 94.

4. The plea of the defence was one of denial and false implication.

5. The accused chose not to adduce any evidence.

6. In order to prove its case, the prosecution examined eight witnesses, namely, Pitamber @ Pita, PW-1 (father of the deceased), Ganeshi, PW-2, Dharam Veer, PW-3, Dr. S.K. Sharma, PW-4, Head Constable Mahfooj Khan, PW-5, Dr. S.R.P. Mishra, PW-6, Balvir Singh, S.I., PW-7 and Constable Vinod Kumar, PW-8.

7. Pitamber @ Pita PW-1 stated on oath that the accused influenced his daughter Vineshwari, who was taking bath in the canal water to accompany him to the nearby field. He has further stated that the accused attempted to commit rape on his daughter and ultimately strangulated her throat that caused her death. Ganeshi, PW-2 deposed that he along with Kali Charan was there. On hearing the cry of the girl, he and Kali Charan went to the field of Layak Singh and found that the accused was trying to commit rape on Vineshwari and tied a shirt on her neck. Dharam Veer, PW-3, could not be examined because he was unable to grasp the questions.

8. Dr. S.K. Sharma, PW-4 conducted the post mortem of Vineshwari and found the following anti-mortem injuries:-

(1) Abrasion 5 cm. X 1 cm. over Rt. Ramus of jaw extending neck region.

(2) Abrasion 3 cm. X 1 cm. over left Supra Clovicular region.

No injury was found on the private parts and/or thighs nor on chest and buttocks. However, two vaginal smears were prepared and sent for pathological examination.

Over eternal pericardium larynxes and both the lungs of the deceased, deposits of blood were found. Except this, the liver, pancreas, spleen and both kidneys were filled with blood. On interior examination, Larynx, Trachea, Bronchi and Lungs were found congested. According to Dr. S.K. Sharma, the death of the deceased took place due to asphyxia as a result of throttling.

9. Dr. S.R.P. Mishra, PW-6 examined the accused Jugendra and found certain contusions, abrasions and superfluous injuries on his body.

10. Balvir Singh, S.I., PW-7 proved the site plan, recovery

memo of underwear of Vineshwari, panchnama, report to C.M.O. and chargesheet.

11. The learned trial Judge appreciating the evidence on record found that there were discrepancies and contradictions in the testimony of the witnesses; that it was difficult to believe that the accused was laying upon the deceased in the presence of Kali Charan and Ganeshi; that the deposition of witnesses that they had found blood on the spot had not received corroboration from the examination of Dr. S. K. Sharma, P. W. 4, who had deposed that the blood had not oozed out from the body of the deceased girl; that the colour of the under garment of the girl as stated by her father did not tally with the colour described in the recovery memo; that as per the medical report there was no injury on the private parts of the deceased; that there was difference in the time mentioned by the witnesses as regards the lodging of the FIR inasmuch as the investigating officer arrived at the spot between 1.30 to 2.00 p.m. whereas the FIR was lodged at 2.45 p.m.; and that the colour of the shirt was not properly stated by the witnesses. Because of the aforesaid findings, the trial court came to the conclusion that the prosecution had failed to prove its case beyond reasonable doubt and accordingly acquitted the accused of the charge.

12. The aforesaid judgment of acquittal came to be challenged before the High Court in Criminal Appeal No. 2644of 1998 on the ground that the view expressed by the learned trial Judge was totally perverse since minor discrepancies and contradictions had been magnified and the real evidence had been ignored. It was also put forth that the trial court failed to appreciate the fact that the accused was apprehended at the spot and nothing had been brought on record to dislodge the same. It was also urged that the view expressed by the trial court was totally unreasonable and defied logic in the primary sense.

13. The High Court perused the evidence on record and opined that unnecessary emphasis had been laid on minor

discrepancies by the trial court and the view expressed by it was absolutely perverse and remotely not a plausible one. Being of this view, it over-turned the judgment of acquittal to that conviction and sentenced the accused to undergo life imprisonment for the offence under Section 302 IPC and to undergo rigorous imprisonment for ten years for the offence under Section 376 read with 511 of IPC with the stipulation that both the sentences shall run concurrently.

14. We have heard Mr. Lav Kumar Agrawal, learned counsel for the appellant, and Mr. R. K. Dash, learned counsel for the State.

15. It is contended by Mr. Agrawal that the High Court has not kept in view the parameters on which the judgment of acquittal is to be interfered with and has converted one of acquittal to conviction solely by stating that the judgment is perverse. It is urged by him that the discrepancies and contradictions have been discussed in detail by the trial court and he has expressed a well reasoned opinion that the prosecution has failed to bring home the charge, but the said conclusion has been unsettled by the High Court by stating that the said discrepancies are minor in nature. It is his further submission that the ocular evidence has not received any corroboration from the medical evidence and further the material particulars have been totally overlooked and hence, the judgment of conviction is sensitively vulnerable.

16. Mr. Dash, learned senior counsel appearing for respondent, has canvassed that the learned trial judge had treated the ordinary discrepancies which are bound to occur when rustic witnesses have been accentuated as if they are in the realm of high degree of contradiction and inconsistency. It is submitted by him that when the judgment of the trial court suffers from perversity of approach especially in relation to the appreciation of evidence and the view cannot be treated to be a possible one, no flaw can be found with the judgment of reversal by the High Court.

17. To appreciate the submissions raised at the bar and to evaluate the correctness of the impugned judgment, we think it appropriate to refer to certain authorities in the field which deal with the parameters for reversing a judgment of acquittal to that of conviction by the appellate court.

18. In *Jadunath Singh and Others v. State of U.P.*,[1] a three Judge Bench of this Court has held thus:-

> "This Court has consistently taken the view that an appeal against acquittal the High Court has full power to review at large all the evidence and to reach the conclusion that upon that evidence the order of acquittal should be reversed. This power of the appellate court in an appeal against acquittal was formulated by the Judicial Committee of the Privy Council in *Sheo Swarup v. King Emperor*[2], and *Nur Mohammad v. Emperor*[3]. These two decisions have been consistently referred to in judgments of this Court as laying down the true scope of the power of an appellate court in hearing criminal appeals: see *Surajpal Singh v. State*[4] and *Sanwat Singh v. State of Rajasthan*[5]. "

19. In *Damodar Prasad Chandrika Prasad and Others v. State of Maharashtra*[6] it has been held that once the Appellate Court comes to the conclusion that the view of the trial court is unreasonable, that itself provides a reason for interference. The two-Judge Bench referred to the decision in *State of Bombay v. Rusy Mistry*[7], to hold that if the finding shocks the

1. AIR 1972 SC 116.
2. 61 Ind App 398 = AIR 1934 PC 227.
3. AIR 1945 PC 151.
4. 1952 SCR 193 = AIR 1952 SC 52.
5. (1961) 3 SCR 120 = AIR 1961 SC 715.
6. AIR 1972 SC 622.
7. AIR 1960 SC 391.

conscience of the Court or has disregarded the norms of legal process or substantial and grave injustice has been done, the same can be interfered with.

20. In *Shivaji Sahebrao Bobade and another v. State of Maharashtra*[8], the three-Judge Bench opined that there are no fetters on the plenary power of the Appellate Court to review the whole evidence on which the order of acquittal is founded and, indeed, it has a duty to scrutinise the probative material de novo, informed, however, by the weighty thought that the rebuttable innocence attributed to the accused having been converted into an acquittal the homage of our jurisprudence owes to individual liberty constrains the higher court not to upset the finding without very convincing reasons and comprehensive consideration. This Court further proceeded to state that the cherished principles of golden thread to prove beyond reasonable doubt which runs through the wave of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. Emphasis was laid on the aspect that a balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish the marginal innocents.

21. In *State of Karnataka v. K. Gopala Krishna*[9], it has been held that where the findings of the Court below are fully unreasonable or perverse and not based on the evidence on record or suffer from serious illegality and include ignorance and misreading of record, the Appellate Court will be justified in setting aside such an order of acquittal. If two views are reasonably possible and the view favouring the accused has been accepted by the courts below, that is sufficient for upholding the order of acquittal. Similar view was reiterated in *Ayodhya Singh v. State of Bihar and others*[10].

8. AIR 1973 SC 2622.
9. AIR 2005 SC 1014.
10. 2005 9 SCC 584.

22. In *Anil Kumar v. State of U.P.,*[11] it has been stated that interference with an order of acquittal is called for if there are compelling and substantial reasons such as where the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated.

23. In *Girija Prasad (dead) by LRs. v. State of M. P.,*[12] it has been observed that in an appeal against acquittal, the Appellate Court has every power to re-appreciate, review and reconsider the evidence as a whole before it. It is, no doubt, true that there is a presumption of innocence in favour of the accused and that presumption is reinforced by an order of acquittal recorded by the trial court, but that is not the end of the matter. It is for Appellate Court to keep in view the relevant principles of law to re-appreciate and reweigh as a whole and to come to its own conclusion in accord with the principle of criminal jurisprudence.

24. In *State of Goa v. Sanjay Thakran,*[13] it has been reiterated that the Appellate Court can peruse the evidence and interfere with the order of acquittal only if the approach of the lower court is vitiated by some manifest illegality or the decision is perverse.

25. In *State of U. P. v. Ajai Kumar,*[14] the principles stated in *State of Rajasthan v. Sohan lal*[15] were reiterated. It is worth noting that in the case of *Sohan Lal,* it has been stated thus:-

> "This Court has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be reappreciate the entire

11. 2004 13 SCC 257.
12. 2007 7 SCC 625.
13. 2007 3 SC 755.
14. AIR 2008 SC 1269.
15. (2004) 5 SCC 573.

evidence, though while choosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal."

26. In *Chandrappa v. State of Karnataka*[16], this Court held as under: -

"42 From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind

16. (2007) 4 SCC 415.

that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

27. In *S. Ganesan v. Rama Raghuraman and others,*[17] one of us (Dr. B.S. Chauhan,J.), after referring to the decision in *Sunil Kumar Sambhudayal Gupta (Dr.) v. State of Maharashtra,*[18] considered various aspects of dealing with a case of acquittal and after placing reliance upon earlier judgments of this Court, particularly in *Balak Ram v. State of U.P.,*[19] *Budh Singh v. State of U.P.,*[20] *Rama Krishna v. S. Rami Reddy,*[21] *Aruvelu v. State*[22] and *Babu v. State of Kerala,*[23] held that unless there are substantial and compelling circumstances, the order of acquittal is not required to be reversed in appeal. Similar view has been reiterated in *Ranjitham v. Basvaraj & Ors.*[24] and *State of Rajasthan v. Shera Ram @ Vishnu Dutta.*[25]

17. (2011) 2 SCC 83.
18. (2010) 13 SCC 657.
19. (1975) 3 SCC 219.
20. (2006) 9 SCC 731.
21. (2008) 5 SCC 535.
22. (2009) 10 SCC 206.
23. (2010) 9 SCC 189.
24. (2012) 1 SCC 414.
25. (2012) 1 SCC 602.

28. Keeping in view the aforesaid well-settled principles, we are required to scrutinize whether the judgment of the High Court withstands the close scrutiny or conviction has been recorded because a different view can be taken. First we shall refer to the ante mortem injuries which were found on the deceased – (i) abrasion 5 cm x 1 cm over right ramus of jaw extending to the neck and (ii) abrasion 3 cm x 1 cm over left supra clavicular region. On internal examination, larynx, trachea and bronchi were found congested. Both the lungs were congested. Brain was congested. Partially digested food was found in the stomach. Small and large intestine were half full. The doctor who conducted the post mortem has opined that the cause of death was due to asphyxia as a result of throttling.

29. PW-6 Dr. S.R.P. Mishra had examined the accused and had found four contusions and two abrasions on his forehead, left ear, neck, left side chest and right shoulder. The learned trial Judge has given some emphasis on these injuries but the High Court has expressed the view that when the accused was apprehended at the spot by the witnesses, he had been given a beating for the criminal act and hence, the minor injuries had no significance.

30. The question is whether the trial court was justified in coming to hold that there were discrepancies and contradictions in the evidence of the witnesses and, therefore, the case of the prosecution did not deserve acceptance. The discrepancies that have been found have been described while we have dealt with the trial court judgment. The medical report clearly says that the death was caused due to asphyxia as a result of throttling. PW-4, the surgeon, who has conducted the autopsy, stated that the deceased was wearing a shirt. PW-1, the father, has stated that she was strangulated by a bush shirt. The learned trial Judge has given much emphasis by drawing a distinction between a shirt and a bush shirt. The High Court has treated that it is not a material contradiction. In the FIR, it was clearly mentioned that the accused strangulated the deceased with the help of her shirt. The medical report supports the same and,

therefore, the nature of the shirt which has been given importance by the learned trial Judge, in our considered opinion, has been rightly not accepted. The learned trial Judge has doubted the testimony of Ganeshi, PW-2, that he had not seen the children taking the bath and further he has also opined that it would not have been possible for the accused to lay upon the deceased in their presence. In this regard, the distance has been taken into consideration to discard the testimony. The High Court has perused the testimony or deposition of PW-2 wherefrom it is evincible that the spot was at the distance of 100 paces where he was grazing the cattle. The Investigating Officer has deposed that there was water in about half kilometre area as there was a crack in the canal as a consequence of which water was flowing in front of the house of the informant. Thus, the High Court has opined that the variance with regard to the details of distance cannot be made the edifice to discard their testimony. The High Court has treated Ganeshi as a natural and neutral witness and it has also observed that his evidence could not have been thrown overboard on the ground of absence of precise description of distance and the fact that he had not seen the children bathing in the water. That apart, the inference by the trial court is that when they had arrived on the scene, the accused could not have been laying on the deceased in their presence. On a perusal of his deposition as well as analysis made by the learned trial Judge, it is evident that there was some time gap and distance. The accused was laying on the deceased and throttled her neck with the shirt. The other witnesses had arrived after five to ten minutes. The High Court has taken note of the distance, time and the age of the deceased and has found that the reasoning ascribed by the trial court to disbelieve the version of PW-2 is unacceptable.

31. The learned trial Judge has noticed that both Pitambar and Ganeshi had deposed that they had seen blood on the spot, though the medical report clearly showed that there was no oozing of blood from any part of the body of the deceased and further that there was no injury on the private parts of the girl. It

is apt to note here that there was some frothy liquid coming out from the nose of the deceased. The High Court, while analysing the said evidence, has observed that the witnesses though had stated to have seen blood on the spot in their cross-examination, yet that would not really destroy the version of the prosecution regard being had to the many other facts which have been proven and further there was no justifiable reason to discard the testimony of the father and others who were eye witnesses to the occurrence.

32. The learned trial Judge has taken note of the fact that PW-1 had stated in his cross-examination that the underwear of the deceased was printed green in colour while PW-2 had stated that the colour of the underwear was red in colour and according to the recovery memo, the colour was red, white and yellow. The High Court has perused the memo, Ext. Ka2, prepared by the Investigating Officer wherein it has been described that the printed underwear was of red, white, yellow and black colour. That apart, when the witnesses were deposing almost after a span of three years, it was not expected of them to remember the exact colour of the printed underwear. In any case, the High Court has observed that the said discrepancy, by no stretch of imagination, could be treated as a discrepancy of any significance.

33. Another aspect which has weighed with the learned trial Judge was about the time of the lodging of the FIR. The said timing has no bearing on the case of the prosecution inasmuch as rustic and uneducated villagers could not have been precise on the time concept.

34. At this juncture, we may remind ourselves that it is the duty of the court to shift the chaff from the grain and find out the truth from the testimony of the witnesses. A testimony of the witness is required to inspire confidence. It must be creditworthy. In *State of U.P.* v. *M.K. Anthony*[26], this Court has observed that in case of minor discrepancies on trivial matters

26. AIR 1985 SC 48.

not touching the core of the case, hypertechnical approach by taking the sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer and not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

35. In *Rammi alias Rameshwar v. State of Madhya Pradesh,*[27] this Court has held as follows: -

> "24. When eye-witness is examined at length it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant details. Perhaps an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But Courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the Court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny."

36. In *Appabhai and another v. State of Gujarat*[28], this Court has ruled thus: -

> "The Court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The Court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record

27. AIR 1999 SC 3544.

28. AIR 1988 SC 696.

by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the Court. The courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy."

37. Judged on the aforesaid principles of law, we are of the considered opinion that the learned trial Judge had given unnecessary importance on absolutely minor discrepancies which do not go to the root of the matter and the High Court has correctly treated the analysis to be perverse. Quite apart from that, it is noticeable from the judgment of the trial court that the learned trial Judge has proceeded on a wrong footing by saying that the case of the prosecution was that the accused had committed rape on the deceased whereas on a perusal of the FIR, it is quite clear that the allegation was that the accused has pulled the underwear of the girl with the intention to commit rape. Similar is the testimony of Ganeshi (PW-1) who has stated that the accused was laying on the girl. It is difficult to understand how the learned trial Judge has conceived that the case of the prosecution was that the accused had committed rape.

38. Thus, from the aforesaid analysis, there can be no trace of doubt that the view taken by the learned trial Judge was absolutely unreasonable, perverse and on total erroneous appreciation of evidence contrary to the settled principles of law. It can never be treated as a plausible view. In our considered opinion, only a singular view is possible that the accused had made an attempt to commit rape and he was witnessed while he was strangulating the child with a shirt. The result was that a nine year old child breathed her last. The reasoning ascribed by the learned trial Judge that she did not die because of any injury makes the decision more perverse

rather than reasonable. That apart, nothing has been brought on record to show that there was any kind of enmity between the family of the deceased and that of the accused appellant. There is no reason why the father and the other witnesses would implicate the accused appellant in the crime and would spare the real culprit. Quite apart from the above, he was apprehended on the spot. The accused had taken the plea that the deceased had died as she had drowned in the water. The medical report runs absolutely contrary inasmuch there was no water in her stomach or in any internal part of the body. There was no motive on the part of any of the witnesses to falsely involve the accused in the crime. In view of our aforesaid analysis, we entirely agree with the view expressed by the High Court.

39. Before parting with the case, we may note that the appellant has created a situation by which a nine year old girl who believed in him as a co-villager and went with him in total innocence breathed her last before she could get into her blossom of adolescence. Rape or an attempt to rape is a crime not against an individual but a crime which destroys the basic equilibrium of the social atmosphere. The consequential death is more horrendous. It is to be kept in mind that an offence against the body of a woman lowers her dignity and mars her reputation. It is said that one's physical frame is his or her temple. No one has any right of encroachment. An attempt for the momentary pleasure of the accused has caused the death of a child and had a devastating effect on her family and, in the ultimate eventuate, on the collective at large. When a family suffers in such a manner, the society as a whole is compelled to suffer as it creates an incurable dent in the fabric of the social milieu. The cry of the collective has to be answered and respected and that is what exactly the High Court has done by converting the decision of acquittal to that of conviction and imposed the sentence as per law.

40. Consequently, the appeal, being sans merit, stands dismissed.

R.P. Appeal dismissed.

ACC LIMITED (FORMERLY KNOWN AS THE ASSOCIATED CEMENT CO. LTD.)
v.
GLOBAL CEMENTS LTD.
(Special Leave Petition (C) No. 17689 of 2012)

JUNE 11, 2012

[K.S. RADHAKRISHNAN AND JAGDISH SINGH KHEHAR, JJ.]

Arbitration and Conciliation Act, 1996 – s. 11 – Appointment of arbitrator – Death of named arbitrator in the arbitration clause in the agreement – Application for appointment of a substitute arbitrator – Validity of the arbitration agreement – Held: The intention of the parties to enter into an arbitration agreement can be clearly gathered from the arbitration clause of the Agreement – Expression "at any time" used in the arbitration clause has nexus only to the time frame within which the question or dispute or difference arises between the parties be resolved – Arbitration clause has no nexus with the life time of the named arbitrator – Arbitration clause does not prohibit or debar the parties in appointing a substitute arbitrator in place of the named arbitrators and, in the absence of any prohibition or debarment, parties can persuade the court for appointment of an arbitrator under the arbitration clause of the agreement – Thus, the High Court justified in entertaining an application for appointment of a substitute arbitrator to adjudicate the dispute between the parties.

Parties entered into an agreement containing an arbitration clause 21 for reference of any dispute between them to an arbitrator. Respondent sought reference of the dispute to an arbitrator. By that time the two nominated arbitrators under clause 21 had expired. The respondent filed an application under Section 11 of the Arbitration

and Conciliation Act, 1996 seeking appointment of a substitute arbitrator. The High Court entertained the application under Section 11 and appointed a substitute arbitrator to adjudicate the dispute between the parties. Therefore, the appellant filed the instant Special Leave Petition.

Dismissing the Special Leave Petition, the Court

HELD: 1.1. Section 14 of the Arbitration and Conciliation Act, 1996 provides for the circumstances in which the mandate of the arbitrator is to terminate. It says that the mandate of an arbitrator will end when it becomes impossible for him to perform his functions *de facto* or *de jure* or for some other reasons he fails to act without undue delay or withdraws from office or the parties agree to terminate his mandate. Section 15(2) of the Act provides that where a substitute arbitrator has to be appointed due to termination of the mandate of the previous arbitrator, the appointment must be made according to the rules that were applicable to the appointment of the arbitrator being replaced. No further application for appointment of an independent arbitrator under Section 11 will lie where there has been compliance with the procedure for appointment of a substitute arbitrator. On appointment of the substitute arbitrator in the same manner as the first, no application for appointment of independent arbitrator under Section 11 could be filed. Of course, the procedure agreed upon by the parties for the appointment of the original arbitrator is equally applicable to the appointment of a substitute arbitrator, even if the agreement does not specifically say so. [Para 14] [224-F-H; 225-A-B]

Yashwitha Constructions (P.) Ltd. v. Simplex Concrete Piles India Ltd. **(2006) 6 SCC 204: 2006 (3) Suppl. SCR 96 – referred to.**

1.2. Sections 14 and 15 provide the grounds for termination of the mandate of the arbitrator on the ground of incapability of the arbitrator to act or if he withdraws from his office or when the parties agree to the termination of the mandate of the arbitrator. Section 15(2) states that a substitute arbitrator shall be appointed as per the rules that were applicable to the appointment of the arbitrator being replaced. Section 15(2), therefore, has to be given a liberal interpretation so as to apply to all possible circumstances under which the mandate may be terminated. Section 11(6) would not apply only if it is established that parties had intended not to supply the vacancy occurred due to the inability of the arbitrator to resolve the dispute or due to whatever reasons but that intention should be clearly spelt out from the terms of the arbitration clause in the Agreement. [Paras 15, 17] [225-C-E; 226-A-B]

San-A Trading Company Ltd. v. IC Textiles Ltd. **(2006) Arb. LR 11 – referred to.**

1.3. The legislative policy embodied in Sections 14 and 15 of the Act is to facilitate the parties to resolve the dispute by way of arbitration. The arbitration clause if clearly spells out any prohibition or debarment, the court has to keep its hands off and there is no question of persuading or pressurising the parties to resolve the dispute by a substitute arbitrator. Generally, this stands out as an exception and that should be discernible from the language of the arbitration clause and the intention of the parties. In the absence of such debarment or prohibition of appointment of a substitute arbitrator, the court's duty is to give effect to the policy of law that is to promote efficacy of arbitration. [Para 18] [226-B-D]

Situ Sahu and Ors. v. State of Jharkhand and Ors. **(2004) 8 SCC 340: 2004 (4) Suppl. SCR 258;** *Ibrahimpatnam Taluk Vyavasaya Coolie Sanghem v. K. Suresh Reddy and Ors.*

AIR 2003 SC 3592: 2003 (2) Suppl. SCR 698; *New Delhi Municipal Committee v. Life Insurance Corporation of India and Ors.* **(1977) 4 SCC 84: 1978 (1) SCR 279 – referred to.**

1.4. The time factor mentioned in the arbitration clause "at any time" is a clear indication of the intention of the parties and is used in various statutory provisions as well and the meaning of the same has been interpreted by this Court in various judgments. The words "at any time" which appear in Clause 21 of the arbitration clause in the Agreement dated 16.12.1989, is of considerable importance. "At any time" expresses a time when an event takes place expressing a particular state or condition that is when the dispute or difference arises. The arbitration clause 21 has no nexus with the life time of the named arbitrator. The expression "at any time" used in the arbitration clause has nexus only to the time frame within which the question or dispute or difference arises between the parties be resolved. Those disputes and differences could be resolved during the life time of the named arbitrators or beyond their life time. The incident of the death of the named arbitrators has no nexus or linkage with the expression "at any time" used in clause 21 of the Agreement. The time factor mentioned therein is the time within which the question or dispute or difference between the parties is resolved as per the Agreement. Arbitration clause would have life so long as any question or dispute or difference between the parties exists unless the language of the clause clearly expresses an intention to the contrary. The question may also arise in a given case that the named arbitrators may refuse to arbitrate disputes, in such a situation also, it is possible for the parties to appoint a substitute arbitrator unless the clause provides to the contrary. Objection can be raised by the parties only if there is a clear prohibition or debarment in resolving the question or dispute or difference between the parties in case of death of the

named arbitrator or their non-availability, by a substitute arbitrator. [Para 19, 21] [226-E; 228-A-F]

1.5. The intention of the parties to enter into an arbitration agreement can clearly be gathered from clause 21 of the Agreement. Clause 21 does not prohibit or debar the parties in appointing a substitute arbitrator in place of the named arbitrators and, in the absence of any prohibition or debarment, parties can persuade the court for appointment of an arbitrator under clause 21 of the agreement. The High Court was justified in entertaining such an application and appointing a former Judge of this Court as a sole arbitrator under the Arbitration and Conciliation Act, 1996 to adjudicate the dispute and difference between the parties. [Paras 11, 22 and 23] [224-A-B; 228-G-H; 229-A]

Jagdish Chander v. *Ramesh Chander* **(2007) 5 SCC 719: 2007 (5) SCR 720 – referred to.**

Case Law Reference:

2007 (5) SCR 720	**Referred to.**	**Para 12**
2006 (3) Suppl. SCR 96	**Referred to.**	**Para 14**
(2006) Arb.LR 11	**Referred to.**	**Para 16**
2004 (4) Suppl. SCR 258	**Referred to.**	**Para 19**
2003 (2) Suppl. SCR 698	**Referred to.**	**Para 20**
1978 (1) SCR 279	**Referred to.**	**Para 20**

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 17689 of 2012.

From the Judgment & Order dated 8.5.2012 of the High Court of Judicature at Bombay in Arbitration Application No. 7 of 2012.

S. Ganesh, U.A. Rana, M. Mazumdar (for Gagrat & Co.) for the Petitioner.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. The question that falls for consideration in this case is whether on the death of a named arbitrator, the arbitration agreement survives or not.

2. At the very outset, let us refer to the relevant arbitration clause in the agreement dated 16.12.1989, which reads as follows:

> "21. If any question or difference or dispute shall arise between the parties hereto or their representatives at any time in relation to or with respect to the meaning or effect of these presents or with respect to the rights and liabilities of the parties hereto then such question or dispute shall be referred either to Mr. N.A. Palkhivala or Mr. D.S. Seth, whose decision in the matter shall be final and binding on both the parties." (emphasis added)

3. The petitioner submits that both Shri N.A. Palkhivala and Shri D.S. Seth are no more and therefore the arbitration clause in the agreement does not survive. It was pointed out that Shri N.A. Palkhivala was named in the agreement since he was the Chairman of the petitioner company and Shri D.S. Seth was named in the agreement since he was the Director of the company. Both of them were nominated as arbitrators since they were closely associated with the company and also due to their eminence, impartiality and familiarity in all commercial transactions and the corporate laws. The petitioner submits that since the arbitrators are no more, the arbitration clause in the agreement has no life and hence there is no question of entertaining the application preferred under Section 11 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') filed by the respondent.

4. The respondent, (applicant before the High Court), refuted those contentions and submitted before the High Court that the arbitration clause in the agreement would survive even after the death of the named arbitrators and the parties can still resolve their difference or dispute by referring them to another arbitrator or move the court for appointing a substitute arbitrator whose decision would be final and binding on both the parties.

5. Bombay High Court entertained the application preferred by the respondent under Section 11 of the Act. The Court took the view that clause 21 of the Agreement did constitute an agreement to refer disputes to arbitration and also took the view that in the absence of any prohibition or debarment, there is no reason for the court to presume an intent on the part of the parties to the effect that a vacancy that arises on account of a failure or inability of a named arbitrator to act cannot be supplied by the court under Section 11. The court took the view unless the parties have expressly precluded such a course being followed, give effect to the policy of the law, which is to promote the efficacy of arbitration and the efficacy of commercial arbitration must be preserved particularly when business dealings are based on an agreement which provides recourse to arbitration. The designated Judge of the High Court appointed Mr. Justice S.N. Variava, former Judge of this Court as an arbitrator to adjudicate the dispute and difference between the parties. Legality of that order is under challenge before us.

6. Mr. S. Ganesh, Senior Advocate appearing for the petitioner explained the circumstance under which Shri N.A. Palkhivala as well as Shri D.S. Seth was nominated as arbitrators in the arbitration clause of the Agreement dated 16.12.1989. Learned senior advocate pointed out that Shri N.A. Palkhivala was an eminent jurist of high reputation and he was the former Chairman of the applicant's company and the parties had specifically named him as an arbitrator because of his familiarity and in-depth knowledge of arbitration law as

well as corporate law. Learned senior counsel also pointed out that Shri D.S. Seth was appointed since he was the former Director of the applicant's company and was familiar with the commercial transactions and he was also instrumental in dealing with the various issues between the parties. Learned counsel pointed out because of the special nature of the appointment of both Shri N.A. Palkhivala and Shri D.S. Seth, the parties wanted their difference or dispute to be resolved only by those named arbitrators and on their death, the arbitration clause in the agreement would not survive. Learned counsel pointed out that that was the intention of the partiesand the same is clearly discernable from the facts of the case and the terms of the arbitration Clause in the agreement. Parties, it was pointed out, never intended to refer the dispute to any other arbitrator except the named arbitrator and such an inference can be drawn from Clause 21 and the facts of the case. Learnedcounsel also pointed out that in the above circumstances, Section 15(2) of the Act has no application and the High Court has committed an error in entertaining the application under Section 11 appointing a substitute arbitrator.

FACTS

7. The petitioner by way of Agreement dated 16.12.1989 transferred land admeasuring 53 acres 33 Gunthas and land admeasuring 100 acres 01 Gunthas with buildings and Mining Leases granted by the Government of Gujarat in or under lands admeasuring 423.22 hectares, 21.121 hectares and 4.7551 hectares to the respondent. By Orders dated 24.01.2002 and 03.02.2003, the Collector, Porbander as well as Secretary(Appeals), Revenue Department, State of Gujarat held that the petitioner had committed breach of condition Nos. 3, 4 and 5 of the order of 1993 and condition Nos. 8 & 11 of Lease Agreement dated 15.03.1982 and that the said lands were transferred to the respondent without prior permission of the Collector and as such the petitioner had committed breach of the conditions of order/lease agreement. The Collector,

therefore, resumed possession of the aforesaid lands. Aggrieved by those orders, the petitioner had filed Special Civil Applications bearing Nos. 1975 of 2003 and 1972 of 2003 inter alia challenging the orders passed by the Collector, Porbander and Secretary (Appeals) before the High Court of Gujarat. The respondents were made parties in the above proceedings, the predecessor in title of the respondent neither initiated any proceedings against the petitioner nor challenged those orders of the Collector, Porbander or the Secretary (Appeals). Therefore, the Special Civil Applications were dismissed by the High Court on 15.12.2009 and appeals were not preferred against the said judgment and no proceedings were initiated by the respondent as well.

8. The respondent later sent a lawyer notice to the petitioner seeking reference of the dispute to an arbitrator involving Clause 21 of the Agreement. By a letter dated 08.10.2011, the respondent sought to propose the names for appointment as a Sole Arbitrator on the ground that the two nominated arbitrators under clause 21 had expired.

9. The petitioner through their lawyer replied vide letter dated 07.12.2011 objecting to the appointment of a substitute arbitrator on the ground that the arbitration clause 21 of the Agreement did not provide for the appointment of any other arbitrator and that was the intention of the parties. It was pointed out that on the death of the two named arbitrators, the arbitration clause itself would come to an end and there is no question of appointing another arbitrator to resolve the question or dispute or difference between the parties.

10. We have examined closely arbitration clause 21 of the Agreement dated 16.12.1989 as well as various letters exchanged between the parties and ascertained the intention of the parties from the facts.

REASONING AND CONCLUSION:

11. Clause 21 of the Agreement indisputably is an arbitration agreement which falls under Section 7 of the Act. The intention of the parties to enter into an arbitration agreement can therefore clearly be gathered from clause 21 of the Agreement. Clause 21 clearly indicates an agreement on the part of the parties to refer the disputes to the named arbitrators in theAgreement.

12. This Court in *Jagdish Chander v. Ramesh Chander* [(2007) 5 SCC 719] in a clear exposition of law has laid down the principles to be borne in mind while interpreting an arbitration agreement under Clause 7 of the Act. Existence of an agreement is not in dispute, the question is about its enforceability on the death of the named arbitrators. Facts clearly indicate that the parties in this case have contemplated that if any question or difference or dispute arises between them, in relation to or with respect to the meaning or effect of the contract or with respect to their rights and liabilities, the same would be referred to one of thetwo named arbitrators named in the arbitration clause. The question is whether Clause 21 would outlive the lives of the named arbitrators.

13. Section 14 of the Arbitration and Conciliation Act, 1996 provides for the circumstances in which the mandate of the arbitrator is to terminate. It says that the mandate of an arbitrator will end when it becomes impossible for him to perform his functions de facto or de jure or for some other reasons he fails to act without undue delay or withdraws from office or the parties agree to terminate his mandate.

14. Section 15(2) of the Act provides that where a substitute arbitrator has to be appointed due to termination of the mandate of the previous arbitrator, the appointment must be made according to the rules that were applicable to the appointment of the arbitrator being replaced. No further application for appointment of an independent arbitrator under

Section 11 will lie where there has been compliance with the procedure for appointment of a substitute arbitrator. On appointment of the substitute arbitrator in the same manner as the first, no application for appointment of independent arbitrator under Section 11 could be filed. Of course, the procedure agreed upon by the parties for the appointment of the original arbitrator is equally applicable to the appointment of a substitute arbitrator, even if the agreement does not specifically say so. Reference may be made to the judgment of thisCourt in *Yashwitha Constructions (P.) Ltd. v. Simplex Concrete Piles India Ltd.,* (2006) 6 SCC 204.

15. Sections 14 and 15 provide the grounds for termination of the mandate of the arbitrator on the ground of incapability of the arbitrator to act or if he withdraws from his office or when the parties agree to the termination of the mandate of the arbitrator. Section 15(2) states that a substitute arbitrator shall be appointed as per the rules that were applicable to the appointment of the arbitrator being replaced. Section 15(2), therefore, has to be given a liberal interpretation so as to apply to all possible circumstances under which the mandate may be terminated.

16. The scope of Sections 11(6) and 15 came up for consideration before the learned designate of the Chief Justice of India in *San-A Trading Company Ltd. v. IC Textiles Ltd.* [(2006) Arb.LR 11] and the learned Judge held as follows:

> ".....It therefore follows that in case where the arbitration clause provides for appointment of a sole arbitrator and he had refused to act, then the agreement clause stands exhausted and then the provisions of Section 15 would be attracted and it would be for the court under Section 11(6) to appoint an arbitrator on the procedure laid down in Section 11(6) being followed unless there is an agreement in the contract where the parties specifically debar appointment of any other arbitrator in case the named arbitrator refuses to act."

17. Section 11(6) would not apply only if it is established that parties had intended not to supply the vacancy occurred due to the inability of the arbitrator to resolve the dispute or due to whatever reasons but that intention should be clearly spelt out from the terms of the arbitration clause in the Agreement.

18. The legislative policy embodied in Sections 14 and15 of the Act is to facilitate the parties to resolve the dispute by way of arbitration. The arbitration clause if clearly spells out any prohibition or debarment, the court has to keep its hands off and there is no question of persuading or pressurising the parties to resolve the dispute by a substitute arbitrator. Generally, this stands out as an exception and that should be discernible from the language of the arbitration clause and the intention of the parties. In the absence of such debarment or prohibition of appointment of a substitute arbitrator, the court's duty is to give effect to the policy of law that is to promote efficacy of arbitration.

19. We are of the view that the time factor mentioned in the arbitration clause "at any time" is a clear indication of the intention of the parties and is used in various statutory provisions as well and the meaning of the same has been interpreted by this Court in various judgments. In *Situ Sahu and Others v. State of Jharkhand and Others* [(2004) 8 SCC 340], this Court dealt with Sections 71-A and 71-B of the Chota Nagpur Tenancy Act, 1908 wherein the power was given to the Deputy Commissioner to restore possession of "raiyat" belonging to Scheduled Tribes transferred in contravention of the provisions of the Act or fraudulently. Section 71-A provides that "if at any time it comes to the notice of the Deputy Commissioner that transfer of land belonging to a raiyat..... who is a member of the Scheduled Tribes has taken plea in contravention of..... any other provisions of this Act or by any fraudulent method....." This Court took the view that the words "at any time" in Section 71-A is evidence of the legislative intent to give sufficient flexibility to the Deputy Commissioner to

implement the socio-economic policy of the Act, namely to prevent inroads upon the rights of the ignorant, illiterate and backward citizens. Certainly, the expression of the words "at any time" used in Clause 21 of the Arbitration Agreement is to give effect to the policy of the Act which is to promote efficacy of arbitration.

20. In *Ibrahimpatnam Taluk Vyavasaya Coolie Sanghem v. K. Suresh Reddy and Others* AIR [2003 SC 3592], this Court examined the scope of Section 50-B of the Andhra Pradesh (Talangana Area) Tenancy and Agricultural Lands Act, 1950. The Court, while interpreting the words "at any time", took the view that the use of the words "at any time" in sub-section (4) of Section 50-B of the Act cannot be rigidly read letter by letter. It must be read and construed contextually and reasonably. The Court also opined that the words "at any time" must be understood as within a reasonable time depending on the facts and circumstances of each case in the absence of prescribed period of limitation. In *New Delhi Municipal Committee v. Life Insurance Corporation of India and Others* (1977) 4 SCC 84, this Court was interpreting the expression of the words "at any time" which finds its place in Section 67 of the Punjab Municipal Act, 1911 read with Section 68A which gave power to the Municipal authorities to amend the assessment list. The Court held that the term "at any time" implies that the list may be amended retrospectively. Stating otherwise would amount to denying to the expression "at any time" even its plain, grammatical meaning, quite apart from ignoring the context in which it occurs and the beneficent purpose of its incorporation. The Court held that the expression must be given its full force and effect, which requires the recognition of the committee's power to amend an assessment list even after the expiry of the year following the one in which the list was finalized by due authentication. These decisions are, therefore, to the effect that the expression "at any time" has to be interpreted contextually and reasonably taking note of the intention of the parties.

21. We have carefully gone through the arbitration clause in the Agreement dated 16.12.1989 and, in our view, the words "at any time" which appear in Clause 21, is of considerable importance. "At any time" expresses a time when an event takes place expressing a particular state or condition that is when the dispute or difference arises. The arbitration clause 21 has no nexus with the life time of the named arbitrator. The expression "at any time" used in the arbitration clause has nexus only to the time frame within which the question or dispute or difference arises between the parties be resolved. Those disputes and differences could be resolved during the life time of the named arbitrators or beyond their life time. The incident of the death of the named arbitrators has no nexus or linkage with the expression "at any time" used in clause 21 of the Agreement. The time factor mentioned therein is the time within which the question or dispute or difference between the parties is resolved as per the Agreement. Arbitration clause would have life so long as any question or dispute or difference between the parties exists unless the language of the clause clearly expresses an intention to the contrary. The question may also arise in a given case that the named arbitrators may refuse to arbitrate disputes, in such a situation also, it is possible for the parties to appoint a substitute arbitrator unless the clause provides to the contrary. Objection can be raised by the parties only if there is a clear prohibition or debarment in resolving the question or dispute or difference between the parties in case of death of the named arbitrator or their non-availability, by a substitute arbitrator.

22. We are of the view clause 21 does not prohibit or debar the parties in appointing a substitute arbitrator in place of the named arbitrators and, in the absence of any prohibition or debarment, parties can persuade the court for appointment of an arbitrator under clause 21 of the agreement.

23. The High Court in our view was justified in entertaining such an application and appointing a former Judge of this Court

as a sole arbitrator under the Arbitration and Conciliation Act, 1996 to adjudicate the dispute and difference between the parties.

24. In view of the above mentioned reasons, we find no reason to grant leave to appeal and issue notice on the petition for special leave to appeal and the petition is dismissed.

N.J. Special Leave dismissed.

BISHNUPADA SARKAR & ANR.
v.
STATE OF WEST BENGAL
(Criminal Appeal No.876 of 2012)

JULY 2, 2012

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

Penal Code, 1860: s.304 (Part I) r/w s.34 – Culpable homicide not amounting to murder – Verbal altercation between the victim-deceased and uncle of appellants – Next day, appellant no.2, brother of appellant no.1 called the son of the deceased outside his house near the drain and started beating him – When deceased intervened, appellant no.2 started beating the deceased with fists and blows – Appellant no.1 was allegedly standing nearby and instigating him – Deceased succumbed to injuries inflicted – Trial court convicted both the appellants u/s.304 Part I r/w s.34 and sentenced to undergo rigorous imprisonment for ten years besides a fine of Rs.5000 each and in default to suffer further imprisonment for a period of one year – High Court upheld the conviction and sentence – On appeal, held: There was no evidence to suggest any pre-meditation on the part of the appellants to assault the deceased or to show that they intended to kill the deceased – There was no previous enmity between the parties who were residents of the same locality except that there was a minor incident in which some hot words were exchanged between the deceased and uncle of appellants – Even on the following day, the incident near the drain involved appellant No.1 and the complainant-son of the deceased – It was only when the deceased noticed the incident and intervened to save his son that appellant no.2 started assaulting the deceased and inflicted injuries on his body that resulted in his death – Both the courts below believed the prosecution case that appellant no.1 was

exhorting appellant no.2 to assault the deceased and, therefore, rightly convicted him u/s.304 Part I with the help of s.34 – A distinction has, however, to be made in the facts and circumstances of the case between the sentence awarded to the appellant no.1 who is over sixty five years old and that to be awarded to appellant no.2 – In the totality of the circumstances, a rigorous sentence of three years to appellant no.1 and seven years to appellant no.2 meet the ends of justice – Sentence/Sentencing.

The prosecution case was that one day prior to the incident, the victim-deceased protested against the nuisance committed by one 'S' in front of his house. This led to verbal altercation. The next day, appellant no.1 who was nephew of 'S' came to the house of the deceased and threatened him. In the evening of the same day, appellant no.2, the brother of appellant no.1 called the son of the deceased outside his house near the drain and started beating him. The deceased who was leaving for market intervened to save his son. Appellant no.2 started beating the deceased with fists and blows. Appellant no.1 was allegedly standing nearby and instigating him. The son of the deceased cried for help that attracted local people who rushed to the spot and took the deceased to hospital in injured condition where he succumbed to injuries inflicted by appellant no.2 with a brick.

The trial court convicted both the appellants under Section 304 Part I r/w Section 34 IPC and sentenced to undergo rigorous imprisonment for ten years besides a fine of Rs.5000 each and in default to suffer further imprisonment for a period of one year. The High Court upheld the conviction and sentence. The instant appeal was filed challenging the order of the High Court.

Partly allowing the appeal, the Court

HELD: There was no evidence to suggest any pre-meditation on the part of the appellants to assault the deceased or to show that assailants intended to kill the deceased. There was no previous enmity between the parties who were residents of the same locality except that there was a minor incident in which some hot words were exchanged between the deceased and 'S'. Even on the following day, the incident near the drain involved appellant No.1 and the complainant-son of the deceased. It was only when the deceased noticed the incident and intervened to save the complainant, that appellant no.2 started assaulting the deceased and inflicted injuries on his body that resulted in his death. Both the courts below have no doubt believed the prosecution case that appellant no.1 was exhorting appellant no.2 to assault the deceased and, therefore, convicted him under Section 304 Part I with the help of Section 34 IPC. A distinction has, however, to be made in the facts and circumstances of the case between the sentence awarded to the appellant no.1 who is over sixty five years old and that to be awarded to appellant no.2. In the totality of the circumstances, a rigorous sentence of three years to appellant no.1 and seven years to appellant no.2- would meet the ends of justice. The sentence of fine and imprisonment in default of payment thereof will, however, remain unaltered. [Para 8] [235-D-H; 236-A-B]

CRIMINAL APPELLATE JURISDICTION : Civil Appeal No. 876 of 2012.

From the Judgment & Order dated 15.7.2010 of the High Court of Calcutta in C.R.A. No. 641 of 2006.

Ranjan Mukherjee, Mangaaljit Mukherjee, S. Bhowmick, S.C. Ghosh, Garima Bose for the Appellant.

Chandra Bhushan Prasad, Kripa Shankar Prasad, Anip Sachthey, Mohit Paul, Shagun Matta for the Respondent.

The Judgment of the Court was delivered by

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

2. This appeal arises out of a judgment and order dated 15th July, 2010 passed by the High Court of judicature at Calcutta whereby Criminal Appeal No.641 of 2006 filed by the appellants has been dismissed and their conviction for the offence of culpable homicide not amounting to murder punishable under Section 304 Part I read with Section 34 IPC and sentence of rigorous imprisonment for a period of 10 years and fine upheld.

3. Facts giving rise to the commission of the offence by the appellants and their eventual conviction have been set out in the judgment under appeal which need not be recounted again especially because notice in this appeal was issued by us limited to the question of quantum of sentence to be awarded to the appellants. Suffice it to say that the unfortunate incident in which the deceased-Shyamalendu who was then working as Income Tax Inspector did no more than object to the commission of the nuisance in front of his house escalated into an uncalled for assault on him that culminated in his death. The prosecution case is that on 21st May, 2001 at about 7.00 p.m. Sudhir who was also a resident of the same locality was found committing nuisance in an open drain in front of the house of the deceased. The deceased appears to have objected to the nuisance leading to a verbal altercation between the two. On the following day at about 11.30 a.m. the appellant Bishnu Sarkar who happens to be the nephew of Sudhir came to the house of the deceased and threatened him. The deceased tried to reason with the appellant Bishnu Sarkar that he had done nothing wrong in protesting against the nuisance. At about 6.00 p.m. in the evening on the same day Madhav Sarkar, appellant No.2 and brother of Bishnu Sarkar is alleged to have called PW-1 Debabrato Mazumder son of the deceased and the complainant in the case to the slab near the drain and started

beating him. The deceased who was leaving for the market intervened to save Debabrato Mazumder. Madhav Sarkar left the complainant and started beating the deceased with fists and blows. Appellant Bishnu Sarkar was allegedly standing nearby and instigating him. The complainant cried for help that attracted some local people who rushed to the place and took the deceased to the hospital in an injured condition where he succumbed to the injuries inflicted by Madhav Sarkar-appellant no.2 with the help of a brick.

4. The police filed a charge-sheet against the appellants after completing the investigation for commission of offences punishable under Section 304 read with Section 34 IPC. At the trial the prosecution examined as many as 13 witnesses including the Investigating Officer to prove the charge while the defence examined Parvat Kumar Paria besides placing reliance on certain documents. By its order dated 30th August, 2006 the Trial Court came to the conclusion that the deceased had died a homicidal death because of the injuries inflicted by Madhab Sarkar-appellant no.2 at the exhortation of appellant no.1-Bishnu Sarkar. Both of them were accordingly convicted under Section 304 Part I read with Section 34 IPC and sentenced to undergo rigorous imprisonment for ten years besides a fine of Rs.5,000/- each and in default to suffer further imprisonment for a period of one year. The High Court by the order impugned before us affirmed the said conviction and sentence while dismissing the appeal filed by the appellants.

5. Appearing for the appellants Mr. Ranjan Mukherjee submitted that the appellant-Bishnu Sarkar had not inflicted any injury on the deceased and that all that was alleged against him was that he exhorted appellant no.2-Madhab to assault the deceased and teach him a lesson. It was further submitted that the appellant-Bishnu Sarkar is more than 65 years of age and had already undergone 1½ years sentence in jail. He is also afflicted with various age related ailments that call for a lenient view in his case.

6. In so far as appellant no.2 was concerned, Mr. Mukherjee argued that the incident was more than 12 years old and that a drawn long trial and proceedings in appeal have already put the said appellant to tremendous financial and physical hardship. Being the only earning member of the family even appellant no.2, argued Mr. Mukherjee, deserves a reduction in the sentence especially when there was no intention to kill the deceased and the whole incident had taken place in the heat of passion on account of a sudden quarrel unfortunately culminating in the demise of the deceased.

7. Learned counsel appearing for the respondent, on the other hand, argued that the nature of injuries sustained by the deceased and the manner in which the incident had taken place did not justify the reduction in the sentence awarded to the appellants.

8. There is no evidence to suggest any pre-meditation on the part of the appellants to assault the deceased leave alone evidence to show that assailants intended to kill the deceased. There was no previous enmity between the parties who were residents of the same locality except that there was a minor incident in which some hot words were exchanged between the deceased and Sudhir. Even on the following day i.e. on 22nd May, 2001 the incident near the drain involved the appellant-Bishnu Sarkar and the complainant- Debabrato Mazumder son of the deceased. It was only when the deceased noticed the incident and intervened to save the complainant, that Madhab Sarkar started assaulting the deceased and inflicted injuries on his body that resulted in his death. Both the Courts below have no doubt believed the prosecution case that appellant-Bishnu Sarkar was exhorting appellant-Madhab Sarkar to assault the deceased and, therefore, convicted him under Section 304 Part I with the help of Section 34 IPC. A distinction has, however, to be made in the facts and circumstances of the case between the sentence awarded to the appellant-Bishnu Sarkar who is over sixty five years old and that to be awarded to appellant-

Madhab Sarkar. In the totality of the circumstances to which we have referred above, we are of the view that a rigorous sentence of three years to appellant no.1-Bishnu Poda Sarkar and seven years to appellant no.2-Madhab Sarkar would meet the ends of justice. The sentence of fine and imprisonment in default of payment thereof will, however, remain unaltered. We accordingly allow the appeal in part and to the extent indicated above in modification of the orders passed by the Courts below.

D.G. Appeal Partly allowed.

HARYANA STATE INDUSTRIAL DEVELOPMENT CORPORATION LTD.

v.

MAWASI & ORS. ETC.ETC.

(Review Petition (C) No. 235-578 of 2011)

JULY 2, 2012

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

Review: Scope of – Land Acquisition – Award of compensation by Supreme Court – Review petition against the judgment of Supreme Court on the ground that it was based on sale deed Exhibit P1 which was not genuine since the sale transaction had taken place between two corporate entities controlled by same management and the land was overvalued with oblique motive – Similar review petitions filed earlier were dismissed – Held: The earlier review petitions were dismissed on the ground that no material was produced by petitioner to substantiate its assertion – In the instant review petitions, petitioner placed on record certain documents, however, the documents neither singularly nor collectively supported the petitioner's plea that management of the two companies, i.e., the vendor and the vendee, was under the control of the same set of persons or that the vendee had paid unusually high price with some oblique motive – The power of review is a creature of the statute and no Court or quasi-judicial body or administrative authority can review its judgment or order or decision unless it is legally empowered to do so – Article 137 empowers Supreme Court to review its judgments subject to the provisions of any law made by Parliament or any rules made under Article 145 of the Constitution – The Rules framed by Supreme Court under that Article lay down that in civil cases, review lies on any of the grounds specified in Or.47 Rule 1, CPC – No case was made out by petitioner for exercise of power under Article 137

r/w Or.47, r.1, CPC – The petitioner did not offer any explanation as to why it did not lead any evidence before the reference Court to show that sale deed Exhibit P1 was not a bona fide transaction and the vendee had paid unusually high price for extraneous reasons – Petitioner's assertion about commonality of the management of two companies was ex-facie incorrect leading to an irresistible inference that impugned judgment did not suffer from any error apparent on the face of the record warranting its review – Even otherwise, while deciding the review petitions, Supreme Court cannot make roving inquiries into the validity of the transaction involving the sale of land or declare the same to be invalid by assuming that the vendee had paid higher price to take benefit of an anticipated joint venture agreement with a foreign company – Constitution of India, 1950 – Articles 137, 145 – Code of Civil Procedure, 1908 – Or.47, r.1 – Land Acquisition.

The review petitioner was aggrieved with the judgment dated 17.8.2012 whereby the Supreme Court allowed the appeals by the land owners and gave direction for payment of compensation @ Rs.20 lakhs per acre with all statutory benefits and dismissed the appeals filed by petitioner against the judgment of the High Court. Similar review petitions were filed earlier and were dismissed on 13.1.2011.

The stand of the petitioner was that the High Court committed error by determining market value of the acquired land solely on the basis of Exhibit P1 ignoring other sale deeds by which similar parcels of land were sold @ Rs.7 lacs per acre or less. It was further pleaded that the determination of market value needs reconsideration since the sale deed Exhibit P1 on which reliance was placed by the High Court and the Supreme Court was not genuine transaction; that by Exhibit P1, the sale transaction had taken place between two corporate entities, which were controlled by the same management

and the land was overvalued with an oblique motive of helping the land owners to claim higher compensation and this fact came to the knowledge of the review petitioner only after dismissal of the appeals by the Supreme Court. The further stand of the petitioner was that dismissal of earlier review petition would not operate as a bar to the maintainability of these petitions because till 13.1.2011, the officers of the petitioner did not have any inkling about the composition of the two companies and the fact that the vendor had purchased the land in 1993 at the rate of Rs.6 lakhs per acre only and the relevant facts came to their notice only in October, 2010

Dismissing the review petitions, the Court

HELD: 1. A careful reading of order dated 13.1.2011 would show that in the earlier review petitions, the petitioner had sought reconsideration of judgment dated 17.8.2010 on the premise that the vendor and the vendee had common management and that the price mentioned in the sale deed had been manipulated with an oblique motive. The Court declined to entertain this plea by observing that the petitioner had not produced any material to substantiate its assertion. Along with the instant batch of review petitions, the petitioner placed on record the search reports, Certificate of Incorporation, Memorandum of Association and Articles of Association of vendor showing the purchase of land by the vendor by sale deeds dated 16.8.1993 and 18.8.1993, annual return of vendee company showing 'SKP', 'GSG' and 'JP' as the Directors. The documents neither singularly nor collectively supported the petitioner's plea that management of the two companies, i.e., the vendor and the vendee, was under the control of the same set of persons or that the vendee had paid unusually high price with some oblique motive. As a matter of fact, 'SKP' and 'JP' were appointed as Directors of the vendee company

on 9.6.1994 and 'GSG' was so appointed on 9.2.1997 whereas the agreement for sale was executed on 31.5.1994. The petitioner did not controvert the averments contained in the reply affidavit filed in the instant review petition, perusal of which makes it clear that in 1993 similar parcels of land had been sold at the rate of Rs.15,73,289/- and Rs.13,74,345/- per acre. Therefore, it cannot be said that the vendee company had paid exorbitantly high price to the vendor company for extraneous reasons and there was no valid ground for indirect review of order dated 13.1.2011. [Para 8] [265-C-H; 266-A-C]

2. The power of review is a creature of the statute and no Court or quasi-judicial body or administrative authority can review its judgment or order or decision unless it is legally empowered to do so. Article 137 empowers this Court to review its judgments subject to the provisions of any law made by Parliament or any rules made under Article 145 of the Constitution. The Rules framed by this Court under that Article lay down that in civil cases, review lies on any of the grounds specified in Order 47 Rule 1 of the Code of Civil Procedure, 1908. [Para 9] [266-C-E]

3. The petitioner did not offer any explanation as to why it did not lead any evidence before the Reference Court to show that sale deed Exhibit P1 was not a bona fide transaction and the vendee had paid unusually high price for extraneous reasons. The parties had produced several sale deeds, majority of which revealed that the price of similar parcels of land varied from Rs. 6 to 7 lakhs per acre. A reading of the sale deeds would have prompted any person of ordinary prudence to make an enquiry as to why the vendee company had paid more than Rs.2,42,00,000/- for 12 acres land, which was purchased by the vendor only a year back at an average

price of Rs.6 lakhs per acre. However, neither the advocate for the petitioner nor its officers/officials, who were dealing with the cases made any attempt to lead such evidence. This may be because they were aware of the fact that at least in two other cases such parcels of land had been sold in 1993 for more than Rs.13 lakhs and Rs.15 lakhs per acre and in 1996, a sale deed was executed in respect of the land of village Naharpur Kasan at the rate of Rs.25 lakhs per acre. This omission coupled with the fact that the petitioner's assertion about commonality of the management of two companies is ex-facie incorrect and lead to an irresistible inference that judgment dated 17.8.2010 did not suffer from any error apparent on the face of the record warranting its review. Surely, in guise of seeking review, the petitioner cannot ask for *de novo* hearing of the appeals.[Para 19] [274-F-H; 275-A-C]

4. The petitioner's plea that the documents produced along with the review petitions could not be brought to the notice of the Reference Court and the High Court despite exercise of due diligence by its officers did not commend acceptance because it had not explained as to why the concerned officers/officials, who were very much aware of other sale transactions produced by themselves and the landowners did not try to find out the reasons for wide difference in the price of land sold by Exhibit P1 and other parcels of land sold by Exhibits P2 to P13 and Exhibits R1 to R15. [Para 20] [275-D-E]

5. While deciding the review petitions, this Court cannot make roving inquiries into the validity of the transaction involving the sale of land or declare the same to be invalid by assuming that the vendee had paid higher price to take benefit of an anticipated joint venture agreement with a foreign company. Of course, the petitioner did not controvert the statement made by the respondents that the vendee had sold the land in 2004

for a sum of Rs.13,62,00,000/- i.e. at the rate of Rs.1,13,00,000/- per acre. [Para 21] [275-F-H]

S. Nagaraj v. State of Karnataka **1993 Supp (4) SCC 595: 1993 (2)Suppl. SCR 1;** *Raja Prithwi Chand Lal Choudhury v. Sukhraj Rai* **AIR 1941 FC 1;** *Rajunder Narain Rae v. Bijai Govind Singh* **(1836) 1 Moo PC 117;** *Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius* **AIR 1954 SC 526: 1955 SCR 520;** *Thungabhadra Industries Ltd. v. Govt. of A.P.* **(1964) 5 SCR 174;** *Aribam Tleshwar Sharma v. Aibam Pishak Sharma* **(1979) 4 SCC 389;** *Meera Bhanja v. Nirmala Kumari Choudhury* **(1995) 1 SCC 170: 1994 (5) Suppl. SCR 503;** *Parsion Devi v. Sumitri Devi* **(1997) 8 SCC 715: 1997 (4) Suppl. SCR 470;** *Lily Thomas v. Union of India* **(2000) 6 SCC 224: 2000 (3) SCR 1081;** *Haridas Das v. Usha Rani Banik* **(2006) 4 SCC 78: 2006 (3) SCR 87;** *State of West Bengal v. Kamal Sengupta* **(2008) 8 SCC 612: 2008 (10) SCR 4 – relied on.**

Case Law Reference:

1993 (2) Suppl. SCR 1	**relied on**	**Para 10**
AIR 1941 FC 1	**relied on**	**Para 10**
(1836) 1 Moo PC 117	**relied on**	**Para 10**
1955 SCR 520	**relied on**	**Para11**
(1964) 5 SCR 174	**relied on**	**Para 12**
(1979) 4 SCC 389	**relied on**	**Para 13**
1994 (5) Suppl. SCR 503	**relied on**	**Para 14**
1997 (4) Suppl. SCR 470	**relied on**	**Para 15**
2000 (3) SCR 1081	**relied on**	**Para 16**
2006 (3) SCR 87	**relied on**	**Para 17**
2008 (10) SCR 4	**relied on**	**Para 18**

CIVIL APPELLATE JURISDICTION : Review Petition (C) No. 235-578 of 2011.

IN

CIVIL APPEAL NO(s). 6561,6528, 6531, 6529, 6552, 6567, 6535, 6836, 6560, 6571, 6530, 6525, 6527, 6570, 6546, 6565, 6548, 6550, 6563, 6537, 6532, 6569 , 6534, 6559, 6572, 6583, 6580, 6573, 6584, 6588, 6590, 6575, 6823, 6853, 6855, 6554, 6566, 6557, 6533, 6558, 6541, 6556, 6562, 6568, 6564, 6539, 6538, 6553, 6540, 6852, 6576, 6587, 6582, 6581, 6577, 6574, 6585, 6578, 6579, 6854, 6666-6667, 6757, 6747-6755, 6831, 6756, 6591, 6651, 6606, 6592, 6658, 6594, 6595, 6650, 6657, 6655, 6596, 6597, 6620, 6621, 6602, 6603, 6622, 6598, 6624, 6647, 6654, 6599, 6607, 6608, 6623, 6609, 6600, 6601, 6649, 6593, 6605, 6610, 6611, 6612, 6653, 6613, 6642, 6652, 6643, 6614, 6659, 6645, 6648, 6656, 6646, 6626, 6615, 6616, 6644, 6625, 6639, 6636, 6637, 6627, 6631, 6628, 6638, 6641, 6629, 6630, 6619, 6635, 6640, 6632, 6633, 6824-6827, 6664-6665, 7724, 7725, 7723 of 2009

And

6871-6875, 6876-6878, 53, 1370, 2475, 4212, 4213, 4214, 4215, 4218, 4220, 4221, 4222, 4224, 4225, 4226, 4227, 4228, 4223, 4229, 4230, 4231, 4232, 4233, 4234, 6879, 6880, 6881, 6882, 6883, 6884, 6885-6888, 6889, 6890, 6891, 6892, 6893, 6894, 6895, 6896, 6897, 6898, 6899, 6900, 6901, 6902, 6903, 6904, 6905, 6906, 6907, 6908, 6909, 6910, 6911, 6912, 6913, 6914, 6915, 6916, 6917, 6918, 6919, 6920, 6921, 6922, 6923, 6924, 6925, 6926, 6927, 6928, 6929, 6930, 6931, 6932, 6933, 6934, 6935, 6936, 6937, 6938, 6939, 6940, 6941, 6942, 6943, 6944, 6945, 6946, 6947, 6948, 6949, 6950, 6951, 6952, 6953, 6954, 6955, 6956, 6957, 6958, 6959, 6960, 6961, 6962, 6963, 6964, 6965, 6966, 6967, 6968, 6969, 6970, 6971, 6972, 6973, 6974, 6975, 6976, 6977, 6978, 6979, 6980, 6981, 6982, 6983, 6984, 6985, 6986, 6988, 6989, 6990, 6991, 6992, 6993,

6994, 6995, 6996-6997, 7002, 7003, 7004, 7005, 7006, 7007, 7008, 7009, 7010, 7011, 7012, 7013, 7014, 7015, 7016, 7017, 7018, 7019, 7020, 7021, 7022, 7023, 7024, 7025, 7026, 7027, 7028, 7029, 7030, 7031, 7032, 7033, 7034, 7035, 7036, 7037, 7038, 7039, 7040, 7041, 7042, 7043, 7044, 7045, 7046, 7047, 7048 of 2010

WITH

I.A. Nos.2066-2067, I.A. No.3 in C.A. No. 6515 of 2009, Conmt.Pet.(C) No.51/2011 In C.A.No.6526/2009, Conmt.Pet.(C)No.52/2011 In C.A.No.6537/2009 and Conmt.Pet.(C)No.89/2011 In C.A.No.6854/2009.

Gopal Suibramanium, Altaf Ahmed, J.L. Gupta, Paras Kuhad, S.R. Singh, P.S. Patwalia, Manjit Singh, AAG, Annam D.N. Rao, Atul Sharma, Abhishek Aggarwal, Neelam Jain, Kirthi Kiran Kota, Pavan Malik, Dr. Kailash Chand, Naresh Kaushik, Sanjeev K. Bhardwaj, Lalita Kaushik, Devendra Singh, Ghanshyam, S.S. Shamshery, R.C. Kohli, Anil Mittal, V. Sushant Gupta, Jatin Chaturvedi, Sanjay Jain, Ram Naresh Yadav, Tarjit Singh, Kamal Mohan Gupta, Raj Shekhar Rao, Karan Laheri, Vikash Pathak, Senthil Jagadisan, Gyanendra Singh, Vishwa Pal Singh, Surjeet Singh, Swetank Shantanu, Pratap Shanker, Ashutosh Thakur, Priya Ranjan Roi, Rajesh Kumar, Neeraj Shekhar, Gagan Gupta for the appearing parties.

The Judgment of the Court was delivered by

G.S. SINGHVI, J.1. Undeterred by the dismissal of two similar petitions, Haryana State Industrial Development Corporation (HSIDC) has filed these petitions for review of judgment dated 17.08.2010 passed in Civil Appeal No. 6515 of 2009 and batch whereby the appeals filed by it against the judgments of the learned Single Judge of the Punjab and Haryana High Court were dismissed, those filed by the landowners were allowed and a direction was given for payment

of compensation at the rate of Rs. 20 lakhs per acre with all statutory benefits.

2. The facts necessary for deciding whether the petitioner has succeeded in making out a case for review are encapsulated below:

2.1. For the purpose of setting up an Industrial Model Township at Manesar, District Gurgaon, the Government of Haryana acquired large chunks of land. By Notification dated 30.4.1994 issued under Section 4(1) of the Land Acquisition Act, 1894 (for short, 'the Act'), the State Government proposed the acquisition of 256 acres 3 kanals and 17 marlas land situated in village Manesar. The declaration under Section 6(1) was published on 30.3.1995. The Land Acquisition Collector passed award dated 28.3.1997 and fixed market value of the acquired land at the rate of Rs.3,67,400/- per acre. Additional District Judge, Gurgaon (hereinafter described as 'the Reference Court') to whom the reference was made under Section 18 considered the pleadings and evidence of the parties and determined the amount of compensation by dividing the acquired land into two blocks, i.e., 'A' and 'B'. For the land comprised in Block 'A' which fell within 500 yards of National Highway No.8, the Reference Court fixed the amount of compensation at the rate of Rs.6,57,994.13 per acre. The remaining land was included in Block 'B' and the amount of compensation was fixed at Rs.3,91,196.97 per acre.

2.2. By another Notification dated 15.11.1994 issued under Section 4(1), the State Government proposed the acquisition of 1490 acres 3 kanals and 17 marlas land situated in villages Manesar, Naharpur Kasan, Khoh and Kasan. The declaration issued under Section 6(1) was published on 10.11.1995. By an award dated 3.4.1997, the Land Acquisition Collector fixed market value at the rate of Rs.4,13,600/- per acre. The Reference Court divided the land into two Blocks. For the land comprised in Block 'A', the Reference Court determined the amount of compensation at the rate of

Rs.6,89,333/- per acre. The remaining land was included in Block 'B' and no enhancement was granted in the compensation determined by the Land Acquisition Collector.

2.3. Before proceeding further, we may mention that in support of their claim for award of higher compensation, the land owners had produced 13 sale deeds which were marked Exhibits P1 to P13. Of these, Exhibit P1 dated 16.9.1994 was in respect of 12 acres land situated in village Naharpur Kasan, which was sold by M/s. Heritage Furniture Pvt. Ltd. to M/s. Duracell India Pvt. Ltd. and was proved by Shri Albel Singh, authorised signatory of M/s. Heritage Furniture Pvt. Ltd. The land owners also produced copy of Massavi Chakbandi of Village Khoh (Exhibit P14) and Aks-shajras of the four villages (Exhibits P15 to P18). On behalf of the State Government, Shri Arun Kumar Pandey, Manager, HSIDC was examined as RW-1 and sale deeds marked Exhibits R1 to R15 were produced along with other documents. The Reference Court did consider Exhibit P1 but did not rely upon the same for the purpose of determining the amount of compensation.

2.4. The appeals filed by the landowners who were affected by Notification dated 15.11.1994 were disposed of by the learned Single Judge of the High Court vide judgment dated 19.5.2006 and market value of the entire acquired land was fixed at Rs.15 lakhs per acre. The learned Single Judge referred to the sale deed Exhibit P1 and opined that the same reflected market value which a willing buyer would have paid to a willing seller. The reasons assigned by the learned Single Judge for arriving at this conclusion are extracted below:

> "The claimants have produced various sale instances to prove their claim. Sale deed Ex.Pl is dated September 16, 1994 whereby 96 kanals and 13 marlas (more than 12 acres) of land in village Naharpur Kasan was sold by the owner, M/s. Heritage Furniture Private Limited to M/s .Dura Cell India Private Limited for a sale consideration of

Rs,.2,42,00,000/-, reflecting the average price of Rs,20,03,103/- per acre. The aforesaid sale instance has been proved by the statement of one Albel Singh PWI, who at the relevant time was the authorised signatory of the seller Company, M/s. Heritage Furniture Private Limited. The aforesaid witness has clearly proved that the said transaction was genuinely entered between the two companies and the entire payment was made through bank drafts. The factum of the payment having been made through bank drafts is also reflected in the sale deed Ex.Pl. Some other sale instances relied upon by the claimants are Ex.P2, P3, P4, P7 and P8. Vide Ex.P2 land measuring 9 kanals was sold on June 4, 1994 for consideration of Rs.7,87,500/-, reflecting an average price of Rs.7 lacs per acre. Similarly Ex.P3 is also dated June 24, 1994 pertaining to sale of 10 kanals 10 marlas of land reflecting average sale price of Rs,7,00,000/- Ex.P4 is dated October 25,1991 whereby land measuring 9 kanals 9 marlas in Manesar was sold for Rs. 9,15,470/- reflecting an average price of Rs,7,75,000/- per acre. Ex.P7 and Ex.P8 are also the sale instances dated June 24, 1994 with regard land measuring 9 marlas each reflecting an average price of Rs,7,00,000/-per acre. The remaining sale instances Ex.P9 and P13 are of the year 1996 i.e. more than two years after the date of notification under section 4 of the Act. Similarly the sale instances Ex.Pl0, P11 and PI2 pertain to the sale of land in village Noorangpur. The said sale instances are, thus, not relevant.

On the other hand, the sale instances relied upon by the State are Ex.Rl to Ex. R15 but they have rightly been rejected by the reference court itself on the ground that the said sale instance reflected an average price which is even less than the one assessed by the Collector and, as such, in view of the provisions of section 25 of the Act, the same were not relevant and worth consideration.

As noticed above, the land which was acquired in the present proceedings is approximately 1500 acres. The sale instance Ex.Pl in my considered view, reflects as near as possible, the market value of the acquired land on the date of notification under section 4 of the Act. The said sale had taken place on September 16,1994. The recitals in the sale deed reflect that there was a prior agreement between the two companies on May 31, 1994 with regard to the sale of the land. It is also recited in the sale deed that the entire sale consideration was paid by the purchaser-company to the seller company by bank drafts. The aforesaid fact is also proved by Albel Singh, PWl. In this view of the matter, since the aforesaid transaction was between two companies, then obviously , there is no justification to doubt the authenticity of the said sale transaction. Moreover, the land covered under the aforesaid sale transaction is a big chunk of land i.e more than 12 acres. The said land was situated in village Naharpur Kasan i.e. one of the villages from which the present land was also acquired. In these circumstances to my mind, the said sale instance could not have been rejected by the reference Court, in any manner. Although the other sale instances Ex. P2, P3, P7 and P8 reflect the market price of Rs.7 lacs per acre but it is also apparent that the aforesaid transactions pertain to small piece of land and are between private persons. In these circumstances, the possibility of the aforesaid sale deeds being undervalued, with a view to save stamp duty and registration charges, can also not be ruled out. However, there is no justification to prefer the aforesaid sale deeds Ex.P2, P3, P7 and P8 over and above the sale deed Ex.Pl which is a transaction between the two cooperate bodies and wherein the entire sale consideration had been paid through bank drafts. The aforesaid sale also pertains to a big chunk of land i.e. more than 12 acres. It may also be noticed that the acquired land was owned by approximately more than 350 persons, thus each having

a small holding. Therefore, the sale-deed Ex.Pl duly reflects the market value, which a willing buyer would have paid to a willing seller. "

(underlining is ours)

2.5. The appeals filed by the landowners affected by the first acquisition were disposed of by the learned Single Judge vide judgment dated 5.9.2008. He referred to judgment dated 19.5.2006 but applied the cut of 20% and fixed market value of the acquired land at the rate of Rs.12 lakhs per acre.

2.6. The petitioner had challenged the judgments of the High Court on several grounds but the only point argued by the learned senior counsel appearing on its behalf was that the High Court committed serious error by determining market value of the acquired land solely on the basis of Exhibit P1 ignoring other sale deeds by which similar parcels of land were sold at the rate of Rs.7 lakhs per acre or less. This is evinced from the following extracts of the judgment under review:

"Shri Amarendera Sharan, learned Senior Counsel and Shri Ravindra Bana, learned counsel appearing for the Corporation argued that the High Court committed serious error by fixing market value of the acquired land at Rs. 15 lakhs per acre in one batch of appeals and Rs. 12 lakhs in the other batch of appeals by relying upon the sale deed, Ext. P-1 excluding other sale transactions, which were produced before the Reference Court. The learned counsel submitted that the value of 12 acres of land which was sold by Ext. P-1 was wholly disproportionate to the prevailing market value and, therefore, the same could not be made basis for fixing market value of the acquired land measuring more than 1490 acres. Shri Amarendera Sharan emphasised that actual market value of the acquired land was not more than Rs. 7 lakhs and the High Court committed serious error by discarding other sale transactions through which similar parcels of land were

sold for Rs. 7 lakhs or less. The learned Senior Counsel submitted that if the High Court had given due weightage to other sale transactions, market value of the acquired land could not have been fixed at Rs. 15 lakhs or even Rs. 12 lakhs per acre."

2.7. This Court rejected the aforesaid argument and observed:

"In our view, the learned Single Judge did not commit any error by relying upon sale transaction Exhibit P1 for the purpose of fixing market value of the acquired land. Undisputedly, that sale transaction was between two corporate entities and the entire sale price was paid through bank drafts. It is also not in dispute that the land which was subject matter of Exhibit P1 is situated at village Naharpur Kasan and is adjacent to the acquired land. The Corporation and the State Government did not adduce any evidence to prove that the land sold vide Exhibit P1 was over valued with an oblique motive of helping the land owners to claim higher compensation. Therefore, we do not find any justification to discard or ignore sale deed Exhibit P1. The refusal of the learned Single Judge to rely upon other sale transactions in which sale price of the land was shown as Rs.7 lakhs per acre also does not suffer from any legal infirmity because it is well-known that transactions involving transfer of properties are usually undervalued with a view to avoid payment of the requisite stamp duty and registration charges."

2.8. With a view to generate funds necessary for payment of additional compensation to the landowners, the petitioner increased the cost of land to be allotted to the prospective industrial entrepreneurs and others. IMT Industrial Association, which claims to be a representative body of the plot holders protested against this decision of the petitioner and persuaded it to seek review of judgment dated 17.8.2010.

2.9. In the review petitions filed on behalf of the petitioner, which were registered as Review Petition Nos.2107-2108 of 2010, it was pleaded that the determination of market value needs reconsideration because the sale deed Exhibit P1 on which reliance was placed by the High Court and this Court was not a genuine transaction. According to the petitioner, M/s. Heritage Furniture Pvt. Ltd. and M/s. Duracell India Pvt. Ltd. were controlled by the same management and this fact was brought to the notice of the concerned officers only after disposal of the appeals by this Court. IMT Industrial Association filed I.A.Nos.5 and 6 for impleadment as party to the review petitions. This Court dismissed the review petitions and the impleadment applications vide order dated 13.1.2011, paragraphs 4 to 8 of which are extracted below:

> "4. In the review petitions, it has been averred that the sale transaction dated 16.9.1994, upon which reliance was placed by the learned Single Judge of the Punjab and Haryana High Court and by this Court for grant of enhanced compensation was motivated because parties to the transaction were under the control and management of the common board of directors and this fact came to the notice of the review petitioner only after dismissal of the appeals by this Court.
>
> 5. In paragraph 'A' of the grounds of the review petitions, the review petitioner has referred to the composition of M/s. Dura Cell India Private Limited and Heritage Furniture Private Limited to show that both the companies have common management.
>
> 6. The review petition is supported by an affidavit of Shri Hamvir Singh, Deputy General Manager (I.A.), Haryana State Industrial and Infrastructure Development Corporation Ltd. In paragraph 2 of his affidavit, the deponent has stated that contents of the review petition (pages 25 to 43), list of dates (pages B to P) and other applications are true to my knowledge and the information

> derived from records of the case. However, he has not enclosed any document on the basis of which this assertion has been made.
>
> 7. We have carefully perused the entire record and are convinced that the judgment of which review has been sought does not suffer from any error apparent warranting its reconsideration. The review petitioner has not produced any material to substantiate its assertion that the price mentioned in the sale deed relied upon by the courts was manipulated with an oblique motive. Hence, the review petitions are dismissed.
>
> 8. The application filed by IMT Industrial Association is wholly misconceived. The members of the applicant are beneficiaries of the acquisition of the land because plots have been allotted to them out of the acquired land which belong to the respondents and others. Therefore, they do not have the locus standi to be heard in the proceedings relating to determination of market value of the acquired land and that too in a petition filed by the Corporation for review of the judgment of this Court. It is not the pleaded case of the applicant that its members were not aware of the fact that the plots have been carved out of the land acquired by the State Government for and on behalf of the Corporation and that the price mentioned in the allotment letter was tentative and further that in paragraph 5 of the allotment letter, it was specifically mentioned that they will have to pay additional price in the event of enhancement in the compensation. It is quite surprising that members of the applicant-Association paid price of the plots at the rate of Rs.2200/- per square yard and they are objecting to the payment of compensation to the land owners at the rate of less than Rs.500/- per square yard. This shows that members of the applicant want to take advantage of the measure taken by the State Government for compulsory acquisition of the land of the farmers and want to deprive

them of just and reasonable compensation. Consequently, the impleadment application is dismissed."

3. Soon thereafter, the petitioner filed these petitions by reiterating that sale deed Exhibit P1 dated 16.9.1994 executed by M/s. Heritage Furniture Pvt. Ltd. in favour of M/s. Duracell India Pvt. Ltd. was not a bona fide transaction and the High Court and this Court committed serious error by relying upon the same for the purpose of determining the amount of compensation. In paragraph A of the review petition, the petitioner has set out the brief history of the two companies and pleaded that at the time of the execution of sale deed both the entities were under the control of the same set of persons. It has also been averred that the facts relating to composition of the Board of Directors of two companies could not be ascertained by exercising due diligence and the true nature of Exhibit P1 was revealed only after the judgment of this Court. According to the petitioner, M/s. Heritage Furniture Pvt. Ltd. had purchased different parcels of land from the farmers by executing 10 different sale deeds executed on 16th and 18th August, 1993 at an average price of Rs.6 lakhs per acre and, as such, there was no occasion for M/s. Duracell India Pvt. Ltd. to have purchased the same land just after one year at the rate of Rs.20,03,103/- per acre. It is the petitioner's case that exorbitant price is shown to have been paid by the vendee to the vendor because its Indian promoters were to be benefited by the proposed joint venture between the Indian company and M/s. Duracell Inc. USA. Another ground taken by the petitioner is that sale deeds Exhibits P-2, P-3, P-4, P-7 and P-8, three of which were executed in June, 1994 and one in October, 1991 at an average price of Rs.7 lakhs per acre reflected true market value of the acquired land and in the absence of any cogent evidence, the High Court and this Court could not have discarded the same by assuming that the same were undervalued.

4. On 30.3.2011, this Court issued notice to the

landowners and granted stay subject to certain conditions which included a direction to the Managing Director of the petitioner to file an affidavit and disclose the names of the officers/officials responsible for not bringing the facts relating to Exhibit P1 to the notice of the High Court and this Court. In compliance of that order, Shri Rajiv Arora, the Managing Director of the petitioner filed affidavit dated 27.7.2011 in which he did not disclose the names of the concerned officers/officials but claimed that the functionaries of the Corporation did not suspect the bona fides of the sale deed executed between M/s. Heritage Furniture Pvt. Ltd. and M/s. Duracell India Pvt. Ltd. because the same was a registered instrument and they did not know that the two companies were controlled by the same set of persons. Shri Arora further claimed that the facts relating to two companies were brought to the notice of the concerned officers by the representatives of the Manesar Industrial Welfare Association, who were given opportunity of personal hearing in compliance of the order passed by the Punjab and Haryana High Court in Writ Petition No.6527/2010. According to Shri Arora, the information made available by the Association was got verified from the records of the Registrar of Companies and the same was found to be correct. In support of the affidavit of its Managing Director, the petitioner has placed on record the following documents:

(i) Search Reports issued by M/s AKG and Co relating to M/s Heritage Furniture Pvt. Ltd. and M/s Duracell India Pvt Ltd dt. 20.1.2011 and 21.2.2011;

(ii) Certificate of Incorporation of Heritage;

(iii) MoA and AoA of Heritage;

(iv) Mutations showing the purchase of land by Heritage under sale deeds dt. 16.8.1993 and 18.8.1993 at an average price of Rs 6 lac per acre;

(v) Annual Return of Duracell dt. 14.6.2000 showing

Saroj Kumar Poddar, Gurbunder Singh Gill and Jyotsana Poddar as the Directors;

(vi) True copy of sale deed dt. 16.9.1994;

(vii) Statement of Albel Singh substantiating the statements of the petitioners.

5. Some of the landowners have filed reply affidavits. Their stand is that Exhibit P1 reflected true market value of the acquired land as on the date of issue of notifications under Section 4(1) and that the petitioner's assertion that the transaction was not genuine is not correct. They have denied that the vendor and vendees were under the control of the same management and that exorbitantly high price was paid for 12 acres land in anticipation of some collaboration between M/s. Duracell India Pvt. Ltd. and M/s. Duracell Inc. USA, which would have benefited the former. With a view to avoid repetition, we may notice the averments contained in paragraphs 4 to 9 of the reply affidavit filed in Review Petition No.239/2011 and paragraph 5 of the reply affidavit filed on behalf of the landowners who were respondents in Civil Appeal No.6561/2009. The same read as under:

Paragraphs 4 to 9 of the reply affidavit filed in Review Petition No.239/2011

"4. I state that vide 5 sale deeds all dt. 6.7.1992 land measuring 49 kanals 2 marlas situated in Village Kherka Daula, District Gurgaon was sold by some of the co-owners to one Sh. D. C. Rastogi s/o Sh. L. P. Rastogi at the sale price of Rs.1,35,000/- per acre. The said village is at the distance of about 2 km from the land in question. Copies of 5 sale deeds all dt. 6.7.1992 are collectively Annexure R-1 hereto. Thereafter the vendee Sh. D. C. Rastogi sold the said land in terms of agreement to sell dt.6.12.1993 vide sale deed dated 16.3.1994 at the rate of about Rs.15,73,289/- per acre. This shows that there

was a jump in the price of the land in that area equal to almost 11 times of the original price. It is also common knowledge that the parties often undervalue the land price in order to minimize stamp duty and the land might have been sold at a higher price. Copy of sale deed dt. 16.3.1994 is Annexure R-2 hereto. Thus if M/s Heritage Furniture Pvt. Ltd. purchased land, which is subject matter of sale deed dt.16.9.1994, Ex.P.1, in the year 1993 at a price of about Rs.6 lakhs per acre as alleged by the review petitioner even though there is no evidence of purchase at such rate then its value increasing to Rs.20 lakhs per acre in the year 1994 is commensurate with the market trend. Moreover agreement to sell dt.31.5.1994 was executed after first notification u/s 4 on 30.4.1994 and it is a common knowledge that after publication of section 4 notification, the value of the land increases.

5. It is further submitted that vide sale deed dt.14.12.1993 (Ex.P.10) one M/s. DCN Internatinal Ltd. sold land measuring 62 kanals 7 marlas situated in Village Naurangpur District Gurgaon for Rs.95,21,160/- i.e. at the rate of Rs.13,74,345/- per acre. Copy of sale deed dt. 14.12.1993 is Annexure R.3 hereto.

6. I further state that sale deed dt. 16.9.1994 (Ex.P.1) was executed pursuant to agreement to sell dt.31.5.1994 between M/s Heritage Furniture Pvt. Ltd. (vendor) and M/s Duracell (India) Pvt. Ltd. (vendee) wherein the vendor agreed to sell the land in question measuring about 12 acres to the vendee at a sale price of Rs.2,42,00,000/- (Rs. Two crore forty lakhs only) as is clear from the recital in the sale deed itself. Ultimately vide sale deed dt.16.9.1994 the said land was sold at the same sale price by the vendor to the vendee. Thus the sale price of the land was agreed upon and fixed on 31.5.1994 as is clear from the recitation of the sale deed itself.

7. I further state that as per assertion of the review

petitioner M/s. Heritage Furniture Pvt. (vendor) and M/s Duracell (India) Pvt. Ltd. (vendee) had common persons in their Board of Directors namely Sh. Saroj Kumar Poddar, Ms. Jyotsana Poddar and Sh. Gurvinder Singh Gill. The review petitioner has filed search reports of both the said companies to show that the abavoe said three persons were common directors of both the companies. However, from the said search report of M/s. Duracell (India) Pvt. Ltd. it is clear the two directors namely Sh. Saroj Kumar Poddar and Ms. Jyotsana Poddar were appointed as Directors of this company on 9.6.1994 whereas Sh. Gurvinder Singh gill was appointed as its Director on 9.2.1997. Thus all the three alleged common Directors of the vendor and vendee companies were not on the Board of Directors of M/s Duracell (India) Pvt. Ltd. on or before 31.5.1994 on which date the agreement to sell of the land in question was executed and the sale price was fixed. The said three directors had no interest in M/s. Duracell (India) Pvt. Ltd. (vendee) as on 31.5.1994 when the sale price of the land was fixed.

8. I further state that except for making a bald allegation that the sale price of the said land was inflated intentionally so that the vendee company would increase its share holding in a Joint Venture it was going to enter into with one Duracell INC USA, this assertion has not been substantiated by placing ay cogent evidence on record. So much so that even it has not been pleaded in the review petition as to whether Joint Venture between M/s Duracell (India) Pvt. Ltd. and M/s. Duracell INC USA did take place or not. To the knowledge of the deponent there was no joint venture between M/s. Duracell (India) Pvt. Ltd. and M/s. Duracell INC USA. This fact that there was no Joint Venture between the said two companies also stands proved from the fact that the land purchased vide said sale deed dt.16.9.1994 was sold by M/s Duracell (India) Pvt. Ltd. vide sale deed dt.28.4.2004 to one M/s Lattu Finance

& Investments Ltd. at a sale consideration Rs.13,62,00,000/- i.e. approximately at the rate of Rs.1,13,00,000/- (Rs.one crore thirteen lakhs per acre approximately). At the time the name of M/s Duracell (India) Pvt. Ltd. had been changed to M/s Gillette India Ltd. on account of its amalgamation with other company. In this sale deed dt. 28.4.2004 entire history of purchase of land by M/s. Duracell (India) Pvt. Ltd. from M/s. Heritage Furniture Pvt. Ltd. in 1994 onwards has been recited, which includes construction of industrial building over the said land, its conversion of status from Pvt. Ltd. to Public Ltd. Company, its amalgamation with Indian Shaving Products Ltd. in the year 2000 and its change of name from Indian Shaving Products Ltd. to Gillette India Ltd. in December, 2000 and thereafter its sale to M/s. Lattu Finance & Investments Ltd. However, in the entire recitation there is no mention of any joint venture with M/s Duracell INC USA.

9. It is submitted by the respondents/land owners that the said sale deed (Ex.P.1) reflects true market price of the land in the year 1994 when section 4 notifications for the acquired land was issued. The allegation of the review petitioner that the sale deed (Ex.P.1) reflects inflated price is false and baseless. It is further submitted that another sale deed dt.17.7.1996 which is on record as (Ex.P.9) reflects the market value of the land in one of the acquired villages at Rs.25,00,000/- (Rs. Twenty five lakhs) per acre. In this transaction 1 kanal 11 marlas of land situated in Village Naharpur Kasan, has been sold at a price of Rs.4,84,375/-. This sale deed also proves that the market price of the acquired land in the year 1994 was Rs.20 lakhs per acre. Copy of sale deed dt.17.7.1996 is Annexure R-4 is hereto. It may be mentioned here that the same purchaser purchased different pieces of land at the same rate vide 15 different sale deeds and the total land purchased was 18 kanals 5 marlas i.e. more than 2.25

acres."

Paragraph 5 of the reply affidavit filed on behalf of the landowners who were respondents in Civil Appeal No.6561/2009.

"5. That the present review petition is being filed only on the ground that Ex. P-1, which has been relied upon by the Hon'ble High Court as well as upheld by this Hon'ble Court was entered by the corporate which were under the control and management of common board of directors and hence it is not the correct market value. In reply thereto the respondents humbly submits that:-

a) This fact for the first time is brought into the notice at the level of this Hon'ble Court, therefore review petition are estopped by their own conduct.

b) That merely the both the corporate have common board of directors does not prove that the sale in between the corporate was an escalated rates, rather it should be on other side i.e. common board would have trying to get the sale as possible as on lower rate. Therefore the ground for review is not legally justifiable.

c) It is submitted that later on corporate Gillette India Ltd. made a sale deed (land in issue of Ex.P-1) dated 28.4.2004 to another corporate namely Laltu Finance and Investment Ltd. for a sum of Rs. 13,62,00,000/- of land measuring 96 Kanalas and 13 Marlas. (i.e. one crore sixty lacs per acre). It is submitted that this sale can not be said to be an escalated rate and therefore the Ex. P-1 denotes the correct market value at the relevant time. A copies of the relevant sale deeds are annexed herewith and marked as ANNEXURE R-1.

d) It is also submitted that some other sale deeds at the relevant time (20.9.1996) were executed in favour of Time Master Pvt. Ltd. which came around 25 lakh per acre.

Details of the same are as follows-

Sr. No.	Vasika No.	Dt.	Land sold	Sale Consideration
1.	8725	20.9.1996	1K 1-1/2M	3,55,000/-
2.	8726	20.9.1996	1K 8M	3,59,375/-
3.	8727	20.9.1996	1K 1-1/2M	3,53,000/-
4.	8728	20.9.1996	1K 5M	4,06,000/-
5.	8799	20.9.1996	1K 9M	3,75,000/-
6.	8807	20.9.1996	1K 5M	4,06,000/-
7.	8815	20.9.1996	1K 6M	4,08,000/-
8.	8825	20.9.1996	1K 1M	3,53,000/-
9.	8832	20.9.1996	0K 17M	2,75,000/-
10.	8839	20.9.1996	1K 6M	4,08,000/-
11.	8846	20.9.1996	1K 5M	4,06,000/-
12.	8854	20.9.1996	1K 1M	3,55,000/-
13.	8861	20.9.1996	0K 17M	2,75,000/-

Total land sale is 15 Kanals 3 Marlas total amount 4734375/- i.e. at rate of Rs.25 lakh per acre.

14.	5431	17.7.96	1K 11M	4,84,375/-

i.e. at the rate of Rs. 25 lakh per acre.

It is submitted at sale deed No.5431 (at sr. no. 14) was already produced as Ex.P-9 before Reference Court in favour of Time Master Pvt. Ltd. by Vinod Kumar vendor.

Thus time master India Pvt. Ltd. purchased total land

measuring 16 kanals 14 marlas at the rate of Rs. 25 lakhs per acre.

(e) It is also relevant to point out the following are the sale transactions in December 2006 of the village Naharpur/ Kasan.

Land sold of Village Naharpur/Kasan

Sr. No.	Vasika No	Dt .	Land sold	Sale consideration	Per acre
1.	18628	4.12.06	12K 16.5M	2,56,50,000/-	1,60,00000
2.	18742	5.12.06	5K 13M	1,13,00,000/-	1,60,00000
3.	18743	5.12.06	5K 14M	74,00,000/-	1,60,00000
4.	19350	14.12.06	5K 13M	1,13,00,000/-	1,60,00000

(f) it is also submitted that the rate on which auction sale of Tower side on acquired land is done on 30.6.2006.

Tower Site No.	Area in meter	Amount of consideration	per sq yard
J	6804	95.10 crores	116865/- per sq. yd
K	5832	101.50 crores	145518/- per sq. yd
L	6804	93.00 crores	114284.50/- per sq. yd

(g) It is also submitted the following details of auction by HSIDC IMT Manesar.

Auction sales by HSIDC IMT Manesar

Allotment of SCO Sites for shopping booth in Sector-I, IMT Manesar auction held on 18.8.2009.

Sr.No.	Site No.	Area in Sq. Mts	Price of Site
1.	T-1	144	2,67,50,000/-
2.	T-2	144	2,33,50,000/-
3.	T-3	144	2,29,00,000/-
4.	T-4	144	2,29,00,000/-
5.	T-5	144	2,31,00,000/-
6.	T-7	144	2,28,00,000/-
7.	T-8	144	2,25,00,000/-
8.	T-9	144	2,22,00,000/-
9.	T-10	144	2,16,00,000/-
10.	D-1	108	1,82,00,000/-
11.	D-2	108	1,58,00,000/-
12.	D-3	108	1,62,50,000/-
13.	D-4	108	1,60,00,000/-
14.	D-5	108	1,51,00,000/-
15.	D-6	108	1,38,50,000/-
16.	D-7	108	1,40,00,000/-
17.	D-8	108	1,37,00,000/-
18.	D-9	108	1,35,00,000/-
19.	D-10	108	1,33,50,000/-

Total area 2376 square mts. total Rs.35,78,50,000/- i.e. 150610.26 per Mt.i.e. Rs.12,5928.58 per yard i.e. Rs.60,94,94,327/- per acre.

Allotment of SCO Sites for shopping booth in Sector-1, IMT Manesar auction held on 11.8.2010.

1.	D-10	108	2,12,50,000/-
2.	D-12	108	1,89,50,000/-
3.	D-14	108	1,90,00,000/-
4.	D-15	108	1,88,50,000/-
5.	D-16	108	1,92,00,000/-

Allotment of Triple Storey SCO Sites for in Sector-1, IMT Manesar, auction held on 11.8.2010 on following rates.

1.	11	144	3,03,00,000/-
1.	11	144	3,03,00,000/-
2.	12	144	3,00,00,000/-
3.	12-A	144	2,87,00,000/-

Total area 972 sq mts allotted for total amount of Rs.186250000/- i.e Rs.191615.22 per Mt. i.e. Rs.160213.67 per square yard or Rs. 77,54,34189/- per acre."

6. S/Shri Gopal Subramanium and Altaf Ahmed, learned senior advocates and other counsel who appeared for the petitioner relied upon reports dated 20.1.2011 and 21.1.2011 prepared by the Chartered Accountant M/s. AKG and Company to show that at least two of the Directors, namely, Shri Saroj Kumar Poddar and Ms. Jyotsana Poddar were common to the management of the two companies and submitted that land was shown to have been purchased by M/s. Duracell India Pvt. Ltd. at a very high price because it was hoping to reap benefit of the joint venture agreement with M/s. Duracell Inc. USA. Learned counsel pointed out that the vendor, namely, M/s.

Heritage Furniture Pvt. Ltd. had purchased 12 acres land from different landowners at an average price of Rs.6 lakhs per acre and argued that even if the benefit of 12% notional increase in the value of land was allowed to the vendor, no person of ordinary prudence would have purchased the same land after a period of 13 months at the rate of more than Rs.20 lakhs per acre. Learned counsel also referred to the statement of the authorised signatory of the vendor M/s. Heritage Furniture Pvt. Ltd. to drive home the point that the Sale Deed Exhibit P1 was not a bona fide transaction. Learned senior counsel then argued that dismissal of Review Petition Nos.2107-2108 of 2010 cannot operate as a bar to the maintainability of these petitions because till 13.1.2011, the officers of the petitioner did not have any inkling about the composition of the two companies and the fact that the vendor had purchased the land in 1993 at the rate of Rs.6 lakhs per acre only and the relevant facts came to their notice only in October, 2010 from the representatives of IMT Industrial Association.

7. S/Shri J.L. Gupta, S.R. Singh, P.S. Patwalia and Paras Kuhad, senior advocates and other counsel, who appeared for the landowners argued for dismissal of the review petitions. They emphasized that the very premise on which the review petitions have been filed, namely, discovery of the facts relating to composition of the board of directors of the two companies is incorrect because no-one from the Poddar group on the board of directors of M/s. Duracell India Pvt. Ltd. till 9.6.1994. Shri J. L. Gupta and Shri Paras Kuhad pointed out that Shri Saroj Kumar Poddar and Ms. Jyotsana Poddar were taken on the board of directors of M/s. Duracell India Pvt. Ltd. after execution of the agreement for sale and no joint venture agreement was executed between the vendee, i.e., M/s. Duracell India Pvt. Ltd. and M/s. Duracell Inc. USA. Shri Paras Kuhad also referred to the Memorandum of Association and Articles of Association of M/s. Duracell India Pvt. Ltd. to show that S/Shri Jyoti Sagar and Sajay Singh were the only promoters of the company. Learned counsel then argued that the petitioner

cannot seek review of judgment dated 17.8.2010 on the pretext of discovery of facts relating to composition of the two companies because no evidence was adduced before the Reference Court to prove that the sale deed Exhibit P1 was not a bona fide transaction or that vendee had paid exorbitant price for extraneous reasons. Learned counsel further argued that after dismissal of Review Petition Nos.2107-2108 of 2010, the petitioner cannot revive its prayer because there was total absence of diligence on the part of its officers.

8. We shall first consider whether the petitioner's prayer for review should be entertained by ignoring the dismissal of similar petitions by this Court vide order dated 13.1.2011. A careful reading of that order shows that in Review Petition Nos.2107-2108 of 2010, the petitioner had sought reconsideration of judgment dated 17.8.2010 on the premise that the vendor and the vendee had common management and that the price mentioned in the sale deed had been manipulated with an oblique motive. The Court declined to entertain this plea by observing that the petitioner had not produced any material to substantiate its assertion. Along with the present batch of review petitions, the petitioner has placed on record the search reports prepared by M/s AKG and Company, Certificate of Incorporation, Memorandum of Association and Articles of Association of M/s. Heritage Furniture Pvt. Ltd., mutations showing the purchase of land by M/s. Heritage Furniture Pvt. Ltd. vide sale deeds dated 16.8.1993 and 18.8.1993, annual return of M/s. Duracell India Pvt. Ltd. showing Shri Saroj Kumar Poddar, Shri Gurbunder Singh Gill and Ms. Jyotsana Poddar as the Directors and the statement of Albel Singh, but these documents neither singularly nor collectively support the petitioner's plea that management of the two companies, i.e., the vendor and the vendee, was under the control of the same set of persons or that the vendee had paid unusually high price with some oblique motive. As a matter of fact, Shri Saroj Kumar Poddar and Ms. Jyotsana Poddar were appointed as Directors of M/s. Duracell India Pvt. Ltd. on 9.6.1994 and Shri Gurbunder

Singh Gill was so appointed on 9.2.1997 whereas the agreement for sale was executed on 31.5.1994. The petitioner has not controverted the averments contained in paragraphs 4 and 5 of the reply affidavit filed in Review Petition No.239/2011, perusal of which makes it clear that in 1993 similar parcels of land had been sold at the rate of Rs.15,73,289/- and Rs.13,74,345/- per acre. Therefore, it cannot be said that M/s. Duracell India Pvt. Ltd. had paid exorbitantly high price to M/s. Heritage Furniture Pvt. Ltd. for extraneous reasons and we do not find any valid ground for indirect review of order dated 13.1.2011.

9. At this stage it will be apposite to observe that the power of review is a creature of the statute and no Court or quasi-judicial body or administrative authority can review its judgment or order or decision unless it is legally empowered to do so. Article 137 empowers this Court to review its judgments subject to the provisions of any law made by Parliament or any rules made under Article 145 of the Constitution. The Rules framed by this Court under that Article lay down that in civil cases, review lies on any of the grounds specified in Order 47 Rule 1 of the Code of Civil Procedure, 1908 which reads as under:

"Order 47, Rule 1:

1. Application for review of judgment.—

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case of which he applies for the review.

Explanation- The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment."

10. The aforesaid provisions have been interpreted in several cases. We shall notice some of them. In *S. Nagaraj v. State of Karnataka* 1993 Supp (4) SCC 595, this Court referred to the judgments in *Raja Prithwi Chand Lal Choudhury v. Sukhraj Rai* AIR 1941 FC 1 and *Rajunder Narain Rae v. Bijai Govind Singh* (1836) 1 Moo PC 117 and observed:

"Review literally and even judicially means re-examination or re-consideration. Basic philosophy inherent in it is the universal acceptance of human fallibility. Yet in the realm of law the courts and even the statutes lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of justice.

Even when there was no statutory provision and no rules were framed by the highest court indicating the circumstances in which it could rectify its order the courts culled out such power to avoid abuse of process or miscarriage of justice. In *Raja Prithwi Chand Lal Choudhury v. Sukhraj Rai* the Court observed that even though no rules had been framed permitting the highest Court to review its order yet it was available on the limited and narrow ground developed by the Privy Council and the House of Lords. The Court approved the principle laid down by the Privy Council in *Rajunder Narain Rae v. Bijai Govind Singh* that an order made by the Court was final and could not be altered:

"... nevertheless, if by misprision in embodying the judgments, by errors have been introduced, these Courts possess, by Common law, the same power which the Courts of record and statute have of rectifying the mistakes which have crept in .... The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have however gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects in order to enable the decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies."

Basis for exercise of the power was stated in the same decision as under:

"It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of last resort, where

> by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard."

Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality. When the Constitution was framed the substantive power to rectify or recall the order passed by this Court was specifically provided by Article 137 of the Constitution. Our Constitution-makers who had the practical wisdom to visualise the efficacy of such provision expressly conferred the substantive power to review any judgment or order by Article 137 of the Constitution. And clause (c) of Article 145 permitted this Court to frame rules as to the conditions subject to which any judgment or order may be reviewed. In exercise of this power Order XL had been framed empowering this Court to review an order in civil proceedings on grounds analogous to Order XLVII Rule 1 of the Civil Procedure Code. The expression, 'for any other sufficient reason' in the clause has been given an expanded meaning and a decree or order passed under misapprehension of true state of circumstances has been held to be sufficient ground to exercise the power. Apart from Order XL Rule 1 of the Supreme Court Rules this Court has the inherent power to make such orders as may be necessary in the interest of justice or to prevent the abuse of process of Court. The Court is thus not precluded from recalling or reviewing its own order if it is satisfied that it is necessary to do so for sake of justice."

11. In *Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius* AIR 1954 SC 526, the three-Judge Bench referred to the provisions of the Travancore Code of Civil Procedure, which was similar to Order 47 Rule 1 CPC and observed:

"It is needless to emphasise that the scope of an

application for review is much more restricted than that of an appeal. Under the provisions in the Travancore Code of Civil Procedure which is similar in terms to Order 47 Rule 1 of our Code of Civil Procedure, 1908, the court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used therein.

It may allow a review on three specified grounds, namely, (i) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed, (ii) mistake or error apparent on the face of the record, and (iii) for any other sufficient reason.

It has been held by the Judicial Committee that the words "any other sufficient reason" must mean "a reason sufficient on grounds, at least analogous to those specified in the rule". See *Chhajju Ram v. Neki* AIR 1922 PC 12 (D). This conclusion was reiterated by the Judicial Committee in Bisheshwar Pratap Sahi v. Parath Nath AIR 1934 PC 213 (E) and was adopted by on Federal Court in *Hari Shankar Pal v. Anath Nath Mitter* AIR 1949 FC 106 at pp. 110, 111 (F). Learned counsel appearing in support of this appeal recognises the aforesaid limitations and submits that his case comes within the ground of "mistake or error apparent on the face of the record" or some ground analogous thereto."

12. In Thungabhadra Industries Ltd. v. Govt. of A.P. (1964) 5 SCR 174, another three-Judge Bench reiterated that the power of review is not analogous to the appellate power and observed:

"A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. We do not consider that this furnishes a suitable occasion for dealing with this difference

exhaustively or in any great detail, but it would suffice for us to say that where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions, entertained about it, a clear case of error apparent on the face of the record would be made out."

13. In *Aribam Tuleshwar Sharma v. Aibam Pishak Sharma* (1979) 4 SCC 389, this Court answered in affirmative the question whether the High Court can review an order passed under Article 226 of the Constitution and proceeded to observe:

"But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate powers which may enable an appellate court to correct all manner of errors committed by the subordinate court."

14. In *Meera Bhanja v. Nirmala Kumari Choudhury* (1995) 1 SCC 170, the Court considered as to what can be characterised as an error apparent on the fact of the record and observed:

".....it has to be kept in view that an error apparent on the face of record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there

may conceivably be two opinions. We may usefully refer to the observations of this Court in the case of Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale AIR 1960 SC 137 wherein, K.C. Das Gupta, J., speaking for the Court has made the following observations in connection with an error apparent on the face of the record:

"An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior court to issue such a writ."

15. In *Parsion Devi v. Sumitri Devi* (1997) 8 SCC 715, the Court observed:

"An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Order 47 Rule 1 CPC..... A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise"."

16. In *Lily Thomas v. Union of India* (2000) 6 SCC 224, R.P. Sethi, J., who concurred with S. Saghir Ahmad, J., summarised the scope of the power of review in the following words:

"Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise. The mere possibility of two views on the subject is not a ground for

review. Once a review petition is dismissed no further petition of review can be entertained. The rule of law of following the practice of the binding nature of the larger Benches and not taking different views by the Benches of coordinated jurisdiction of equal strength has to be followed and practised."

17. In *Haridas Das v. Usha Rani Banik* (2006) 4 SCC 78, the Court observed:

"The parameters are prescribed in Order 47 CPC and for the purposes of this lis, permit the defendant to press for a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient reason". The former part of the rule deals with a situation attributable to the applicant, and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible. Neither of them postulate a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the court and thereby enjoyed a favourable verdict."

18. In *State of West Bengal v. Kamal Sengupta* (2008) 8 SCC 612, the Court considered the question whether a Tribunal established under the Administrative Tribunals Act, 1985 can review its decision, referred to Section 22(3) of that Act, some of the judicial precedents and observed:

"At this stage it is apposite to observe that where a review is sought on the ground of discovery of new matter or evidence, such matter or evidence must be relevant and must be of such a character that if the same had been produced, it might have altered the judgment. In other words, mere discovery of new or important matter or evidence is not sufficient ground for review ex debito justitiae. Not only this, the party seeking review has also to show that such additional matter or evidence was not

within its knowledge and even after the exercise of due diligence, the same could not be produced before the court earlier.

The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 47 Rule 1 CPC or Section 22(3)(f) of the Act. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment / decision."

19. In the light of the propositions laid down in the aforementioned judgments, we shall now examine whether the petitioner has succeeded in making out a case for exercise of power by this Court under Article 137 of the Constitution read with Order 47 Rule 1 CPC. This consideration needs to be prefaced with an observation that the petitioner has not offered any explanation as to why it did not lead any evidence before the Reference Court to show that sale deed Exhibit P1 was not a bona fide transaction and the vendee had paid unusually high price for extraneous reasons. The parties had produced several sale deeds, majority of which revealed that the price of similar parcels of land varied from Rs. 6 to 7 lakhs per acre. A reading of the sale deeds would have prompted any person of ordinary prudence to make an enquiry as to why M/s. Duracell India Pvt. Ltd. (vendee) had paid more than Rs.2,42,00,000/- for 12 acres land, which have been purchased by the vendor only a year back at an average price of Rs.6 lakhs per acre. However, the

fact of the matter is that neither the advocate for the petitioner nor its officers/officials, who were dealing with the cases made any attempt to lead such evidence. This may be because they were aware of the fact that at least in two other cases such parcels of land had been sold in 1993 for more than Rs.13 lakhs and Rs.15 lakhs per acre and in 1996, a sale deed was executed in respect of the land of village Naharpur Kasan at the rate of Rs.25 lakhs per acre. This omission coupled with the fact that the petitioner's assertion about commonality of the management of two companies is ex-facie incorrect leads to an irresistible inference that judgment dated 17.8.2010 does not suffer from any error apparent on the face of the record warranting its review. Surely, in guise of seeking review, the petitioner cannot ask for *de novo* hearing of the appeals.

20. The petitioner's plea that the documents produced along with the review petitions could not be brought to the notice of the Reference Court and the High Court despite exercise of due diligence by its officers does not commend acceptance because it had not explained as to why the concerned officers/officials, who were very much aware of other sale transactions produced by themselves and the landowners did not try to find out the reasons for wide difference in the price of land sold by Exhibit P1 and other parcels of land sold by Exhibits P2 to P13 and Exhibits R1 to R15.

21. Before concluding, we would like to add that while deciding the review petitions, this Court cannot make roving inquiries into the validity of the transaction involving the sale of land by M/s. Heritage Furniture Pvt. Ltd. to M/s. Duracell India Pvt. Ltd. or declare the same to be invalid by assuming that the vendee had paid higher price to take benefit of an anticipated joint venture agreement with a foreign company. Of course, the petitioner has not controverted the statement made by the respondents that the vendee had sold the land to M/s. Lattu Finance and Investments Ltd. in 2004 for a sum of Rs.13,62,00,000/- i.e. at the rate of Rs.1,13,00,000/- per acre.

22. In the result, the review petitions are dismissed. The interim order passed on 30.3.2011 stands automatically vacated. The petitioner shall pay cost of Rs.25,000/- in each case. The amount of cost shall be deposited with the Supreme Court Legal Services Committee within a period of three months.

23. However, it is made clear that the petitioner shall be free to withdraw the amount which it had deposited in compliance of this Court's order dated 30.3.2011. In any case, the petitioner shall pay the balance amount of compensation to the landowners and/or their legal representatives along with other statutory benefits within three months from today.

24. In view of the dismissal of the review petitions and the direction given for payment of the balance amount, the contempt petitions and all the pending interlocutory applications are disposed of as infructuous.

D.G. Review petitions dismissed.

VILLAGE PANCHAYAT, CALANGUTE

v.

THE ADDITIONAL DIRECTOR OF PANCHAYAT-II AND ORS.

(Civil Appeal No. 4832 of 2012)

JULY 02, 2012

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

Goa Panchayat Raj Act, 1994 – ss. 3, 64 and 8 – Establishment of village Panchayat u/s. 3 – Order passed by the designated officer-Additional Director of Panchayat exercising the power of an appellate authority qua the action/ decision/resolution of the Village Panchayat – Locus of Village Panchayat to file a petition under Article 226 and/or 227 for setting aside the order passed by Additional Director of Panchayat – On appeal, held: Village Panchayat has the locus to challenge the orders passed by Additional Director of Panchayat – On facts, local residents had complained against the illegal construction of blocking access to water well and the chapel by a Cpompany and the Village Panchayat passed separate resolutions for revocation of occupancy certificate and permission for construction – Thereafter, Sarpanch issued notices to the Company and directed it to stop the further construction – However, the Additional Director of Panchayat instead of suspending the execution of the resolutions passed by the Village Panchayat or the notice issued by the Sarpanch and sending the matter to the State Government for confirmation, suo-moto annulled the resolutions and the notice by assuming that he had the power to do so – Thus, while the village Panchayat and the Sarpanch had exercised their respective powers in public interest, Additional Director of Panchayat nullified that exercise because he felt that the resolution/action was contrary

to law and was unjustified – While exercising the power under the Act, the Panchayat was not acting as a subordinate to Additional Director of Panchayat but as a body representing the will of the people and also a body corporate in terms of s.8 – High Court erred in holding that the writ petition filed by the Village Panchayat challenging the order passed by Additional Director of Panchayat was not maintainable – Order passed by the High Court set aside – Writ petitions filed by the Village Panchayat being maintainable, restored to their original numbers.

Panchayat – Functions and responsibilities of village panchayat – Explained.

The question which arose for consideration in the instant appeals was whether a Village Panchayat established under Section 3 of the Goa Panchayat Raj Act, 1994 or any other statutory dispensation existing prior to the enactment of the Act has the locus to file a petition under Article 226 and/or 227 of the Constitution for setting aside an order passed by the designated officer exercising the power of an appellate authority qua the action/decision/resolution of the Village Panchayat.

Appellant-Village Panchayat granted permission to a Company for raising construction on property. It is alleged that the company made illegal construction whereby it blocked the access to the water well and the chapel. The local residents made a complaint. The appellant passed resolution for revocation of the occupancy certificate. By another resolution the permission granted to the company for raising construction was revoked. Aggrieved, the appellant filed Panchayat Petition and the resolution canceling the permission was recalled since the rules of natural justice was not followed. Thereafter, the Sarpanch issued notice under Section 64 of the Goa Panchayat Raj Act, 1994 and

directed the company to stop further construction. The Company challenged the notice in Panchayat Appeal and respondent No.1-the Additional Director of Panchayat passed an ex-parte interim order. Meanwhile, the Company filed an application for grant of permission to use the property for running a guest house and the appellant rejected the same. The Company challenged the decision of the Gram Panchayat in Panchayat Appeal. Some residents also filed a complaint before Block Development Officer against the illegal construction raised by the company. The Block Development Officer dismissed the complaint holding that the construction made by the company was not illegal and any restriction on the use of property would seriously prejudice its cause. The appellant filed writ petition challenging the orders passed by respondent No.1 and order passed by the Block Development Officer on the ground that respondent No.1 did not have the jurisdiction to entertain an appeal against the notice issued under Section 64 of the Act and, in any case, such notice could not be stayed under Section 178; that even if the appeal filed by the company was treated as maintainable, there was no justification to pass an interim order which had the effect of allowing the appeal; and that the Block Development Officer could not have exercised power under Section 66 of the Act and disposed of the complaint filed by the local residents and thereby allowed the company to continue the illegal construction which had effectively blocked access to the water well and the chapel. During the pendency of the writ petition, respondent No.1 passed final order in Panchayat Appeal and directed the appellant to reconsider the application made by the company for grant of permission to use the property for running a guest house. The appellant filed a writ petition challenging the order passed by respondent No. 1. The Single Judge of the High Court dismissed both the writ

petitions as not maintainable. Therefore, the appellant filed the instant appeals.

Allowing the appeals, the Court

HELD: 1.1 A conjoint reading of the provisions contained in Chapter III of the Goa Panchayat Raj Act, 1994 shows that a Panchayat is generally required to perform the functions specified in Schedule I and also make provision for carrying out any other work or measures likely to promote the health, safety, education, comfort or convenience or social or economic well-being of the inhabitants of the Panchayat area. It also has the power to do all acts necessary for or incidental to carrying out the functions entrusted, assigned or delegated to it. The Sarpanch is not only entrusted with the duty to implement the programme of welfare schemes and other development works, but also stop any unauthorised construction erected in the Panchayat area. Section 66 which regulates erection of buildings within Panchayat area empowers it and/or the Sarpanch to take action against erection of building without obtaining permission from the competent authority or any violation of the conditions imposed at the time of grant of such permission. The Panchayat is also empowered to issue direction for up-keep and maintenance of sources of water supply which are in private hands. [Para 18] [299-F-H; 300-A-B]

1.2. Section 178 empowers the Director to suspend the execution of any order or resolution passed by a Panchayat or prohibit the doing of anything by or on behalf of a Panchayat if he is satisfied that the execution of any such order or resolution or doing of anything by or on behalf of the Panchayat is unjust, unlawful or is improper or is causing or is likely to cause injury or annoyance to the public or lead to a breach of peace. Section 178(2) casts a duty on the Director to forward to

the Government and the Panchayat affected by his order a copy of the statement of reasons for making the order. The Government has the power to confirm or rescind the order or direct that it shall continue to remain in force with or without modification permanently or for a specified period. Proviso to this Section imposes an obligation on the Government to give reasonable opportunity of showing cause to the concerned Panchayat against the proposed confirmation, revision or modification of the order of the Director. Section 201 provides for appeal against an order of the Panchayat made under Sections 76, 77, 84, 104 and 105. Where no appeal has been provided under the Act on any miscellaneous matter dealt with by the Panchayat or the Village Panchayat Secretary or the Sarpanch, an appeal lies to the Block Development Officer under Section 201-A(1). In terms of Section 201-A(2), Deputy Director is empowered to exercise revisional power qua the order which may be passed by the Block Development Officer under sub-section (1). [Para 19] [300-C-H]

1.3. In both the cases, respondent No.1 set aside the resolutions passed by the appellant as also the notice issued by the Sarpanch. The orders passed by respondent No.1 do not refer to the particular provision under which the concerned officer was exercising the appellate power. Surely, he could not have exercised the power vested in the appellate authority under Section 201 because the source of power of the resolutions passed by the appellant and the notice issued by the Sarpanch cannot be traced in Sections 76, 77, 84, 104 and 105 of the Act which relate to removal of any building or part thereof or any tree or branch of a tree if it is in a ruinous state or is likely to fall or is otherwise dangerous to any person occupying such building or part thereof or matters relating to sanitation, conservancy and drainage or exercise of power by the Secretary in relation to any

well, stream, channel, tank or other source of water supply or which postulates right to carry drain through land or into drain belonging to other persons. Similarly, respondent No.1 cannot be said to have exercised power under Section 201-A because under that provision, only the Block Development Officer is competent to entertain an appeal in a miscellaneous matter which is dealt with by the Panchayat or the Village Panchayat Secretary or the Sarpanch and against which no appeal has been specifically provided under the Act. Therefore, it is reasonable to infer that respondent No.1 had exercised power under Section 178(1). However, instead of suspending the execution of the resolutions passed by the appellant or the notice issued by the Sarpanch and sending the matter to the State Government for confirmation, the concerned officer suo-moto annulled the resolutions and the notice by assuming that he had the power to do so. It is thus, evident that while the appellant and the Sarpanch had exercised their respective powers in public interest, respondent No.1 nullified that exercise because he felt that the resolution/ action was contrary to law and was unjustified. While exercising the power under the Act, the Panchayat was not acting as a subordinate to respondent No.1 but as a body representing the will of the people and also a body corporate in terms of Section 8 of the Act. Therefore, it had the locus to challenge the orders passed by respondent No.1 and the High Court was clearly in error in holding that the writ petition was not maintainable. The writ petitions filed by the appellant were maintainable and the Single Judge of the High Court committed grave error by summarily dismissing the same. The contrary view expressed by the High Court in other judgments does not represent the correct legal position. The impugned order is set aside and the writ petitions filed by appellant are restored to their original numbers. The High Court shall now issue notice to the respondents and decide the

writ petitions on merits. [Para 20, 21, 26 and 27] [301-C-H; 302-A-D; 306-D-F]

Karunagappally Grama Panchayat v. State of Kerala **1996 (1) KLT 419;** *High Court of M.P. v. Mahesh Prakash and others* **(1995) 1 SCC 203;** *State of Orissa v. Union of India* **1995 Supp. (2) SCC 154;** *Godde Venkateswara Rao v. Government of Andhra Pradesh* **AIR 1966 SC 828 – relied on.**

Village Panchayat of Calangute v. The Deputy Director of Panchayats **2004(2) Goa LR 497;** *Karunagappally Grama Panchayat v. State of Kerala* **1996 (1) KLT 419;** *Village Panchayat of Velim v. Shri Valentine S.K.F. Rebello and another* **1990(1) Goa L.T 70 – referred to.**

Rex v. London Quarter Sessions Ex parte Westminster Corporation **(1950) 1 KB 148 – referred to.**

Case Law Reference:

2004(2) Goa LR 497	**Referred to.**	**Para 9**
1996 (1) KLT 419	**Referred to.**	**Para 9**
1990(1) Goa L.T 70	**Referred to.**	**Para 10**
(1950) 1 KB 148	**Referred to.**	**Para 10**
1996 (1) KLT 419	**Relied on.**	**Para 22**
(1995) 1 SCC 203	**Relied on.**	**Para 23**
1995 Supp. (2) SCC 154	**Relied on.**	**Para 24**
AIR 1966 SC 828	**Relied on.**	**Para 25**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4832 of 2012.

From the Judgment & Order dated 18.8.2010 of the High Court of Bombay at Goa in Writ Petition No. 312 of 2010.

WITH

C.A. No. 4833 of 2012

Shyam Divan, Pratap Venugopal, Varun Singh, Gaurav Nair for the Appellant.

V.C. Daga, Neil Hildreth, Shruti Sabharwal, Ritu Rastogi, Praveen Kumar, Siddharth Bhatnagar, Pawan Kr. Bansal, T. Mahipal for the Respondents.

The Judgment of the Court was delivered by

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

2. Whether a Village Panchayat established under Section 3 of the Goa Panchayat Raj Act, 1994 (for short, 'the Act') or any other statutory dispensation existing prior to the enactment of the Act has the locus to file a petition under Article 226 and/or 227 of the Constitution for setting aside an order passed by the designated officer exercising the power of an appellate authority qua the action/decision/resolution of the Village Panchayat is the question which arises for consideration in these appeals filed against order dated 18.08.2010 passed by the learned Single Judge of the Bombay High Court, Goa Bench in Writ Petition Nos. 16 and 312 of 2010.

3. M/s. Kay Jay Constructions Company Pvt. Ltd. (hereinafter described as, 'the company') (respondent No.4 in the appeal arising out of SLP (C) No.1758 of 2011) was granted permission by the appellant in 2006 for raising construction on property bearing Survey No. 362/12 and part of Survey No. 362/10 at Porbawado, Calangute, Bardez. The company is said to have illegally constructed a wall and thereby blocked access to the water well situated in Survey No.362/10 and the chapel situated beyond Survey No.362/12 as also the existing water drains. When the local residents complained against the illegal construction, the appellant passed resolution

dated 24.03.2008 for revocation of the occupancy certificate, which was issued by the Secretary on the basis of what were termed as manipulated resolutions passed on 22.12.2007 and 28.02.2008. The appellant passed another resolution dated 25.3.2009 and revoked the permission granted to the company. The latter challenged the same by filing Panchayat Petition No.6/2009 on the ground that the decision taken by the appellant was contrary to the rules of natural justice. On realizing that the action taken by it was not proper, the appellant revoked resolution dated 25.03.2009. Thereafter, the Sarpanch issued notice dated 29.7.2009 under Section 64 of the Act and directed the company to stop further construction. Simultaneously, he fixed 4.8.2009 as the date for inspection of the site. The company challenged the notice in Panchayat Appeal No.12/2009. Respondent No.1 - the Additional Director of Panchayat entertained the appeal and passed an ex-parte interim order dated 3.8.2009.

4. In the meanwhile, application dated 24.7.2009 was made on behalf of the company for grant of permission to use the property for running a guest house. The same was rejected by the appellant vide resolution dated 4.8.2009. The Managing Director of the company challenged the decision of the Gram Panchayat in Panchayat Appeal No.174/2009. On being noticed, the appellant made a request that hearing of Panchayat Appeal No. 174/2009 may be deferred till the disposal of Panchayat Appeal No. 12/2009 and it may be permitted to inspect the construction made by the company. Respondent No.1 rejected the appellant's request and fixed Panchayat Appeal No.174/2009 for final hearing.

5. It is borne out from the record that some residents had also filed complaint before Block Development Officer, Bardez, Goa against the illegal construction raised by the company and the consequential blockage of access to the well and change of the natural flow of rain water resulting in water logging. Initially, the Block Development Officer passed an injunction order against the company but after considering the latter's

reply, he dismissed the complaint by observing that the construction made by the company was not illegal and any restriction on the use of property would seriously prejudice its cause.

6. The appellant challenged orders dated 3.8.2009 and 30.11.2009 passed by respondent No.1 and order dated 19.10.2009 passed by the Block Development Officer in Writ Petition No.16/2010 on the ground that respondent No.1 did not have the jurisdiction to entertain an appeal against the notice issued under Section 64 of the Act and, in any case, such notice could not be stayed under Section 178. It was also pleaded that even if the appeal filed by the company was treated as maintainable, there was no justification to pass an interim order which had the effect of allowing the appeal. As regards the order of the Block Development Officer, it was pleaded that he could not have exercised power under Section 66 of the Act and disposed of the complaint filed by the local residents and thereby allowed the company to continue the illegal construction which had effectively blocked access to the water well and the chapel.

7. During the pendency of Writ Petition No.16/2010, respondent No.1 passed final order dated 12.02.2010 in Panchayat Appeal No. 12/2009 and directed the appellant to reconsider the application made by the company for grant of permission to use the property for running a guest house. The appellant challenged that order in Writ Petition No. 312/2010.

8. The learned Single Judge of the High Court relied upon the order passed in Writ Petition No.620/2009 and dismissed both the writ petitions as not maintainable.

9. Shri Shyam Divan, learned senior counsel relied upon the judgment of the learned Single Judge in Village Panchayat of Calangute v. The Deputy Director of Panchayats 2004(2) Goa LR 497 and of the Division Bench of the Kerala High Court in Karunagappally Grama Panchayat v. State of Kerala 1996

(1) KLT 419 and argued that summary dismissal of the writ petitions was not at all warranted because the issues raised by the appellant were of considerable public importance. Shri Divan submitted that the illegal construction raised by the company has the effect of preventing the public from having access to the water well in Survey No. 362/10 and the chapel situated beyond Survey No.362/12 and argued that the appellant being a representative body of the people of the village has the right to question the orders passed by respondent No.1 and the Block Development Officer and the High Court could not have non-suited it by accepting the narrow interpretation of the term 'person aggrieved'.

10. Shri V.C. Daga, learned senior counsel for the company relied upon the judgment of the Division Bench of the High Court in *Village Panchayat of Velim v. Shri Valentine S.K.F. Rebello and another* 1990(1) Goa L.T 70 and order dated 13.08.2010 passed by learned Single Judge in Writ Petition No. 620/2009 and batch and argued that the writ petitions filed by the appellants were rightly dismissed as not maintainable. Shri Daga also relied upon the judgment in *Rex v. London Quarter Sessions Ex parte* Westminster Corporation (1950) 1 KB 148 and argued that the appellant cannot be treated as a 'person aggrieved' by the orders passed by respondent No.1 and the Block Development Officer. Learned senior counsel also pointed out that Writ Petition No. 5/2010 filed by the local residents questioning order dated 19.10.2009 passed by the Block Development Officer was dismissed by the learned Single Judge vide order dated 20.10.2010 and argued that in view of that order the appellant is estopped from questioning order dated 19.10.2009 .

11. We have considered the respective submissions. Before independence, majority population of the States which merged in the Union was rural. After independence and even now India continues to be a pre-dominantly rural country. There are almost six lakh villages in the country and almost 75% of

the population lives in the villages. Article 40 of the Constitution, which enshrines one of the Directive Principles of State Policy was incorporated in the Draft Constitution in the light of the suggestions made by S/Shri M.A. Ayangar, N.G. Ranga, Surendra Mohan Ghose and Seth Govind Das, all of whom strongly advocated that the dream of the Father of Nation of initiating democracy at the grass root (rural India) be translated into reality by making Panchayats as units of self-Government. This Article mandates the State to take steps to organize Village Panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-Government. Notwithstanding the mandate of Article 40, the State failed to take effective steps to make Village Panchayats as units of self-Government. In 1977, a Committee was constituted under the chairmanship of Shri Ashok Mehta to evaluate Panchayati Raj institutions and their functioning. In its report, the Committee observed that the existing model of Panchayats has failed to transfer the fruits of democracy to the weaker sections of society because they are dominated mostly by socially and economically privileged people.

12. In 1992, the Constitution (Seventy-third Amendment) Act was introduced in Parliament and the existing Part IX was substituted. The background in which this amendment was introduced is evinced from the first two paragraphs of the Statement of Objects and Reasons, which are extracted below:

> "Though the Panchayati Raj institutions have been in existence for a long time, it has been observed that these institutions have not been able to acquire the status and dignity of viable and responsive people's bodies due to a number of reasons including absence of regular elections, prolonged supersessions, insufficient representation of weaker sections like Scheduled Castes, Scheduled Tribes and women, inadequate devolution of powers and lack of financial resources.

Article 40 of the Constitution which enshrines one of the directive principles of State Policy lays down that the State shall take steps to organise Village Panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government. In the light of the experience in the last forty years and in view of the shortcomings which have been observed, it is considered that there is an imperative need to enshrine in the Constitution certain basic and essential features of Panchayati Raj institutions to impart certainty, continuity and strength to them."

13. The aforesaid amendment is a turning point in the history of local self-Government. By this amendment Panchayat became an 'institution of self-governance' – Article 243(d) and comprehensive provisions came to be incorporated for democratic decentralization of governance on Gandhian principle of participatory democracy. The Panchayati Raj institutions structured under 73rd Amendment are meant to bring about sweeping changes in the governance at the grass root level. By this amendment, Parliament introduced three tier system of Panchayati Raj institutions at Village, Block and District levels. Article 243-C provides for composition of a Panchayat and filling up of the seats in a Panchayat by direct election. Article 243-D provides for reservation of seats and Article 243-E provides for duration of Panchayat. Article 243-F enumerates the grounds of disqualification of membership of the Panchayat and Article 243-G prescribes the powers, authority and responsibilities of a Panchayat. Article 243-H gives power to the State Legislatures to enact law and authorise a Panchayat to levy, collect and appropriate taxes, duties, tolls and fees; assign to a Panchayat such taxes, duties, tolls and fees levied and collected by the State Government and also provide for making such grants-in-aid to the Panchayats from the Consolidated Fund of the State. Clause (d) of this Article envisages a legislative provision for constitution of appropriate provisions for crediting all monies received by or

on behalf of the Panchayats and also for withdrawal of such monies. Article 243-I envisages constitution of Finance Commission to review financial position of the Panchayats. Article 243-K (1) declares that the superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats shall be vested in a State Election Commission. Clause 4 of this Article empowers the State Legislature to make law with respect to all matters relating to, or in connection with, elections to the Panchayats. By virtue of Article 243-L, the provisions of Part IX have been made applicable to the Union Territories. Article 243-M declares that provisions of Part IX shall not apply to the Scheduled Areas referred to in clause (1) and the tribal areas referred to in clause (2) of Article 244, the States of Nagaland, Meghalaya and Mizoram, hill areas in the State of Manipur for which District Councils exist as also the hill areas of Darjeeling. Clause 3(a) of this Article excludes the application of the provisions relating to reservation of seats for the Scheduled Castes insofar as the State of Arunachal Pradesh is concerned. Article 243-N contains a transitory provision for continuance of the existing laws for a maximum period of one year. Article 243-O contains a *non-obstante* clause and declares that the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 243-K, shall not be called in question in any Court and that no election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the State Legislature. Article 243(d) and Article 243-G which have bearing on the issue raised in theses appeals read as under:

"243(d). In this Part, unless the context otherwise requires,-

(d) "Panchayat" means an institution (by whatever name called) of self-government constituted under article 243B, for the rural areas;

243G**.** Powers, authority and responsibilities of Panchayat - Subject to the provisions of this Constitution, the Legislature of a State may, by law, endow the Panchayats with such powers and authority and may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats, at the appropriate level, subject to such conditions as may be specified therein, with respect to

(a) the preparation of plans for economic development and social justice;

(b) the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule."

14. In the light of the Constitution (Seventy-third Amendment) Act, the State legislature enacted the Act, as is evident from its preamble, which reads thus:

"Whereas it is expedient to replace the present enactment by a comprehensive enactment to establish a two-tier Panchayat Raj System in the State with elected bodies at village and district levels, in keeping with the Constitution Amendment relating to Panchayats for greater participation of the people and more effective implementation of rural development programmes."

15. Chapter I of the Act contains definitions of various terms including "Panchayat" which means a Village Panchayat established under Section 3. Chapter II contains provisions relating to Gram Sabha and constitution of Panchayats including election to the Panchayats in which every person enrolled in the electoral roll of the Legislative Assembly of the State is entitled to participate. Chapter III contains provisions relating to functions, duties and powers of Panchayats,

Sarpanch and Deputy Sarpanch. Since, we are not concerned with the provisions relating to staff of Panchayats, constitution of Taluka Panchayats and related provisions, constitution of Zilla Panchayats and related provisions, we do not consider it necessary to make a detailed reference to the provisions contained in Chapters IV to IX. Chapter X contains provisions relating to inspection and supervision etc. of Panchayats. Chapter XI relates to financial control and audit. Chapter XII incorporates miscellaneous provisions. For the sake of reference, Sections 2(14), 3(1), (2), 47-A, 60, 62, 64, 66, 70, 84, 178, 201, 201-A and relevant portions of Schedule-I are reproduced below:

"CHAPTER I

Preliminary

2. Definitions.— In this Act, unless the context otherwise requires,-

(14) "Panchayat" means a Village Panchayat established under section 3;

CHAPTER II

Gram Sabha — Constitution of Panchayats

3. Declaration of Panchayat areas and establishment of Panchayats.— (1) After making such inquiry as may be necessary, the Government may, by notification, declare a local area, comprising of a village or a group of villages or any part or parts thereof, or a combination of any two or more of them to be a Panchayat area for the purposes of this Act and also specify its headquarters.

(2) For every Panchayat area, there shall be a Panchayat as from such date as the Government may, by notification, appoint.

47-A. Executive powers of the Sarpanch.— Notwithstanding anything contained in this Act and the rules framed thereunder, the Sarpanch shall exercise the powers on the following matters, namely:—

(i) to implement the programme of welfare schemes and other developmental works;

(ii) to execute and implement the resolution passed by the Panchayat on the matters not specified in section 47.

(Inserted by the Amendment Act 1 of 1997)

CHAPTER III

Functions, Duties and Powers of Panchayats, Sarpanch and Deputy Sarpanch

60. Functions of the Panchayat.— (1) Subject to such conditions as may be specified by the Government from time to time, the Panchayat shall perform the functions specified in Schedule-I.

(2) The Panchayat may also make provision for carrying out within the Panchayat area any other work or measure which is likely to promote the health, safety, education, comfort, convenience or social or economic well-being of the inhabitants of the Panchayat area.

62. General powers of the Panchayat.— Panchayat shall have powers to do all acts necessary for or incidental to the carrying out of the functions entrusted, assigned or delegated to it and in particular and without prejudice to the foregoing powers to exercise all powers specified under this Act.

64. Powers and duties of the Sarpanch and Deputy Sarpanch.— (1) The Sarpanch of the Panchayat shall, in addition to the power exercisable under any other provision of this Act or rules made thereunder,—

(j) stop any unauthorized construction erected in the Panchayat area notwithstanding anything contained in sub-section (3) of section 66 of this Act and place the matter immediately before the ensuing meeting of the Panchayat for taking suitable decision;

(k) remove encroachment and obstruction upon public property, street, drains and open sites not being private property;

(l) ensure due compliance of the provisions of the Act; and

66. Regulation of the erection of buildings.— (1) Subject to such rules as may be prescribed, no person shall erect any building or alter or add to any existing building or reconstruct any building without the written permission of the Panchayat. The permission may be granted on payment of such fees as may be prescribed.

(2) If a Panchayat does not, within thirty days from the date of receipt of application, determine whether such permission should be given or not and communicate its decision to the applicant, the applicant may file an appeal within thirty days from the date of expiry of aforesaid period, to the Deputy Director who shall dispose of the same within thirty days from the date of filings of such appeal. If the Deputy Director fails to dispose of the appeal within thirty days, such permission shall be deemed to have been given and the applicant may proceed to execute the work, but not so as to contravene any of the provisions of this Act or any rules or bye-laws made under this Act.

(3) Whenever any building is erected, added to or reconstructed without such permission or in any manner contrary to the rules prescribed under sub-section (1) or any conditions imposed by the permission granted, the Panchayat may,—

(a) direct that the building, alteration or addition be stopped; or

(b) by written notice require within a reasonable period to be specified therein, such building alteration or addition to be altered or demolished.

70. Control of hotels etc.— No place within the jurisdiction of a Panchayat shall be used as a hotel, restaurant, eating house, coffee house, sweetmeat shop, bakery, boarding house or lodging house (other than a hostel recognized by the Government), or a dharmashala or for manufacturing ice or aerated water except under a licence granted or renewed by the Panchayat and except in accordance with condition specified therein.

84. Powers and duties in regard to sources of water supply.— The Secretary or any officer authorized by the Panchayat in this behalf may at any time by written notice require that the owner or any person who has control over any well, stream, channel, tank, or other source of water supply shall, whether it is private property or not,—

(a) if the water is used for drinking,-

(i) keep and maintain any such source of water supply other than a stream, in good repair; or

(ii) within a reasonable time to be specified in the notice, cleanse any such source of water supply from silt, refuse and decaying vegetation; or

(iii) in such manner as the Panchayat may direct, protect any such source of water supply from pollution by surface drainage; or

(iv) desist from using and from permitting others to use for drinking purposes any such sources of water supply, which not being a stream in its natural flow,

is in the opinion of the Panchayat unfit for drinking; or

(v) if notwithstanding any such notice under sub-clause (iv), such use continues and cannot, in the opinion of the Panchayat, be otherwise prevented, close either temporarily or permanently, or fill up or enclose or fence in such manner as the Panchayat considers sufficient to prevent such use, such source of water supply; or

(vi) drain off or otherwise remove from any such source of water supply, or from any land or premises or receptacle or reservoir attached or adjacent thereto, any stagnant water which the Panchayat considers as injurious to health or offensive to the neighbourhood;

178. Power of suspending execution of unlawful orders or resolution.— (1) If in the opinion of the Director, the execution of any order or resolution of a Panchayat or Zilla Panchayat or any order of any authority or officer of the Panchayat or the Zilla Panchayat or the doing of anything which is about to be done, or is being done, by or on behalf of a Panchayat or a Zilla Panchayat is unjust, unlawful or improper or is causing or is likely to cause injury or annoyance to the public or to lead to a breach of peace, he may by order suspend the execution or prohibit the doing thereof.

(2) When the Director makes an order under sub-section (1), he shall forthwith forward to the Government and the Panchayat or Zilla Panchayat affected thereby a copy of the order with a statement of the reasons for making it, and the Government may confirm or rescind the order or direct that it shall continue to be in force with or without modification permanently or for such period as it thinks fit:

Provided that no order of the Director passed under sub-section (1) shall be confirmed, revised or modified by the Government without giving the Panchayat or the Zilla Panchayat concerned a reasonable opportunity of showing cause against the proposed order.

201. Appeals.— (1) Any person aggrieved by original order of the Panchayat under section 76, 77, 84, 104 and 105 of the Act, may, within such period as may be prescribed, appeal to the Director.

(2) The Appellate Authority may, after giving an opportunity to the appellant to be heard and after such enquiry as it deems fit, decide the appeal and its decision shall be final.

201-A. Appeal on miscellaneous matter dealt by the Panchayats. — (1) Where no appeal has been specifically provided in this Act on any miscellaneous matter which is dealt with by the Panchayat or the Village Panchayat Secretary or the Sarpanch, an appeal shall lie to the Block Development Officer within a period of thirty days from the date of refusal of any request by the said authority and his decision on such appeal, subject to the provision of sub-section (2), shall be final.

Explanation:— For the purpose of this section, "refusal" means rejecting of any request in writing or non conveying of any reply to the application within a period of fifteen days from the receipt of application in his office.

(2) A revision shall lie to the Deputy Director against any order passed by the Block Development Officer under sub-section (1) within a period of thirty days from the date of the order. "

SCHEDULE – I

FUNCTIONS AND RESPONSIBILITIES OF VILLAGE PANCHAYAT

I. General functions:

(1) Preparation of annual plans for the development of the Panchayat area.

(7) Demolition of unauthorised construction.

VIII. Drinking water:

(1) Construction, repairs and maintenance of drinking water well, tanks and ponds.

(2) Prevention and control of water pollution.

(3) Maintenance of rural water supply schemes."

16. The Preamble, Part IV and Part IX of the Constitution must guide our understanding of the Panchayati Raj institutions and the role they play in the lives of the people in rural parts of the country. The conceptualization of the Village Panchayat as a unit of self government having the responsibility to promote social justice and economic development and as a representative of the people within its jurisdiction must be borne in mind while interpreting the laws enacted by the State which seek to define the ambit and scope of the powers and the functions of Panchayats at various levels.

17. An analysis of Article 40 and Articles 243 to 243-O shows that the framers of the Constitution had envisaged Village Panchayat to be the foundation of the country's political democracy - a decentralized form of Government where each village was to be responsible for its own affairs. By enacting the Constitution (Seventy-third Amendment) Act, Parliament has attempted to remedy the defects and remove the deficiencies of the Panchayati Raj system evolved after independence,

which failed to live up to the expectation of the people in rural India. The provisions contained in Part IX provide firm basis for self-governance by the people at the grass root through the institution of Panchayats at different levels. For achieving the objectives enshrined in Part IX of the Constitution, the State Legislatures have enacted laws and made provision for devolution of powers upon and assigned various functions listed in the Eleventh Schedule to the Panchayats. The primary focus of the subjects enumerated in the Eleventh Schedule is on social and economic development of the rural parts of the country by conferring upon the Panchayat the status of a constitutional body. Parliament has ensured that the Panchayats would no longer perform the role of simply executing the programs and policies evolved by the political executive of the State. By virtue of the provisions contained in Part IX, the Panchayats have been empowered to formulate and implement their own programs of economic development and social justice in tune with their status as the third tier of government which is mandated to represent the interests of the people living within its jurisdiction. The system of Panchayats envisaged in this Part aims at establishing strong and accountable systems of governance that will in turn ensure more equitable distribution of resources in a manner beneficial to all.

18. In the light of the above, it is to be seen whether the appellant has the locus to challenge the orders passed by respondent No.1 in the appeals filed by the company. A conjoint reading of the provisions contained in Chapter III of the Act shows that a Panchayat is generally required to perform the functions specified in Schedule I and also make provision for carrying out any other work or measures likely to promote the health, safety, education, comfort or convenience or social or economic well-being of the inhabitants of the Panchayat area. It also has the power to do all acts necessary for or incidental to carrying out the functions entrusted, assigned or delegated to it. The Sarpanch is not only entrusted with the duty to implement the programme of welfare schemes and other

development works, but also stop any unauthorised construction erected in the Panchayat area. Section 66 which regulates erection of buildings within Panchayat area empowers it and/or the Sarpanch to take action against erection of building without obtaining permission from the competent authority or any violation of the conditions imposed at the time of grant of such permission. The Panchayat is also empowered to issue direction for up-keep and maintenance of sources of water supply which are in private hands.

19. Section 178 empowers the Director to suspend the execution of any order or resolution passed by a Panchayat or prohibit the doing of anything by or on behalf of a Panchayat if he is satisfied that the execution of any such order or resolution or doing of anything by or on behalf of the Panchayat is unjust, unlawful or is improper or is causing or is likely to cause injury or annoyance to the public or lead to a breach of peace. Section 178(2) casts a duty on the Director to forward to the Government and the Panchayat affected by his order a copy of the statement of reasons for making the order. The Government has the power to confirm or rescind the order or direct that it shall continue to remain in force with or without modification permanently or for a specified period. Proviso to this Section imposes an obligation on the Government to give reasonable opportunity of showing cause to the concerned Panchayat against the proposed confirmation, revision or modification of the order of the Director. Section 201 provides for appeal against an order of the Panchayat made under Sections 76, 77, 84, 104 and 105. Where no appeal has been provided under the Act on any miscellaneous matter dealt with by the Panchayat or the Village Panchayat Secretary or the Sarpanch, an appeal lies to the Block Development Officer under Section 201-A(1). In terms of Section 201-A(2), Deputy Director is empowered to exercise revisional power qua the order which may be passed by the Block Development Officer under sub-section (1).

20. In this case, the appellant had entertained the complaint made by local residents, revoked occupancy certificate and also cancelled the permission granted to the company for raising construction. The resolution cancelling the permission was recalled apparently because the rules of natural justice had not been followed. Thereafter, the Sarpanch issued notice under Section 64 and directed the company to stop further construction. The company challenged the notice and succeeded in persuading respondent No.1 to pass an ex-parte interim order. The application made by the company for permission to use the property for running a Guest House was rejected by the appellant because legality of the construction made by the company was under scrutiny. In both the cases, respondent No.1 set aside the resolutions passed by the appellant as also the notice issued by the Sarpanch. The orders passed by respondent No.1 do not refer to the particular provision under which the concerned officer was exercising the appellate power. Surely, he could not have exercised the power vested in the appellate authority under Section 201 because the source of power of the resolutions passed by the appellant and the notice issued by the Sarpanch cannot be traced in Sections 76, 77, 84, 104 and 105 of the Act which relate to removal of any building or part thereof or any tree or branch of a tree if it is in a ruinous state or is likely to fall or is otherwise dangerous to any person occupying such building or part thereof or matters relating to sanitation, conservancy and drainage or exercise of power by the Secretary in relation to any well, stream, channel, tank or other source of water supply or which postulates right to carry drain through land or into drain belonging to other persons. Similarly, respondent No.1 cannot be said to have exercised power under Section 201-A because under that provision, only the Block Development Officer is competent to entertain an appeal in a miscellaneous matter which is dealt with by the Panchayat or the Village Panchayat Secretary or the Sarpanch and against which no appeal has been specifically provided under the Act. Therefore, it is reasonable to infer that respondent No.1 had exercised

power under Section 178(1). However, instead of suspending the execution of the resolutions passed by the appellant or the notice issued by the Sarpanch and sending the matter to the State Government for confirmation, the concerned officer suo-moto annulled the resolutions and the notice by assuming that he had the power to do so.

21. It is thus evident that while the appellant and the Sarpanch had exercised their respective powers in public interest, respondent No.1 nullified that exercise because he felt that the resolution/action was contrary to law and was unjustified. While exercising the power under the Act, the Panchayat was not acting as a subordinate to respondent No.1 but as a body representing the will of the people and also a body corporate in terms of Section 8 of the Act. Therefore, it had the locus to challenge the orders passed by respondent No.1 and the High Court was clearly in error in holding that the writ petition was not maintainable.

22. In *Karunagappally Grama Panchayat v. State of Kerala,* 1996 (1) KLT 419, the Division Bench of the Kerala High Court considered an identical question. In that case, the Writ Petition filed by the appellant – Gram Panchayat questioning the order of the State Government whereby a direction was issued to permit construction of a multi-storied building was dismissed by the learned Single Judge by observing that the Panchayat cannot be treated as an aggrieved person. While reversing the order of the learned Single Judge, the Division Bench made the following observations:

> "If a Panchayat has a legal right to sue, then its corollary is that it can mention an action under Art. 226 of the Constitution. The legal character of a Panchayat is very much analogous to that of a Municipality or such other local body. In the case of a municipality, the position seems to be settled that it can sue or be sued. The right of a company registered under the Companies Act for suing another and also for moving under Art 226 has been

recognised by the Apex Court in *D. C. & G. M. Co. Ltd.* ***v.*** *Union of India* **(**AIR 1983 SCC 937). It may be that an officer of a Company or local body is incompetent to challenge an order passed by any authority superior to the local body through a suit or writ petition. He has to abide by the order. But that principle cannot be imported to the situation where the Juristic person itself becomes the aggrieved party.

In this context, we refer to S. 5 of the Act which says "every Panchayat shall be a body corporate by the name of the Panchayat…". It shall have perpetual succession and a common seal. It shall, subject to any restriction or qualification imposed by or under the Act or any other law "be vested with the capacity of suing or being sued on its corporate name". The Section further says that Panchayat shall be vested with the capacity of acquiring, holding and transferring property, movable or immovable or entering into contracts, and of doing all things necessary, proper or expedient for the purpose for which it is constituted.

Legal concept envisaged in S. 5 of the Act makes the position clear that Panchayat is a body corporate. If so it can sue or be sued. In that position Panchayat cannot be denuded of the right to move under Art. 226 of the Constitution when any of its legal right is infringed by the authorities including the Government."

23. In *High Court of M.P. v. Mahesh Prakash and others* (1995) 1 SCC 203, this Court considered several questions including the one whether the High Court has the locus to challenge the order passed on judicial side by filing a petition under Article 136 of the Constitution. While rejecting the decision of the High Court, this Court observed:

"The order that the first respondent challenged in the writ petition filed by him before the High Court was an order passed by the High Court on its administrative side. By

reason of Article 226 of the Constitution it was permissible for the appellant to move the High Court on its judicial side to consider the validity of the order passed by the High Court on the administrative side and issue a writ in that behalf. In the writ petition the first respondent was obliged to implead the High Court for it was the order of the High Court that was under challenge. It was, therefore, permissible for the High Court to prefer a petition for special leave to appeal to this Court against the order on the writ petition passed on its judicial side. The High Court is not here to support the judicial order its Division Bench passed but to support its administrative order which its Division Bench set aside. We find, therefore, no merit in what may be termed the preliminary objection to the maintainability of the appeal."

24. In *State of Orissa v. Union of India* 1995 Supp. (2) SCC 154, the Court considered the question whether the State Government has *locus standi* to challenge the order passed by the Central Government in exercise of its revisional power under the Mineral Concession Rules, 1960. While answering the question in affirmative, this Court observed:

"In this connection, it is necessary to note that in the first place, the State Government is not merely an authority subordinate to the Central Government which would, undoubtedly, be bound by the revisional orders of the superior authority. It is also the owner of the mines and minerals in question. If it is directed to issue a mining lease in favour of any party, it has locus standi to challenge that order under Article 226 of the Constitution of India."

25. In *Godde Venkateswara Rao v. Government of Andhra Pradesh* AIR 1966 SC 828, this Court examined the issue of locus standi of a President of Panchayat Samithi to challenge the decision of the Government in the matter of location of Primary Health Centre and held:

"Article 226 confers a very wide power on the High Court to issue directions and writs of the nature mentioned therein for the enforcement of any of the rights conferred by Part III or for any other purpose. It is, therefore, clear that persons other than those claiming fundamental right can also approach the court seeking a relief thereunder. The Article in terms does not describe the classes of persons entitled to apply thereunder; but it is implicit in the exercise of the extraordinary jurisdiction that the relief asked for must be one to enforce a legal right. The right that can be enforced under Art. 226 also shall ordinarily be the personal or individual right of the petitioner himself, though in the case of some of the writs like habeas corpus or quo warranto this rule may have to be relaxed or modified.

Has the appellant a right to file the petition out of which the present appeal has arisen? The appellant is the President of the Panchayat Samithi of Dharmajigudem. The villagers of Dharmajigudem formed a committee with the appellant as President for the purpose of collecting contributions from the villagers for setting up the Primary Health Center. The said committee collected Rs.10,000/- and deposited the same with the Block Development Officer. The appellant represented the village in all its dealings with the Block Development Committee and the Panchayat Samithi in the matter of the location of the Primary Health Center at Dharmajigudem. His conduct, the acquiescence on the part of the other members of the committee, and the treatment meted out to him by the authorities concerned support the inference that he was authorized to act on behalf of the committee. The appellant was, therefore, a representative of the committee which was in law the trustees of the amounts collected by it from the villagers for a public purpose. We have, therefore, no hesitation to hold that the appellant had the right to maintain the application under Art. 226 of the Constitution. This

Court held in the decision cited supra that "ordinarily" the petitioner who seeks to file an application under Art. 226 of the Constitution should be one who has a personal or individual right in the subject-matter of the petition. A personal right need not be in respect of a proprietary interest : it can also relate to an interest of a trustee. That apart, in exceptional cases, as the expression "ordinarily" indicates, a person who has been prejudicially affected by an act or omission of an authority can file a writ even though he has no proprietary or even fiduciary interest in the subject matter thereof. The appellant has certainly been prejudiced by the said order. The petition under Art. 226 of the Constitution at his instance is, therefore, maintainable."

26. By applying the ratio of the aforesaid judgments to the facts of these cases, we hold that the writ petitions filed by the appellant were maintainable and the learned Single Judge of the High Court committed grave error by summarily dismissing the same. We also declare that the contrary view expressed by the High Court in other judgments does not represent the correct legal position.

27. In the result, the appeals are allowed, the impugned order is set aside and the writ petitions filed by appellant are restored to their original numbers. The High Court shall now issue notice to the respondents and decide the writ petitions on merits.

28. It will be open to the appellant to apply for interim relief. If any such application is filed, then the High Court shall decide the same on its own merits.

N.J. Appeals allowed.