R. MOHAN

v.

A.K. VIJAYA KUMAR

(Criminal Appeal No. 883 of 2012)

JULY 3, 2012

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

Code of Criminal Procedure, 1973 - s.357(3), 421 and 431 - Sentence in default of payment of compensation - Legality of - Issuance of cheque without sufficient balance in the bank - Trial court sentenced the accused (drawer of the cheque) to simple imprisonment for 3 months and also directed him to pay compensation of Rs. 5 lakhs to the payee u/s.357(3) CrPC - Further direction of trial court that if the compensation amount was not paid, the accused would have to undergo additional imprisonment of 2 months - Order upheld by Sessions Court - In revision, High Court, while confirming the conviction and sentence of 3 months simple imprisonment as also order of compensation, held that no separate sentence could be awarded in default of payment of compensation when the substantive sentence of imprisonment was independently awarded, and therefore, set aside the sentence in default of payment of compensation - On appeal, held: The idea behind directing the accused to pay compensation to the complainant is to give him immediate relief so as to alleviate his grievance - In terms of s.357(3)CrPC compensation is awarded for the loss or injury suffered by the person due to the act of the accused for which he is sentenced - If merely an order, directing compensation, is passed, it would be totally ineffective - Deterrence can only be infused into the order by providing for a default sentence - If s.421 CrPC puts compensation ordered to be paid by the court on par with fine so far as mode of recovery is concerned, then there is no reason why the court cannot impose a sentence in default of payment of compensation as it can be

done in case of default in payment of fine u/s.64 IPC - Thus, order to pay compensation may be enforced by awarding sentence in default - High Court erred in setting aside the sentence imposed in default of payment of compensation - Penal Code, 1860 - s.64 - Negotiable Instruments Act, 1881 - s.138.

Negotiable Instruments Act, 1881 - s.138 - Conviction and sentence awarded to accused for issuing cheque without sufficient balance in the bank - Propriety of - Held: On facts, proper - The complainant's evidence was wholly satisfactory - High Court was perfectly justified in confirming the conviction and sentence in view of the promissory note (Ex-P1), the cheque (Ex-P2), reply dated 24-5-2002 sent by the accused to the complainant (Ex-P8) and the complainant's Income-tax Returns.

The case of the complainant-payee was that the accused and his wife had jointly borrowed a sum of Rs.5 lakhs from him and executed a promissory note in his favour; that the accused had also issued a cheque in his favour towards the principal amount and that when the said cheque was presented by the complainant with his banker for payment, it was dishonoured with bank's remark "insufficient funds". The accused denied the complainant's claim pleading that he had borrowed only Rs.3 Lakhs which he had already paid back and that the cheque was issued only as a security and that it was not returned to him though demanded. He relied on an entry from a diary maintained by him showing that as of April, 2002, only a sum of Rs.90,101/- was due and payable by him to the complainant.

The accused was tried by the Metropolitan Magistrate Court for offence under Section 138 of the Negotiable Instruments Act, 1881 whereupon he was sentenced to undergo 3 months simple imprisonment and directed to

pay compensation of Rs.5 lakhs to the complainant under Section 357(3) of CrPC, and in default of payment of compensation, to undergo additional 2 months simple imprisonment. The Sessions court confirmed the conviction and sentence. In revision, the High Court confirmed the order of conviction and sentence of 3 months simple imprisonment and compensation of Rs.5 lakhs, however, the High Court was of opinion that no separate sentence could be awarded in default of payment of compensation when substantive sentence of imprisonment is independently awarded. The High Court, therefore, set aside the sentence in default of payment of compensation. Being aggrieved by the said order of conviction and sentence, the accused filed appeal before this Court. The complainant also filed appeal before this Court being aggrieved by the order of the High Court to the extent it set aside the order of sentence in default of payment of compensation.

Dismissing the appeal filed by the accused and allowing the appeal filed by the complainant, the Court

HELD:

On merits

1.1. The High Court was perfectly justified in confirming the conviction and sentence. Ex-P1 is the promissory note in the sum of Rs.5 lakhs executed by the accused and his wife in favour of the complainant. The accused has not led any evidence to prove that the promissory note (Ex-P1) is a got up document. In his reply, he has nowhere taken such a stand. The cheque (Ex-P2) is also on record. According to the accused, he had borrowed only Rs.3 lakhs from the complainant and a blank cheque was offered as security to the complainant. It is suggested in the notice that the said cheque was misused by the complainant. This story has

to be rejected in view of the promissory note (Ex-P1). The accused has relied on xerox copy of some pages from a diary maintained by him (Ex-D1). There is an entry in Ex-D1 that as of April, 2002, an amount of Rs.90,101/- was payable by the accused to the complainant. The complainant has honestly admitted that the said acknowledgement is in his handwriting. It is contended by the accused that this disproves the complainant's case that an amount of Rs.5 lakhs was due from him to the complainant and in discharge of that debt cheque (Ex-P2) was given to him. It is not possible to accept this submission. Several chit transactions are noted in Ex-D1. As stated by the complainant in his evidence, he has been carrying on several businesses since 1990. The accused had borrowed various amounts from him on different occasions and he had repaid those amounts except the amount involved in the transaction in question. The complainant has stated that he finances people and collects interest at 18% per annum. The reference to `chit' in Ex-D1 indicates that he was running a chit fund scheme. The entries in Ex-D1 appear to be entries in connection with the said chit fund scheme. The transaction reflected in Ex-D1 cannot be confused with the loan of Rs.5 lakhs given by the complainant to the accused evidenced by promissory note (Ex-P1) and cheque (Ex-P2). The complainant's evidence is wholly satisfactory. By admitting that entry in Ex-D1 is in his handwriting, he comes out as a truthful witness. If he had dishonest motive he would have never admitted that the said entry was in his handwriting. [Para 8] [11-A-H;12-A]

1.2. Moreover, if the case of the accused is that as of April, 2002, only an amount of Rs.90,101/- was due from him to the complainant, in his reply dated 24-5-2002, he should have said so. This statement is conspicuously absent in the said reply. It is pertinent to note that in order to satisfy itself, the High Court, while hearing the revision,

directed the complainant to produce his Income-tax Returns of the relevant period. The High Court wanted to see whether the instant loan transaction is reflected in the complainant's Income-tax Returns. The complainant produced the Income-tax Returns. The High Court found that in the Assessment Year 2002-2003 and also for the subsequent assessment years, there is an entry of a sum of Rs.5 lakhs as due from the accused to the complainant. The complainant could not have manufactured the Income-tax Returns. Thus, the promissory note (Ex-P1), the cheque (Ex-P2), reply dated 24-5-2002 sent by the accused to the complainant (Ex-P8) and the Income-tax Returns to which a reference is made by the High Court lead this Court to concur with the High Court that the conviction and sentence awarded to the accused is perfectly justified and no interference is called for with the same. [Para 9] [12-B-E]

Whether the court can award a sentence in default of payment of compensation

2.1. Under Section 357,CrPC, the Court can pass order to pay compensation. Sub-Section (1) of Section 357 of the Code empowers the court to award compensation to the victim of offence out of the sentence of fine imposed on the accused. From section 357(3) it is clear that if a fine is not a part of the order of sentence, the court may order the accused to pay compensation to the person who has suffered any loss or injury because of the act of the accused for which he is sentenced. [Para 10] [12-F-H; 13-A-B]

2.2. There is no specific provision in the Code of Criminal Procedure which enables the court to sentence a person who commits breach of the order of payment of compensation. Section 421 CrPC provides for the action which the court can take for the recovery of the fine where the accused has been sentenced to pay a fine.

Proviso thereto states how to deal with a situation where default sentence is prescribed. Section 431 CrPC provides for recovery of any money (other than a fine) payable by virtue of any order made under the Code and the recovery of which is not otherwise expressly provided for. Compensation awarded by a court can fall in this category. Section 431 says that such money shall be recoverable as if it were a fine. Thus, one has to again fall back on section 421 CrPC for recovery of compensation directed to be paid by the court. For the purpose of mode of recovery, compensation is put on par with fine. [Paras 13, 14] [14-E; 15-F; 16-B-C]

2.3. It cannot be said that where there is default in payment of compensation ordered by the court, recourse can only be had to Section 421 CrPC. If such a view is taken, the very object of sub-section (3) of Section 357 would be frustrated and the relief contemplated therein would be rendered somewhat illusory. [Para 16] [16-G-H;17-A]

2.4. The idea behind directing the accused to pay compensation to the complainant is to give him immediate relief so as to alleviate his grievance. In terms of Section 357(3) compensation is awarded for the loss or injury suffered by the person due to the act of the accused for which he is sentenced. If merely an order, directing compensation, is passed, it would be totally ineffective. It could be an order without any deterrence or apprehension of immediate adverse consequences in case of its non-observance. The whole purpose of giving relief to the complainant under Section 357(3) of the Code would be frustrated if he is driven to take recourse to Section 421 of the Code. Order under Section 357 (3) must have potentiality to secure its observance. Deterrence can only be infused into the order by providing for a default sentence. If Section 421 of the Code puts compensation ordered to be paid by the court

on par with fine so far as mode of recovery is concerned, then there is no reason why the court cannot impose a sentence in default of payment of compensation as it can be done in case of default in payment of fine under Section 64 IPC. The conclusion, therefore, is that the order to pay compensation may be enforced by awarding sentence in default. [Para 18] [17-E-H; 18-A-C]

2.5. There is no illegality in the order passed by the Magistrate and confirmed by the Sessions Court in awarding sentence in default of payment of compensation. The High Court was in error in setting aside the sentence imposed in default of payment of compensation. [Para 19] [18-D]

Suganthi Suresh Kumar v. Jagdeeshan **2002(2) SCC 420: 2002 (1) SCR 269; K.A.** *Abbas HSA v. Sahu Joseph and Another* **2010 (6) SCC 230: 2010 (6) SCR 822;** *Hari Singh v. Sukhbir Singh & Ors.* **(1988) 4 SCC 551: 1988 (2) Suppl. SCR 571;** *Vijayan v. Sadanandan K. & Anr.* **(2009) 6 SCC 652: 2009 (7) SCR 463 and** *K. Bhaskaran v. Sankaran Vaidhyan Balan* **(1997) 7 SCC 510 - relied on.**

Result

3. The impugned order of the High Court to the extent it quashes the sentence in default of payment of compensation, is set aside. The order passed by Magistrate awarding two months simple imprisonment in default of payment of compensation of Rs.5 lakhs under Section 357(3) of CrPC is restored. Two months' time granted to the accused to pay the said amount of compensation to the complainant from the date of receipt of this order. [Para 20] [18-E-F]

Case Law Reference:

2002 (1) SCR 269	**relied on**	**Paras 7, 12**
2010 (6) SCR 822	**relied on**	**Paras 7, 14**
1988 (2) Suppl. SCR 571	**relied on**	**Para 11**
2009 (7) SCR 463	**relied on**	**Para 16**
(1997) 7 SCC 510	**relied on**	**Para 17**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 883 of 2012 etc.

From the Judgment & Order dated 15.12.2011 of the High Court of Judicature at Madras in Crl. R.C. No. 2007 of 2004.

WITH

Criminal Appeal No. 884 of 2012.

Jayanth Muth Raj (for P. Soma Sundaram), R. Nedumaran, S. Beno Bencigar (For Sureshan P.) for the appearing parties.

The Judgment of the Court was delivered by

(SMT.) RANJANA PRAKASH DESAI, J. 1. Leave granted.

2. These two appeals can be disposed of by a common judgment as they arise out of the same facts and challenge the same judgment and order dated 15/12/2011 of the Madras High Court. Special Leave Petition (Crl.) No.2299 of 2012 is filed by accused - R. Mohan (**'the accused'** for convenience) and Special Leave Petition (Crl.) No.3327 of 2012 is filed by complainant - A.K. Vijaya Kumar (**'the complainant'** for convenience).

3. The accused was tried by the Vth Metropolitan Magistrate Court, Egmore, Chennai for an offence under Section 138 of the Negotiable Instruments Act, 1881 (for short, **"the said Act"**) and, by order dated 16/4/2004 he was sentenced to undergo 3 months simple imprisonment and to pay compensation of Rs.5 lakhs to the complainant under Section 357(3) of the Code of Criminal Procedure Code (for

short, **"the Code"**), in default, to undergo two months simple imprisonment. In appeal, the IIIrd Additional Fast Track District & Sessions Judge, Chennai confirmed the conviction and sentence. In revision, the High Court confirmed the order of conviction and sentence of three months simple imprisonment and to pay compensation of Rs.5 lakhs, however, the High Court was of opinion that no separate sentence could be awarded in default of payment of compensation when substantive sentence of imprisonment is independently awarded. The High Court, therefore, set aside the sentence in default of payment of compensation. Being aggrieved by the said order of conviction and sentence, the accused has approached this court by way of Special Leave Petition (Crl.) No.2299 of 2012. The complainant has filed Special Leave Petition No.3327 of 2012 being aggrieved by the order of the High Court to the extent it sets aside the order of sentence in default of payment of compensation.

4. The brief facts are as under:

The case of the complainant is that on 10/9/2001, the accused and his wife jointly borrowed a sum of Rs.5 lakhs from him and executed a promissory note in his favour. The accused also issued a cheque dated 14/5/2002 in favour of the complainant towards the principal amount. When the cheque was presented by the complainant with his banker for payment, it was dishonoured with bank's remark "insufficient funds". The complainant, thereafter, issued a statutory notice under Section 133 of the said Act. The accused in his reply stated that he had borrowed only Rs.3,00,000/-; that he had paid the said amount and that the cheque was issued only as a security and that it was not returned though demanded. The complainant then filed a Complaint under Section 200 of the Code. During the trial, the complainant examined himself. The accused did not examine any witness in support of his case. He denied the complaint's case. He relied on an entry from a diary maintained by him showing that as of April, 2002, only a sum of Rs.90,101/-

was due and payable by him to the complainant.

5. On these facts, the accused was sent up for trial before the Vth Metropolitan Magistrate, Egmore, Chennai, who convicted him as aforesaid. We have already noted how the matter travelled upto this Court.

6. We have heard Mr. R. Nedumaran, learned counsel appearing for the accused. He submitted that the courts below have fallen into a serious error in convicting the accused. He submitted that the importance of the diary entry (Ex.D1) showing that as of April 2002 only a sum of Rs.90,101/- was due and payable by the accused to the complainant was completely overlooked by all the Courts including the High Court. He pointed out that the complainant has accepted that in the said diary entry, he had, in his own handwriting, acknowledged that only Rs.90,101/- was payable by the accused to him. Counsel submitted that the accused had borrowed only Rs.3,00,000/- and had issued a blank cheque as security. He had repaid that amount. But the complainant misused the cheque. Counsel submitted that the promissory note was not executed by the accused. Counsel submitted that the order directing payment of Rs.5,00,000/- as compensation to the complainant is also illegal and unjust.

7. Mr. Jayanth Muth Raj, learned counsel for the complainant submitted that the High Court was in error in observing that no sentence could have been awarded to the accused in default of payment of compensation when substantive sentence of imprisonment was awarded. In support of his submissions counsel relied on *Suganthi Suresh Kumar v. Jagdeeshan*[1], and *K.A. Abbas HSA v. Sahu Joseph and Another*[2]. Counsel submitted that the impugned order of the High Court be set aside only to that extent.

8. So far as the merits of the case are concerned, we have

1. 2002 (2) SCC 420.
2. 2010 (6) SCC 230.

no hesitation in recording that the High Court was perfectly justified in confirming the conviction and sentence. Ex-P1 is the promissory note in the sum of Rs.5 lakhs executed by the accused and his wife in favour of the complainant. The accused has not led any evidence to prove that the promissory note (Ex-P1) is a got up document. In his reply, he has nowhere taken such a stand. The cheque (Ex-P2) is also on record. According to the accused, he had borrowed only Rs.3 lakhs from the complainant and a blank cheque was offered as security to the complainant. It is suggested in the notice that the said cheque was misused by the complainant. This story has to be rejected in view of the promissory note (Ex-P1). The accused has relied on xerox copy of some pages from a diary maintained by him (Ex-D1). There is an entry in Ex-D1 that as of April, 2002, an amount of Rs.90,101/- was payable by the accused to the complainant. The complainant has honestly admitted that the said acknowledgement is in his handwriting. It is contended by the accused that this disproves the complainant's case that an amount of Rs.5 lakhs was due from him to the complainant and in discharge of that debt cheque (Ex-P2) was given to him. It is not possible to accept this submission. We have carefully examined Ex-D1. Several chit transactions are noted in Ex-D1. As stated by the complainant in his evidence, he has been carrying on several businesses since 1990. The accused had borrowed various amounts from him on different occasions and he had repaid those amounts except the amount involved in the transaction in question. The complainant has stated that he finances people and collects interest at 18% per annum. The reference to `chit' in Ex-D1 indicates that he was running a chit fund scheme. The entries in Ex-D1 appear to be entries in connection with the said chit fund scheme. The transaction reflected in Ex-D1 cannot be confused with the loan of Rs.5 lakhs given by the complainant to the accused evidenced by promissory note (Ex-P1) and cheque (Ex-P2). The complainant's evidence is wholly satisfactory. By admitting that entry in Ex-D1 is in his handwriting, he comes out as a truthful witness. If he had dishonest motive he would have never

admitted that the said entry was in his handwriting.

9. Moreover, if the case of the accused is that as of April, 2002, only an amount of Rs.90,101/- was due from him to the complainant, in his reply dated 24/5/2002, he should have said so. This statement is conspicuously absent in the said reply. It is pertinent to note that in order to satisfy itself, the High Court, while hearing the revision, directed the complainant to produce his Income-tax Returns of the relevant period. The High Court wanted to see whether the instant loan transaction is reflected in the complainant's Income-tax Returns. The complainant produced the Income-tax Returns. The High Court found that in the Assessment Year 2002-2003 and also for the subsequent assessment years, there is an entry of a sum of Rs.5 lakhs as due from the accused to the complainant. The complainant could not have manufactured the Income-tax Returns. Thus, the promissory note (Ex-P1), the cheque (Ex-P2), reply dated 24/5/2002 sent by the accused to the complainant (Ex-P8) and the Income-tax Returns to which a reference is made by the High Court lead us to concur with the High Court that the conviction and sentence awarded to the accused is perfectly justified and no interference is called for with the same.

10. That takes us to the legal question whether the court can award a sentence in default of payment of compensation. Under Section 357 of the Code the Court can pass order to pay compensation. Sub-Section (1) of Section 357 of the Code empowers the court to award compensation to the victim of offence out of the sentence of fine imposed on the accused. Section 357(3) is relevant. It reads thus:

"357. Order to pay compensation. -

(1) xxx xxx xxx

(2) xxx xxx xxx

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing

judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced."

Thus, if a fine is not a part of the order of sentence, the court may order the accused to pay compensation to the person who has suffered any loss or injury because of the act of the accused for which he is sentenced.

11. In *Hari Singh v. Sukhbir Singh & Ors.*[3], the accused were convicted and sentenced under Section 325 read with Section 149, Section 323 read with Section 149 and Section 148 of the IPC. They were released on probation of good conduct. Each of them was ordered to pay compensation of Rs.2,500/- to the injured. In default of payment of compensation, they were directed to serve their sentence. This court inter alia considered whether the compensation awarded to the injured could be legally sustained. This court observed that the power of the court under Section 357(3) to award compensation is not ancillary to other sentences, but it is in addition thereto and is intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. This court further observed that it is a measure of responding appropriately to crime as well as of reconciling the victim with the offender. Describing it as a constructive approach to crime, this court recommended to all courts to exercise this power liberally so as to meet the ends of justice in a better way. It was clarified that the order to pay compensation may be enforced by awarding sentence in default. The relevant observations of this court may be advantageously quoted.

"11. The payment by way of compensation must, however, be reasonable. What is reasonable may depend upon the facts and circumstances of each case. The quantum of

3. (1988) 4 SCC 551

compensation may be determined by taking into account the nature of crime, the justness of claim by the victim and the ability of accused to pay. If there are more than one accused they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment may also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by instalments, may also be given. The court may enforce the order by imposing sentence in default."

12. While dealing with a case under Section 138 of the said Act in Suganthi Suresh Kumar, relying on Hari Singh, this court reiterated the same view and held that the court can impose a sentence of imprisonment on the accused in default of payment of compensation ordered under Section 357(3) of the Code.

13. Undoubtedly, there is no specific provision in the Code which enables the court to sentence a person who commits breach of the order of payment of compensation. Section 421 of the Code provides for the action which the court can take for the recovery of the fine where the accused has been sentenced to pay a fine. Proviso thereto states how to deal with a situation where default sentence is prescribed. Section 421 reads thus:

"421. Warrant for levy of fine.-(1) When an offender has been sentenced to pay a fine, the court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may-

(a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender;

(b) issue a warrant to the Collector of the district, authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both, of the defaulter:

Provided that, if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no court shall issue such warrant unless, for special reasons to be recorded in writing, it considers it necessary so to do, or unless it has made an order for the payment of expenses or compensation out of the fine under Section 357.

(2) The State Government may make rules regulating the manner in which warrants under clause (a) of sub-section (1) are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.

(3) Where the court issues a warrant to the Collector under clause (b) of sub-section (1), the Collector shall realise the amount in accordance with the law relating to recovery of arrears of land revenue, as if such warrant were a certificate issued under such law:

Provided that no such warrant shall be executed by the arrest or detention in prison of the offender."

14. Section 431 of the Code provides for recovery of any money (other than a fine) payable by virtue of any order made under the Code and the recovery of which is not otherwise expressly provided for. Compensation awarded by a court can fall in this category. Section 431 says that such money shall be recoverable as if it were a fine. Section 431 of the Code reads thus:

"431. Money ordered to be paid recoverable as fine.- Any money (other than a fine) payable by virtue of any order made under this Code, and the method of recovery of which is not otherwise expressly provided for, shall be recoverable as if it were a fine:

Provided that Section 421 shall, in its application to an order under Section 359, by virtue of this section, be construed as if in the proviso to sub-section (1) of Section 421, after the words and figures 'under Section 357', the words and figures 'or an order for payment of costs under Section 359' had been inserted."

Thus, one has to again fall back on section 421 of the Code for recovery of compensation directed to be paid by the court. For the purpose of mode of recovery, compensation is put on par with fine (See K.A. Abbas HSA.)

15. Section 64 of the IPC also needs to be quoted because it provides for sentence of imprisonment for non-payment of fine. It reads thus:

"64. Sentence of imprisonment for non-payment of fine.-In every case of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable with imprisonment or fine, or with fine only, in which the offender is sentenced to a fine, it shall be competent to the court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence."

16. The above provisions were examined by this Court in *Vijayan v. Sadanandan K. & Anr.*[4] After quoting them, this Court rejected the submission that where there is default in payment of compensation ordered by the court, recourse can only be had to Section 421 of the Code because there is no provision enabling the court to award a default sentence. This Court observed that if such a view is taken, the very object of

4. (20090 6 SCC 652.

sub-section (3) of Section 357 would be frustrated and the relief contemplated therein would be rendered somewhat illusory.

17. We respectfully concur with this view. In *K. Bhaskaran v. Sankaran Vaidhyan Balan*[5] while considering Section 357 (3) of the Code this Court expressed that if the Judicial Magistrate of the First Class were to order compensation to be paid to the complainant from out of the fine realised the complainant will be the loser when the cheque amount exceeded the said limit. In such a case a complainant would get only the maximum amount of rupees five thousand because Judicial Magistrate First Class can as per Section 29 (2) of the Code pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding Rs. 5,000/-, or of both (the said amount is now increased to Rs. 10,000/-). This Court clarified that in such cases the Magistrate can alleviate the grievance of the complainant by taking resort to Section 357(3) of the Code.

18. The idea behind directing the accused to pay compensation to the complainant is to give him immediate relief so as to alleviate his grievance. In terms of Section 357(3) compensation is awarded for the loss or injury suffered by the person due to the act of the accused for which he is sentenced. If merely an order, directing compensation, is passed, it would be totally ineffective. It could be an order without any deterrence or apprehension of immediate adverse consequences in case of its non-observance. The whole purpose of giving relief to the complainant under Section 357(3) of the Code would be frustrated if he is driven to take recourse to Section 421 of the Code. Order under Section 357 (3) must have potentiality to secure its observance. Deterrence can only be infused into the order by providing for a default sentence. If Section 421 of the Code puts compensation ordered to be paid by the court on par with fine so far as mode of recovery is concerned, then there is no reason why the court cannot impose a sentence in default of payment of compensation as it can be done in case of

5. (1997) 7 SCC 510.

default in payment of fine under Section 64 of the IPC. It is obvious that in view of this, in *Vijayan,* this court stated that the above mentioned provisions enabled the court to impose a sentence in default of payment of compensation and rejected the submission that the recourse can only be had to Section 421 of the Code for enforcing the order of compensation. Pertinently, it was made clear that observations made by this Court in *Hari Singh* are as important today as they were when they were made. The conclusion, therefore, is that the order to pay compensation may be enforced by awarding sentence in default.

19. In view of the above, we find no illegality in the order passed by the learned Magistrate and confirmed by the Sessions Court in awarding sentence in default of payment of compensation. The High Court was in error in setting aside the sentence imposed in default of payment of compensation.

20. In the result, we dismiss the appeal arising out of Special Leave Petition (Crl.) No. 2299 of 2012 filed by the accused and allow the appeal arising out of Special Leave Petition (Crl.) No. 3327 of 2012 filed by the complainant. We set aside the impugned order of the High Court to the extent it quashes the sentence in default of payment of compensation. We restore the order passed by learned Magistrate dated 16/4/2004 awarding two months simple imprisonment in default of payment of compensation of Rs.5 lakhs under Section 357(3) of the Code. We grant two months' time to the accused to pay the said amount of compensation to the complainant from the date of receipt of this order.

B.B.B. Appeals disposed of.

COX & KINGS LTD.

v.

INDIAN RLY. CATERING & TOURISM CORPORATION LTD.& ANR.

(Special Leave Petition (CIVIL) Nos. 965-967 of 2012)

JULY 5, 2012

[ALTAMAS KABIR AND J. CHELAMESWAR, JJ.]

Arbitration and Conciliation Act, 1996 - s.9 - Grant of interim measure - Permissibility - Luxury Tourist Train project - Expression of Interest floated by Respondent (IRCTC) for a Joint Venture partner- to operate, manage and run the train - Petitioner selected as Joint Venture shareholder - Petitioner and Respondent became equal shareholders in a Joint Venture Company in terms of a Memorandum of Understanding (MoU) - Luxury Tourist Train leased by Respondent to the Joint Venture Company - Disputes resulting in subsequent termination of the lease arrangement by Respondent - Petitioner initiated proceedings u/s.9 for staying the termination of the lease agreement and also to allow the arrangements to continue for sometime - Single Judge of the High Court deemed it fit to appoint a Receiver, as an interim measure, in the public interest, to prevent discontinuation of the running of the train for which bookings had already been made, and disposed of the s.9 application, inter alia, by directing the train to run under the supervision of the Receiver for certain period - Division Bench, however, set aside the arrangements made by the Single Judge and allowed the appeal preferred by Respondent - On appeal, held: Petitioner was not entitled to question termination of the lease agreement as by itself it had no existence as far as the running of the train was concerned and it was not a party to the proceedings - Petitioner attempted to either restore the lease agreement, which had been terminated, or to create a

fresh agreement to enable the Petitioner to operate the luxury train indefinitely, till a decision was arrived at in s.9 Application - No doubt the Petitioner invested large sums of money in the project, but that cannot entitle it to pray for and obtain a mandatory order of injunction to operate the train once the lease agreement/ arrangement had been terminated - Petitioner's remedy, if any, would lie in an action for damages against IRCTC for breach of any of the terms and conditions of the Joint Venture Agreement and the MoU.

The Ministry of Railways (Rail Mantralaya), Railway Board, approved the proposal submitted by respondent no.1-Indian Railway Catering & Tourism Corporation Ltd. [IRCTC], for operating a Luxury Tourist Train on a Pan-India route within India. Such proposal was made in pursuance of an Expression of Interest floated by the respondent for a Joint Venture partner for the said Luxury Transit Train Project, to operate, manage and run the said train. The Petitioner came to be selected as the Joint Venture shareholder for the operation of the Luxury Tourist Train Project. In terms of a Memorandum of Understanding, the Petitioner and the Respondent became equal shareholders in a Joint Venture Company. The Luxury Tourist Train was leased by the Respondent to the Joint Venture Company for a period of 15 years, which could be extended by another period of 10 years on conditions to be mutually agreed between the Petitioner and the Respondent. Whilst the Joint Venture operations were being conducted, certain disputes arose between the shareholders regarding the working of the Joint Venture Agreement and the Memorandum of Understanding, which ultimately resulted in the termination of the lease arrangement by the Respondent, IRCTC. On account of such termination of the lease agreement, the Petitioner initiated proceedings under Section 9 of the Arbitration and Conciliation Act, 1996 for staying the termination of the lease agreement and also

to allow the arrangements to continue for a specified period, subject to such terms and conditions as may be imposed by the Court.

The Single Judge of the High Court deemed it fit to appoint a Receiver, as an interim measure, in the public interest, to prevent discontinuation of the running of the train for which bookings had already been made, and disposed of the Section 9 application, inter alia, by directing that the train would continue to be run under the supervision of the Receiver for certain period. The Division Bench, however, set aside the arrangements made by the Single Judge and allowed the appeal preferred by the Respondent. The order was challenged before this Court.

Dismissing the Special Leave Petitions as also the connected Contempt Petitions, the Court

HELD: 1. It is evident from the submissions made on behalf of the respective parties that the arrangement between Respondent No.1, IRCTC, was with the Petitioner Company and, although, it was the intention of the parties by virtue of the Joint Venture Agreement that the luxury train, belonging to the Respondent No.1, was to be operated by the Joint Venture Company, at least for a minimum period of 15 years, what ultimately transpired was the termination of the Agreement by Respondent No.1 in favour of the Joint Venture Company. As pointed out by the Division Bench of the High Court, the Petitioner was not entitled to question such termination as by itself it had no existence as far as the running of the train was concerned and it was not a party to the proceedings. In fact, what the Petitioner attempted to do in these proceedings was to either restore the Lease Agreement, which had been terminated, or to create a fresh Agreement to enable the Petitioner to operate the luxury

train indefinitely, till a decision was arrived at in Section 9 Application. [Para 22] [31-F-H; 32-A]

2. It is no doubt true that the Petitioner has invested large sums of money in the project, but that cannot entitle it to pray for and obtain a mandatory order of injunction to operate the train once the lease agreement/ arrangement had been terminated. It cannot be said that the Joint Venture Agreement was akin to a partnership. Such submission had been rightly rejected by the Division Bench. As rightly pointed out by the Division Bench of the High Court, the Petitioner's remedy, if any, would lie in an action for damages against IRCTC for breach of any of the terms and conditions of the Joint Venture Agreement and the Memorandum of Understanding. [Para 23] [32-B-D]

3. Taking into consideration the totality of the circumstances, this Court is inclined to agree with the suggestions made by IRCTC before the Division Bench of the High Court regarding the operation of the train by IRCTC, with liberty to the parties to appoint an Arbitral Tribunal to settle their disputes. It is made clear that if an Arbitral Tribunal is appointed, the aforesaid arrangement will be subject to the decision of the Arbitral Tribunal. [Para 24] [32-E-F]

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 965-967 of 2012 etc.

From the Judgment & Order dated 06.01.2012 of the High Court of Delhi at New Delhi in FAO (OS) No. 433-435 of 2011.

WITH

Conmt. Pet.(C) No. 41-43 of 2012 in SLP (C) No. : 965-967 of 2012.

Mukul Rohatgi, Nikhil Rohatgi, Misha Rohatgi, Peter Lobo, Mahesh Agrawala, Akshay Runge, E.C. Agrawala for the

Petitioner.

R.F. Nariman, S.G.I., Shyam Diwan, Saurav Agrawal, Abhijeet Sinha, Ashish Tiwari, Titash Sen, Vipul Sharda, Kamlendra Mishra, Siddharth Singla for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. In June/July 2007, The Ministry of Railways (Rail Mantralaya), Railway Board, approved the proposal submitted by the Indian Railway Catering & Tourism Corporation Ltd., hereinafter referred to as "IRCTC", for operating a Luxury Tourist Train on a Pan-India route within India. Such proposal was made in pursuance of an Expression of Interest floated by the Respondent for a Joint Venture partner for the said Luxury Transit Train Project, to operate, manage and run the said train. The proposal was approved subject to certain broad principles for running the said train, set out by the Indian Railways in its letter dated 29th November, 2007, addressed to the Respondent, namely,

"(a) The Respondent will own the rake;

(b) The Respondent will pay to the Indian Railways the cost of maintenance and periodical overhaul of the rake;

(c) Railways be entitled to recover the haulage cost;

(d) The Respondent with their associate agencies will manage on board/off board services, marketing, booking, pricing, etc."

2. The Petitioner came to be selected as the Joint Venture shareholder for the operation of the Luxury Tourist Train Project. On 11th January, 2008, the Respondent forwarded the draft Memorandum of Understanding, which was proposed to be executed between the Petitioner and the Respondent, to the Indian Railways. In terms of the said Memorandum of

Understanding, the Petitioner and the Respondent would be equal shareholders of the Joint Venture Company and the project cost was estimated at Rs.37.5 crores, out of which an amount of Rs.7.5 was to be contributed by the Ministry of Tourism as a grant and an amount of Rs.15 crores was to be contributed as advance lease rental by the Petitioner as its share. In addition to the above, the Petitioner was to bring in the funding for the project and the Luxury Tourist Train was to be leased by the Respondent to the Joint Venture Company for a period of 15 years, which could be extended by another period of 10 years on conditions to be mutually agreed between the Petitioner and the Respondent. The Joint Venture Company was incorporated under the name and style of "Royale India Rail Tours Ltd.".

3. Upon receiving the approval of the Indian Railways, the Respondent executed a Memorandum of Understanding with the Petitioner dated 10th July, 2008, wherein it was stated that the Ministry of Railways had given the permission to the Respondent to own and operate the Luxury Tourist Train for the exclusive use of the Joint Venture Company for a period of 15 years, which was renewable for a further period of 10 years. The said Memorandum of Understanding also contained the various terms and conditions on which the train was to be operated. In terms of the Joint Venture Agreement and the Memorandum of Understanding, a Service Agreement dated 5th March, 2010, was executed between the Joint Venture Company and the Ninth Dimension Hotel and Resorts Pvt. Ltd., hereinafter referred to as "MAPPLE Hotels", for providing hospitality services on board and their respective roles and responsibilities were set out in the said agreement.

4. The Maharaja Express commenced operations on 20th March, 2010, and completed 4 journeys in the inaugural runs till 31st March, 2010, and 30 journeys between April, 2010, till April, 2011.

5. Whilst the Joint Venture operations were being

conducted, certain disputes arose between the shareholders regarding the working of the Joint Venture Agreement and the Memorandum of Understanding, which ultimately resulted in the termination of the lease arrangement by the Respondent, IRCTC, by its letter dated 12th August, 2011, on the grounds indicated therein.

6. On account of such termination of the lease agreement, the Petitioner initiated a proceeding under Section 9 of the Arbitration and Conciliation Act, 1996, under the Arbitration Agreement contained in Article 30 of the Joint Venture Agreement, for staying the termination of the lease agreement and also to allow the arrangements to continue till the month of April, 2012, subject to such terms and conditions as may be imposed by the Court.

7. As has been submitted by Mr. Mukul Rohatgi, learned Senior Advocate, appearing for the Petitioner, what was of utmost importance and concern to the Petitioner was not only the huge investment made by the Petitioner in the project, but the loss of goodwill and reputation in the eyes of its clients, who were mainly from foreign countries. Discontinuance of operation would also besmirch the reputation of the Indian Government.

8. One of the other concerns of the Petitioner was that it had been looking after the marketing and the bookings internationally and within India and such bookings had been made much in advance. It was the case of the Petitioner that the Joint Venture Company had received and was holding approximately 400 bookings up to December, 2011 and such bookings had been made by various international travel companies.

9. The prayer for interim directions was contested by the Respondent on several grounds. One of the grounds taken was that by making relief on the basis of the Joint Venture Agreement, the Petitioner was trying to get a lease in favour of the Joint Venture Company, which was neither a party to the

proceedings nor to the Agreement. It was further contended that, in fact, the lease was never executed in favour of the Joint Venture Company and the rights of the Petitioner could not go beyond what had been laid down in the Articles of Association of the Joint Venture Company. It was also urged that since the relationship between the Joint Venture Company and the Respondent had been terminated, the Petitioner was trying to create a right in its favour for operating the train, which was never in its individual possession. It was urged that such a prayer was not maintainable and it was not open to the Petitioner to claim any relief in relation to the train, which was the subject matter of the termination letters issued by the Respondent to the Joint Venture Company, in its capacity as owner of the train. Noting the interest of the parties and keeping in mind the fact that advance bookings had been made, the learned Single Judge of the Delhi High Court, who heard the Application under Section 9 of the Arbitration and Conciliation Act, 1996, came to the conclusion that, although, in terms of the Joint Venture Agreement in which there was a separate provision for arbitration, the arbitral dispute would have to be confined to the disputes between the parties to the Agreement, under the wider connotation of the Agreement between the Respondent and the Joint Venture Company, certain interim orders were required to be made. More so, when the main grievance of the Respondent against the Petitioner and the Joint Venture Company was in respect of inflated bills raised by the Petitioner and non-payment of the amounts payable in terms of the Agreement. In such circumstances, the learned Single Judge found it fit to appoint a Receiver, as an interim measure, in the public interest, to prevent discontinuation of the running of the train for which bookings had already been made. The learned Judge appointed one Shri Sudhir Nandrajog, a Senior Advocate of the Delhi High Court, as Receiver, and disposed of the Section 9 application, inter alia, by directing that the train would continue to be run under the supervision of the learned Receiver for the period commencing from 14th September, 2011, uptil 31st December, 2011, which was the

major period for which the bookings had been effected, as per the arrangement which was continuing during the earlier season. Various other directions were given to enable the learned Receiver to operate the Maharaja Express and for maintenance of accounts. The parties were also granted leave to approach the Court or Arbitrator (if appointed) for modification of the order in case such need arose.

10. In addition to the above, the parties were also given liberty to take necessary steps to have their disputes resolved by the appointment of an Arbitral Tribunal which would be at liberty to decide the disputes without being influenced by the order passed on the application under Section 9 of the 1996 Act. The rights and contentions of both sides were also kept open for submission before the Arbitral Tribunal, if appointed.

11. The order of the learned Single Judge was challenged by IRCTC Ltd. by way of FAO(OS)Nos.433-35 of 2011.

12. The submissions made before the learned Single Judge were reiterated on behalf of both the parties before the Division Bench, but a new dimension was attempted to be added to the submissions advanced on behalf of the Petitioner, M/s Cox & Kings India Ltd. An attempt was made to make out a case that the Joint Venture Company was akin to a partnership and the train in question was partnership property. The Division Bench took note of the fact that the total cost of the train was Rs.49.5 crores, which had been borne by IRCTC and was even recorded in Article 6 of the Agreement. Apart from the above, not only the shell train, but even the cost of the interior, fittings and furnishing was borne by IRCTC. The Division Bench also noted that if the train was to be regarded as a Joint Venture property, there was no reason to provide for leasing of the train by IRCTC to the Joint Venture Company.

13. The Division Bench, however, was disinclined to continue the arrangement, as directed by the learned Single Judge, and accepted the submissions made on behalf of the

IRCTC that the mandatory injunction which had been passed, would have the effect of creating an Agreement between the Joint Venture Company and IRCTC in relation to the train, which would be influenced even though the Joint Venture Company was not a party to the proceedings. However, keeping in mind the prestige of the country in regard to the running of the Maharaja Express which had earned worldwide fame, the Division Bench felt that since the Court was not in a position to restore the terminated arrangement and direct the train to be managed and run by M/s. Cox & Kings under the supervision of the Receiver, the public interest could be subserved if the Maharaja Express continued to be operated even by the IRCTC. Also taking into account the factor relating to the bookings which had already been made in advance, the Division Bench accepted the suggestions made by IRCTC to honour the bookings, without prejudice to the rights and contentions of the parties, as extracted hereinbelow :

"a) The train has to be run by the owner/respondent. All the facility material including crockery, furnish-ings etc. which are in custody of the petitioner should be handed over to respondent for executing this facility arrangement.

b) All revenues arising therefrom without any deductions earned either by the petitioner or respondent may be deposited in the separate account from which expenditure will be funded.

c) All the bookings may be allowed to be transferred to the respondents for honouring.

d) All the on board or off board expenses and railway payments may be allowed to be charged to this account. In this way, the amount will be sufficient to cover the expenses and there will be no need for further loans.

e) The existing service providers may be retained."

14. The Division Bench also directed that while running the train, the IRCTC would remain bound by the aforesaid suggestions. Whatever bookings had been made till then could be transferred by M/s. Cox & Kings to IRCTC. The Division Bench accordingly set aside the arrangements made by the learned Single and allowed the appeal preferred by the Respondent herein.

15. It is against the said judgment and order passed by the Division Bench of the Delhi High Court on 6th January, 2012 in FAO(OS)Nos.433-35 of 2011, that the present Special Leave Petitions have been filed by M/s. Cox & Kings India Ltd.

16. Appearing for the Petitioner Company, Mr. Mukul Rohatgi, learned Senior Advocate, submitted that the primary reason for filing of the writ petition was to protect and save the image and goodwill of the Petitioner Company in the field of global tourism. Mr. Rohtagi submitted that it is in that context that a prayer had been made on behalf of the Petitioner Company for stay of operation of the termination of the Lease Arrangement by the Respondent IRCTC by its letter dated 12th August, 2012. Mr. Rohatgi submitted that almost the entire expenses for commencing operations in respect of the Maharaja Express had been borne by the Petitioner Company in different forms, and in view of the promises contained in the Memorandum of Understanding and the Agreement executed between the Petitioner Company and the Joint Venture Company, the termination of the Lease Arrangement was not warranted.

17. Mr. Rohatgi urged that it had been agreed by both the parties in the said Memorandum of Understanding and the Joint Venture Agreement and other supporting documents that the lease of the train by IRCTC to the Joint Venture Company was for a minimum period of 15 years from the date of the first commercial run of the train and in lieu whereof 50% cost of the

train had been paid by way of advance lease charges which were to be adjusted over a period of 15 years from the date of the first commercial run of the train. Mr. Rohatgi urged that the said amount had been paid by the Petitioner to the IRCTC through the Joint Venture Company. It was on account of the termination letters dated 12th August, 2011, issued by IRCTC that the Petitioner Company was compelled to initiate proceedings before the High Court under Section 9 of the Arbitration and Conciliation Act, 1996. Mr. Rohatgi submitted that the relief claimed in the said application was that the Maharaja Express should be operated only through the Joint Venture Company and that the Respondent IRCTC should be restrained from using the train for any purpose other than for the exclusive use of the Joint Venture Company. Mr. Rohatgi also reiterated the fact that in order to safeguard the interest of the parties concerned, the learned Single Judge had appointed a Receiver to oversee the function and operations of the train and granted injunction to preserve the existing status-quo till the final hearing of the dispute.

18. The major thrust of Mr. Rohatgi's submissions was towards the aforesaid end and was indicative of the fact that the running of the train was of primary importance and should be allowed to continue as per the earlier undertaking, without any disturbance, while the disputes before the learned Arbitrator were finally disposed of.

19. On the other hand, on behalf of the Respondent No.1 it was contended by the Learned Solicitor General that the Special Leave Petitions had been filed by M/s. Cox & Kings. Ltd. in respect of the train, which was owned by the Respondent No.1, IRCTC. The said train had been converted into a luxury train and was being operated on a seasonal basis between the months of September to April by the Joint Venture Company. However, the IRCTC had no option but to terminate the arrangement made with the Joint Venture Company to operate the luxury train on account of various reasons and, in particular, on account of non-payment of the dues of IRCTC. The learned

Solicitor General submitted that the letter terminating the Joint Venture Agreement was the subject matter of the Section 9 Application before the learned Single Judge of the High Court, who, by his order dated 6th September, 2011, allowed the prayers made therein in part and issued a mandatory injunction and also appointed a Receiver for operation of train between the months of September to December, 2011. However, the train was never operated under the Receiver on account of the interim orders passed in the appeal on 9th September, 2011.

20. The learned Solicitor General reiterated the fact that on 6th January, 2012, the Division Bench set aside the order passed by the learned Single Judge which was, in any event, to operate only till 31st December, 2011.

21. The learned Solicitor General urged that there was no ambiguity regarding the ownership of the train and it had been clearly understood by all concerned that it was IRCTC which was to be the owner of the train and that the Joint Venture Company was to be formed for management and operation of the train. It had also been made clear that IRCTC's association with other agencies was for the purpose of management of the train only.

22. It is evident from the submissions made on behalf of the respective parties that the arrangement between the Respondent No.1, IRCTC, was with the Petitioner Company and, although, it was the intention of the parties by virtue of the Joint Venture Agreement that the luxury train, belonging to the Respondent No.1, was to be operated by the Joint Venture Company, at least for a minimum period of 15 years, what ultimately transpired was the termination of the Agreement by the Respondent No.1 in favour of the Joint Venture Company. As pointed out by the Division Bench of the High Court, the Petitioner was not entitled to question such termination as by itself it had no existence as far as the running of the train was concerned and it was not a party to the proceedings. In fact, what the Petitioner has attempted to do in these proceedings

is to either restore the Lease Agreement, which had been terminated, or to create a fresh Agreement to enable the Petitioner to operate the luxury train indefinitely, till a decision was arrived at in Section 9 Application.

23. It is no doubt true that the Petitioner has invested large sums of money in the project, but that cannot entitle it to pray for and obtain a mandatory order of injunction to operate the train once the lease agreement/arrangement had been terminated. We are also unable to accept Mr. Rohatgi's submission that the Joint Venture Agreement was akin to a partnership. Such submission had been rightly rejected by the Division Bench. As rightly pointed out by the Division Bench of the High Court, the Petitioner's remedy, if any, would lie in an action for damages against IRCTC for breach of any of the terms and conditions of the Joint Venture Agreement and the Memorandum of Understanding.

24. Taking into consideration the totality of the circumstances, we are inclined to agree with the suggestions which had been made by IRCTC before the Division Bench of the High Court regarding the operation of the train by IRCTC, with liberty to the parties to appoint an Arbitral Tribunal to settle their disputes. We, therefore, dismiss the Special Leave Petitions, but make it clear that if an Arbitral Tribunal is appointed, the aforesaid arrangement will be subject to the decision of the Arbitral Tribunal. We also make it clear that the observations made by the learned Single Judge, the Division Bench of the High Court and by us, shall not, in any way, influence the outcome of the arbitral proceedings, if resorted to by the parties.

25. Having regard to the nature of the facts of the case, the parties shall bear their own costs.

26. In view of the above, no order is required to be passed on the Contempt Petitions and the same are also dismissed.

B.B.B. SLP & Contempt Petitions dismissed.

MS. MAYAWATI

v.

UNION OF INDIA & ORS.

(Writ Petition (Criminal) No. 135 of 2008)

JULY 6, 2012

[P. SATHASIVAM AND DIPAK MISRA, JJ.]

Prevention of Corruption Act, 1988 - s.13(2) r/w s.13(1)(e) - FIR registered under - Quashing of - Writ petition for - Irregularities in Taj Heritage Corridor project under Taj Trapezium Zone (TTZ) Area at Agra - Rs.17 crores released for the project without proper sanction - Directions issued by Supreme Court vide order dated 18-9-2003 - CBI directed to conduct inquiry - FIR lodged by CBI against the writ petitioner u/s.13(2) r/w s.13(1)(e) of the Act on the basis that in the said order dated 18-09-2003, there was a clear direction to register an FIR for investigating into the alleged disproportionate assets of the petitioner - Plea of petitioner (who was the State Chief Minister on the date of filing of the writ petition) that the FIR was beyond the scope of the directions passed by Supreme Court in its order dated 18-9-2003 - Held: Directions issued in the order dated 18-9-2003 have to be read in the light of the previous orders dated 16-7-2003, 21-8-2003 and 11-9-2003 as well as subsequent orders dated 25-10-2004 and 7-8-2006 - Reading of all the orders clearly show the direction to lodge FIR was issued only with respect to Taj Corridor matter, more particularly, irregularities therein - In fact, the direction was confined to find out as to who cleared the project of Taj Corridor and for what purpose it was cleared and whether there was any illegality or irregularity committed by officers and other persons concerned in the State - Supreme Court did not issue any direction to the CBI to conduct a roving inquiry against the assets of the petitioner commencing from 1995 to 2003 even though the Taj Heritage Corridor Project

was conceived only in July, 2002 and the amount of Rs.17 crores was released in August/September, 2002 - Since order dated 18-9-2003 did not contain any specific direction regarding lodging of FIR in the matter of disproportionate assets case against the petitioner, CBI was not justified in proceeding with the FIR -Impugned FIR was without jurisdiction and any investigation pursuant thereto was illegal and liable to be quashed, accordingly quashed.

This Court, by order dated 16.07.2003 in I.A. No. 387 of 2003 in Writ Petition (C) No. 13381 of 1984 titled M.C. Mehta vs. Union of India & Ors. had directed the CBI to conduct an inquiry in regard to the alleged irregularities committed by the officers/persons in the Taj Heritage Corridor Project. By means of order dated 21.08.2003, this Court issued certain directions to the CBI to interrogate and verify the assets of the persons concerned with regard to outflow of Rs. 17 crores which was alleged to have been released without proper sanction for the said Project. On 11.09.2003, a report was submitted by the CBI. This Court, in its further order dated 18.09.2003, on the basis of the report dated 11.09.2003, granted further time to the CBI for verification of the assets of the officers/ persons involved. The CBI submitted a report on 18.09.2003 before this Court which formed the basis of order dated 18.09.2003 wherein the CBI was directed to conduct an inquiry with respect to the execution of the Taj Heritage Corridor Project under Taj Trapezium Zone (TTZ) Area at Agra.

Pursuant thereto, an FIR was lodged on 05.10.2003 being RC No. 0062003A0018/2003 under Section 120-B read with Sections 420, 467, 468 and 471 IPC and under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 (the PC Act) against several persons including the petitioner. On the same date i.e. 05.10.2003, the CBI registered another FIR being R.C. No.

0062003A0019 under Section 13(2) read with Section 13(1)(e) of the PC Act exclusively against the petitioner, on the basis that in the said order dated 18.09.2003 of this Court, there was a clear direction to register an FIR for investigating into the disproportionate assets of the Petitioner.

Subsequently the Petitioner filed the instant writ petition before this Court under Article 32 of the Constitution. On the date of filing of the writ petition, the petitioner was the Chief Minister of U.P.

The question raised in the writ petition was whether FIR No. R.C. 0062003A0019 dated 05.10.2003 lodged under Section 13(2) read with Section 13(1)(e) of the PC Act against the petitioner to investigate into the matter of her alleged disproportionate assets was beyond the scope of the directions passed by this Court in the order dated 18.09.2003 in I.A. No. 376 of 2003 in W.P. (C) No. 13381 of 1984 titled *M.C. Mehta vs. Union of India and Others.*

Allowing the writ petition, the Court

HELD: 1.1. A thorough scrutiny of all the orders including the specific directions dated 18.09.2003 clearly show that the same was confined only in respect to the case relating to Taj Corridor Project which was the subject-matter of reference before the Special Bench. Para 13(f) of the order dated 18.09.2003 makes it clear that the CBI could have lodged only one FIR No. R.C. 0062003A0018 dated 05.10.2003. There being no consideration of alleged disproportionate assets at any stage of the proceedings while dealing with the Taj Corridor matter, there could not have been and in fact there was no such direction to lodge another FIR being No. R.C. 0062003A0019 dated 05.10.2003 exclusively against the petitioner under the P.C. Act. In the absence

of any direction by this Court to lodge an FIR into the matter of alleged disproportionate assets against the petitioner, the Investigating Officer could not take resort to Section 157 CrPC. [Paras 15, 17] [52-D-F; 54-C]

1.2. Further, Section 6 of the Delhi Special Police Establishment Act, 1946 (DSPE Act) prohibits the CBI from exercising its powers and jurisdiction without the consent of the Government of the State. In the instant case, the consent was declined by the Governor of the State and in such circumstance also the second FIR No. R.C. 0062003A0019 dated 05.10.2003 is not sustainable. [Para 17] [54-D-E]

1.3. Also, merely because various orders of this Court including the order dated 18.09.2003 has been communicated to various authorities in terms of the provisions of the rules of this Court, the CBI was not justified in putting the Assistant Registrar of this Court as informant/complainant. The complainant/Assistant Registrar would not and cannot be a witness in the case to corroborate the statements made in the FIR No. R.C. 0062003A0019 dated 05.10.2003. [Para 19] [57-B-C]

1.4. A perusal of various orders of this Court show that Taj Corridor was the subject matter of reference before the Special Bench. Various directions issued in the order dated 18.09.2003 have to be read in the light of the previous orders dated 16.07.2003, 21.08.2003 and 11.09.2003 as well as subsequent orders dated 25.10.2004 and 07.08.2006 wherein this Court has clarified that it was not monitoring the disproportionate assets case. Reading of all the orders of this Court clearly show the direction to lodge FIR was issued only with respect to Taj Corridor matter, more particularly, irregularities therein. In fact, the direction was confined to find out as to who cleared the project of Taj Corridor and for what purpose it was

cleared and whether there was any illegality or irregularity committed by officers and other persons concerned in the State. The CBI cannot be permitted to take the view that two cases, namely, Taj Corridor and Disproportionate Assets case are same and the investigation was done in both the cases as per the directions of this Court. [Paras 18, 20] [55-C-D; 56-H; 57-A, D-G]

1.5. From a perusal of all the available orders, it is clear that this Court being the ultimate custodian of the fundamental rights did not issue any direction to the CBI to conduct a roving inquiry against the assets of the petitioner commencing from 1995 to 2003 even though the Taj Heritage Corridor Project was conceived only in July, 2002 and an amount of Rs. 17 crores was released in August/September, 2002. The method adopted by the CBI was unwarranted and without jurisdiction. The CBI proceeded without proper understanding of various orders dated 16.07.2003, 21.08.2003, 18.09.2003, 25.10.2003 and 07.08.2003 passed by this Court. There was no such direction relating to second FIR, namely, FIR No. R.C. 0062003A0019 dated 05.10.2003. No finding or satisfaction was recorded by this Court in the matter of disproportionate assets of the petitioner on the basis of the status report dated 11.09.2003 and, in fact, the petitioner was not a party before this Court in the case in question. From the perusal of the orders, it is clear that there could not have been any material before this Court about the disproportionate assets case of the petitioner beyond the Taj Corridor Project case and there was no such question or issue about disproportionate assets of the petitioner. In view of the same, giving any direction to lodge FIR relating to disproportionate assets case did not arise. [Para 21] [58-A-G]

1.6. Anything beyond the Taj Corridor matter was not the subject-matter of reference before the Taj Corridor Bench. Since the order dated 18.09.2003 does not contain

any specific direction regarding lodging of FIR in the matter of disproportionate assets case against the petitioner, CBI is not justified in proceeding with the FIR No. R.C. 0062003A0019 dated 05.10.2003. The CBI exceeded its jurisdiction in lodging FIR No. R.C. 0062003A0019 dated 05.10.2003 in the absence of any direction from this Court in the order dated 18.09.2003 or in any subsequent orders. The impugned FIR is without jurisdiction and any investigation pursuant thereto is illegal and liable to be quashed, accordingly quashed. [Paras 22, 24] [58-H; 59-A-B; 60-C]

M.C. Mehta vs. Union of India and Others **(2003) 8 SCC 696: 2003 (3) Suppl. SCR 925;** *M.C. Mehta (Taj Corridor Scam) vs. Union of India & Ors.* **(2007) 1 SCC 110: 2006 (9) Suppl. SCR 683;** *M.C. Mehta (Taj Trapezium Matter) vs. Union of India and Others* **(1997) 2 SCC 353: 1996 (10) Suppl. SCR 973;** *M.C. Mehta vs. Union of India and Others* **(2003) 8 SCC 706;** *M.C Mehta vs. Union of India* **(2003) 8 SCC 711;** *State of West Bengal & Ors. vs. Committee for Protection of Democratic Rights, West Bengal & Ors.* **(2010) 3 SCC 571: 2010 (2) SCR 979;** *M.C. Mehta vs. Union of India and Others* **(2007) 1 SCC 137 and** *M.C. Mehta vs. Union of India and Others* **(2007) 1 SCC 136 - referred to.**

2. Regarding the intervention application - I.A. No. 8 of 2010, it is true that the intervener has no legal right to intervene in the matter of this kind where CBI has been prosecuting the case vigorously against the petitioner. However, inasmuch as the intervener has challenged the order of the Governor of U.P. declining to grant sanction to prosecute the petitioner and the said matter is pending in the Lucknow Bench of the Allahabad High Court, in order to assist the Court, his counsel was heard by this Court. In view of the above special circumstance, the I.A. No. 8 of 2010 is allowed but the same cannot be cited as a precedent for other cases. [Para 23] [59-C, E-F; 60-A]

Union of India & Anr. vs. W.N. Chadha, **1993 (Supp) 4 SCC 260: 1992 (3) Suppl. SCR 594 and** *Janata Dal vs. H.S. Chowdhary & Ors.* **(1991) 3 SCC 756: 1991 (3) SCR 752 - referred to.**

Case Law Reference:

2003 (3) Suppl. SCR 925	**referred to**	**Para 2**
2006 (9) Suppl. SCR 683	**referred to**	**Para 2**
1996 (10) Suppl. SCR 973	**referred to**	**Para 10**
(2003) 8 SCC 706	**referred to**	**Para 11**
(2003) 8 SCC 711	**referred to**	**Para 12**
2010 (2) SCR 979	**referred to**	**Para 16**
(2007) 1 SCC 137	**referred to**	**Para 18**
(2007) 1 SCC 136	**referred to**	**Para 18**
1992 (3) Suppl. SCR 594	**referred to**	**Para 23**
1991 (3) SCR 752	**referred to**	**Para 23**

CRIMINAL ORIGINAL JURISDICTION : Under Article 32 of the Constitution of India.

Mohan Parasaran, ASSG, Harish Salve, S.C. Mishra, Shail Kumar Dwivedi, Kapil Mishra, Abhinav Shrivastava, D.L. Chidananda, T.A. Khan, Arvind Kumar Sharma, B. Krishna Prasad, Kamini Jaiswal, Prashant Bhushan, Anupam Bharti, Shashank SIngh, Pyoli Swatija, Akhilesh Karla, Rohit Kr. Singh, P. Narasimhan for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. The only question raised in this writ petition, filed under Article 32 of the Constitution of India, is as to whether FIR No. R.C. 0062003A0019 dated 05.10.2003 lodged under Section 13(2) read with Section 13 (1) (e) of the

Prevention of Corruption Act, 1988 (hereinafter referred to as "the PC Act") against the petitioner herein to investigate into the matter of alleged disproportionate assets is beyond the scope of the directions passed by this Court in the order dated 18.09.2003 in I.A. No. 376 of 2003 in W.P. (C) No. 13381 of 1984 titled *M.C. Mehta vs. Union of India and Others,* (2003) 8 SCC 696?

2. The case of the petitioner as stated in the writ petition, is summarized hereunder:

(a) On the date of filing of this writ petition before this Court, the petitioner was the Chief Minister of U.P. Earlier also, the petitioner had been the Chief Minister of U.P. for three times. The petitioner had also served as a Member of Parliament many a time both as a Member of Lok Sabha and Rajya Sabha and had also served as a Member of Legislative Assembly and Legislative Council of the State of U.P. The petitioner is a law graduate and had been a teacher from 1977 to 1984. At present, the petitioner is the President of a National Political Party called as "Bahujan Samaj Party (BSP)", which is one of the six National Parties recognized by the Election Commission of India.

(b) This Court, by order dated 16.07.2003 in I.A. No. 387 of 2003 in Writ Petition (C) No. 13381 of 1984 titled *M.C. Mehta vs. Union of India & Ors.* directed the CBI to conduct an inquiry on the basis of an I.A. filed in the aforesaid writ petition alleging various irregularities committed by the officers/ persons in the Taj Heritage Corridor Project and to submit a Preliminary Report.

(c) By means of an order dated 21.08.2003, this Court issued certain directions to the CBI to interrogate and verify the assets of the persons concerned with regard to outflow of Rs. 17 crores which was alleged to have been released without proper sanction for the said Project. When the case was taken up for hearing on 11.09.2003, a report was submitted by the

CBI and it was directed to be kept in a sealed cover in the Registry.

(d) This Court, in its further order dated 18.09.2003, on the basis of the report dated 11.09.2003, granted further time to the CBI for verification of the assets of the officers/persons involved. The CBI-Respondent No. 2 herein submitted a report on 18.09.2003 before this Court which formed the basis of order dated 18.09.2003 wherein the CBI was directed to conduct an inquiry with respect to the execution of the Taj Heritage Corridor Project under Taj Trapezium Zone (TTZ) Area at Agra.

(e) Pursuant to the orders of this Court, an FIR was lodged on 05.10.2003 being RC No. 0062003A0018/2003 under Section 120-B read with Sections 420, 467, 468 and 471 IPC and under Section 13(2) read with Section 13(1)(d) of the PC Act against several persons including the petitioner herein. In the said FIR, certain details and several developments which took place with regard to the aforesaid Project have been given. As per the allegations contained in the report dated 11.09.2003, several irregularities were allegedly being found in the aforesaid Project. Pursuant to the same, investigation has been completed and the report was forwarded to obtain the sanction from the competent authority, namely, the Governor for prosecuting the Chief Minster of the State. The Governor, by order dated 03.06.2007, declined to accord sanction to prosecute the petitioner.

(f) According to the petitioner, in the aforesaid FIR, it was stated that this Court also directed the CBI to conduct an inquiry pertaining to the assets of the officers/individuals concerned in the aforesaid Project as mentioned in the judgment passed by this Court in the aforesaid case in order to ascertain whether any mis-appropriation of funds have been done with regard to outflow of Rs. 17 crores released for the construction of said Project. A perusal of the order dated 18.09.2003 would reveal that whatever directions were issued by this Court were only

in respect of Rs. 17 crores alleged to have been released without proper sanction and there is not even a whisper about making an investigation into any other assets of the persons involved in general. In other words, the scope of the order of this Court was limited to the extent of money released in the said Project and not otherwise. This is clear from the order of this Court dated 18.09.2003 wherein it had specifically observed about lodging of FIR only with regard to Taj Heritage Corridor Project case. That order nowhere mentioned about lodging of second FIR in regard to the disproportionate assets of the petitioner.

(g) It is the further case of the petitioner that contrary to the orders of this Court, with mala fide intentions, the CBI registered another FIR being R.C. No. 19 of 2003 on the same date i.e. 05.10.2003 only against the petitioner alleging therein that in pursuance of the orders dated 21.08.2003, 11.09.2003 and 18.09.2003 passed by this Court, they conducted an inquiry with regard to the acquiring of disproportionate movable and immovable assets by the petitioner and her close relatives and on the basis of this inquiry lodged the said FIR, whereas there was no direction or observation by this Court to inquire into the assets of the petitioner not related to the said Project case.

(h) The said FIR has been lodged by Shri K.N. Tewari, Superintendent of Police, CBI/ACP, Lucknow, however, in the column of complaint at page No. 2 of the FIR, the name of the complainant/informant has been mentioned as Shri Inder Pal, Assistant Registrar, PIL Branch, Supreme Court of India, New Delhi even though no such order or direction issued by him for registration of the case. It is further pointed out that Shri Inder Pal has not signed any such FIR as complainant/informant. Pursuant to the impugned FIR - R.C. No. 19 of 2003 the CBI conducted raids, search and seizure operations at all the premises of the petitioner and her relatives and seized all the bank accounts.

(i) The petitioner has made several representations to the

CBI officials, the State Minister of Personnel and the Hon'ble Prime Minister who heads the Personnel Department drawing their attention that the Supreme Court had not given any such direction or authority to the CBI to lodge an FIR in respect to the alleged disproportionate assets and investigate the entire assets of the petitioner from the year 1995 which have no relation with the case of Taj Heritage Corridor Project which came into being only in August, 2003. In spite of several reminders and further representations, till date no communication has been received from the CBI. The absence of any reply by any of the authorities including the CBI shows that there was no direction or authority to the CBI in the order dated 18.09.2003 to lodge an FIR or to investigate into the assets of the petitioner which are not related to the said Project. Hence, it was incumbent upon the CBI to comply with the provisions of Section 6 of the Delhi Special Police Establishment Act, 1946 (in short 'DSPE Act') which makes it obligatory to obtain the consent of the Government of the concerned State to confer jurisdiction on the CBI to investigate in any case arising within the jurisdiction of a State. In the present case, FIR was lodged and investigation was conducted without obtaining consent of the State Government which is in flagrant violation of Section 6 of the DSPE Act. In the absence of the consent of the State Government, the whole exercise of the CBI about lodging of FIR and investigating into the assets of the petitioner not related to Taj Heritage Corridor Project is without jurisdiction and, therefore, the same is non est and void ab initio.

(j) It is further pointed out that this Court in its order dated 25.10.2004, after perusing the investigation reports filed by the CBI, held that no link was found between the irregularities alleged to have been found in respect to the assets matter and the Taj Heritage Corridor Project which was the subject-matter of the reference before the Special Bench.

(k) The fact that this Court had stopped monitoring the

assets case was again reiterated in the order dated 07.08.2006 passed by this Court.

(l) On 27.11.2006, this Court finally decided the issue in respect to the FIR being R.C. No. 18 relating to the Taj Heritage Corridor matter reported in *M.C. Mehta (Taj Corridor Scam) vs. Union of India & Ors.,* (2007) 1 SCC 110. In the said judgment, this Court observed that it should not embark upon an enquiry in regard to the allegations of criminal misconduct in order to form an opinion one way or the other so as to prima facie determine guilt of a person or otherwise. When the matter came up before the Governor of U.P. to grant or refuse sanction for prosecution, he sought legal opinion from the Additional Solicitor General of India and based on his opinion and on appreciation of entire materials, the Governor has concluded that the petitioner was not even remotely connected with the sanction of the said Project or the payment released for the same. After the above order of the Governor, the directions given by this Court in the order dated 18.09.2003 were fully complied with including in respect to consider violations of the provisions of the PC Act. After this, there was no justification or authority with the CBI to continue with the investigation in other personal assets of the petitioner.

(m) On 05.06.2007, the CBI moved an application before the Special Judge, Anti Corruption Bureau, (CBI), Lucknow informing that the Governor had refused to grant sanction. On perusal of all the materials including the order of the Governor declining to grant sanction, the Special Judge held that in the absence of sanction to prosecute the petitioner, the Court has no jurisdiction to take cognizance.

(n) The order of the Governor was also challenged before this Court in Writ Petition (Civil) No. 434 of 2007. However, this Court, by order dated 06.08.2007, dismissed the same as withdrawn. Even thereafter, the petitioner has made several representations to the Director, CBI to drop the investigation on the basis of the aforesaid FIR. However, the CBI is bent

upon harassing the petitioner. Hence, she approached this Court by filing the present writ petition.

Stand of the CBI-Respondent No.2:

3. Pursuant to the notice issued on 15.05.2008, the CBI-Respondent No.2 herein has filed its counter affidavit wherein it was stated that in the order dated 18.09.2003 of this Court, there was a clear direction to register an FIR for investigating into disproportionate assets of the petitioner on the ground that in the said order it was mentioned that "apart from what has been stated in the reports with regard to the assets, the learned ASG Mr. Altaf Ahmad has submitted that further inquiry/ investigation is necessary by the CBI". It is further stated that the validity of the aforesaid FIRs was not disturbed by the Allahabad High Court by its order dated 22.10.2003 on the ground that the FIR in question was filed as per the directions of this Court. It is further stated by the CBI that the FIR No. RC 19 dated 05.10.2003 under Section 13(2) read with Section 13(1)(e) of the PC Act reveal the details of huge amount of disproportionate assets possessed by the petitioner and her family members beyond their known sources of income.

Further case of the petitioner:

4. A rejoinder affidavit, supplementary affidavit and supplementary counter affidavits have also been filed wherein subsequent developments which took place during the pendency of the writ petition, especially, passing of various orders by the Income Tax Authorities, Income Tax Appellate Tribunal and the Delhi High Court in favour of the petitioner for different assessment years have been mentioned holding that all income shown in her accounts in the form of gift or otherwise are genuine and legal, covering from 1995 to 2004 of which period the assessments were reopened, investigated and reassessed.

Case of the intervenor:

5. During the pendency of this writ petition, which was filed in 2008, one Mr. Kamlesh Verma has filed I.A. No. 8 of 2010 claiming that he is a social worker and petitioner in Writ Petition No. 2019 of 2009 (M/B) concerning FIR being RC No. 18 dated 05.10.2003 for intervention in the above matter and to assist the Court. By pointing out that it was he who challenged the order of the Governor declining to grant sanction in respect of FIR No. 18 and filed Writ Petition No. 2019 of 2009 which is pending in the Allahabad High Court, Lucknow Bench, sought to intervene to put-forth certain factual details. In the said application, the intervener has also highlighted various earlier orders of this Court. The said I.A. was resisted by the petitioner by pointing out that in the present writ petition the petitioner seeks quashing of the second FIR i.e. R.C. No. 19 only on the ground that there was no such direction in the order dated 18.09.2003 passed by this Court. The intervention application is therefore, misconceived. It is also pointed out that the intervener has filed his writ petition in Lucknow in 2009 and his intervention application was filed on 08.09.2010 whereas the petitioner had filed writ petition in May, 2008 and this Court had issued notice on 15.05.2008. It is also pointed out that the intervener was not associated with the Project matter before this Court at any stage when orders were passed on several dates commencing from 2003 ending with 2009.

6. In the light of the above pleadings of the parties, we heard Mr. Harish Salve, learned senior counsel for the petitioner, Mr. Mohan Parasaran, learned Additional Solicitor General for the Union of India and CBI and Ms. Kamini Jaiswal, learned counsel for the intervener.

7. The relief(s) sought for in the writ petition are reproduced hereunder:-

"I. Issue a Writ, Order or direction in the nature of certiorari quashing the FIR No. R.C. 0062003A0019/2003 dated

05.10.2003 lodged by Superintendent of Police, CBI/ACB, Lucknow and investigation proceedings being made in pursuance thereof.

II. Issue a Writ, Order or direction in the nature of Mandamus restraining the respondent no.2 and 3 from proceeding further in pursuance to the said FIR and direct them to close and drop the said proceedings;

III. Issue a writ, order or direction in the nature of mandamus directing the release of all seized bank accounts of the petitioner which have been seized by CBI in pursuance to the impugned FIR.

IV. Issue an appropriate writ, order or direction declaring that this Hon'ble court under Article 32/136/142 of the Constitution of India or the High Court under Article 226 of the Constitution of India can not direct the Central Bureau of Investigation (CBI), an establishment created under the Delhi Special Police Establishment Act, 1946 to investigate a cognizable offence which is alleged to have taken place in a State without the consent of the State Government under Section 6 of the Delhi Special Police Establishment Act, 1946.

V. Issue any other Writ, order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the present case."

8. It is clear from the narration of facts as well as the relief(s) sought for in the writ petition that the petitioner is aggrieved of second FIR being No. R.C. 0062003A0019 dated 05.10.2003. It is also clear that the petitioner has assailed the said FIR on the ground that there was no direction by this Court in its order dated 18.09.2003 which could have empowered the CBI to lodge two FIRs, namely, (i) FIR No. R.C. 0062003A0018 dated 05.10.2003 under Section 120-B read with Sections 420, 467, 468, and 471 IPC and Section 13(2) read with

Section 13(1)(d) of the P.C. Act against the petitioner as well as 10 other accused persons in respect of Taj Corridor matter and (ii) FIR No. R.C. 0062003A0019 dated 05.10.2003 under Section 13(2) read with Section 13(1)(e) of the P.C. Act against the petitioner only. It is the specific stand of the CBI that in the order dated 18.09.2003 passed by this Court in I.A. No. 376 of 2003 in Writ Petition No. 13381 of 1984 - M.C. Mehta vs. Union of India and Others, (2003) 8 SCC 696, there was a clear direction to register an FIR for investigating into disproportionate assets of the petitioner on the ground that in the said order, it is mentioned that "apart from what has been stated in the reports with regard to the assets, the learned ASG Mr. Altaf Ahmed has submitted that further inquiry/investigation is necessary by the CBI". It is also their stand that the validity of the aforesaid FIRs was not disturbed by the Allahabad High Court by its order dated 22.10.2003 on the ground that the FIR in question was filed as per the directions of this Court. It is further stated that the second FIR being No. R.C. 0062003A0019 dated 05.10.2003 revealed the details of huge amount of disproportionate assets possessed by the petitioner and her family members beyond their known sources of income.

9. As against the abovesaid stand of the CBI, the petitioner, in the form of rejoinder and supplementary affidavits, has pointed out that all income shown in her accounts in the form of gift or otherwise are genuine and legal covering from 1995 to 2004. It is further pointed out that all orders passed by the Income Tax Authorities have been brought on record and all of them attained finality and no further appeal is pending against them and all the assessments were reopened investigated and re-assessed.

10. The petitioner has also filed a consolidated compilation of orders passed by this Court commencing from 16.07.2003 ending with 27.04.2009. Mr. Harish Salve, learned senior counsel for the petitioner and Mr. Mohan Parasaran, learned

ASG took us through all those orders. Among those orders, we are very much concerned about the order dated 18.09.2003. Before going into the various directions issued in the said order, it is also relevant to refer the earlier orders dated 16.07.2003, 21.08.2003 and 11.09.2003. It is clear from those orders that this Court by order dated 30.12.1996 in *M.C. Mehta (Taj Trapezium Matter) vs. Union of India and Others,* (1997) 2 SCC 353 issued a number of directions to protect the national and world heritage monument, namely, the Taj. Thereafter, a number of interim applications were filed by the persons concerned who were required to shift their business or manufacturing activities. This Court has also appointed a Monitoring Committee to report whether those directions issued by this Court are complied with or not.

11. In the order dated 16.07.2003 - *M.C. Mehta vs. Union of India and Others,* (2003) 8 SCC 706, this Court, in order to find out who cleared the project, i.e., construction of the 'Heritage Corridor' at Agra and for what purpose it was cleared without obtaining necessary sanction from the Department concerned and whether there was any illegality or irregularity committed by the officers/persons, came to the conclusion that inquiry by CBI is necessary. Accordingly, in para 16 of the said order, this Court directed the Director of CBI to see that inquiry with regard to any illegality/irregularity committed by the officers/persons be conducted at the earliest and directed to submit a report to this Court. This Court also directed the CBI to submit Preliminary report within four weeks and final report within two months from 16.07.2003.

12. In the next order dated 21.08.2003, *M.C Mehta vs. Union of India,* (2003) 8 SCC 711, this Court, after going through the Preliminary Confidential Report submitted by the CBI, directed the higher officer of CBI to interrogate four, five or six more persons who are involved in the decision-making of granting contract for construction of the Taj Heritage Corridor. In the same order, this Court observed that it would be open

to the CBI officer to interrogate and verify their assets because it was alleged that Rs. 17 crores were released without proper sanction.

13. The next order is dated 18.09.2003 - M.C. Mehta vs. Union of India and Others, 2003 (8) SCC 696. In this order, this Court referred to the earlier directions and orders, more particularly, the direction to CBI to interrogate the persons involved and verify their assets in view of the fact that it was alleged that an amount of Rs. 17 crores was released without proper sanction. After going through the report of the CBI submitted on 11.09.2003, further time was given to the CBI for verification of the assets of the persons/officers involved. In the course of hearing, the CBI has pointed out that income tax returns of various persons including the petitioner were collected from different income tax authorities. In the course of the said proceedings, apart from various reports with regard to the assets, the learned ASG - Mr. Altaf Ahmed submitted that further inquiry/investigation is necessary by the CBI. Based on his request, this Court issued the following directions:

> "13. Considering the aforesaid report and the serious irregularities/illegalities committed in carrying out the so-called Taj Heritage Corridor Project, we direct:
>
> (a) the Central Government to hold immediate departmental inquiry against Shri K.C. Mishra, former Secretary, Environment, Union of India;
>
> (b) the State of Uttar Pradesh to hold departmental inquiry against Shri R.K. Sharma, former Principal Environment Secretary, Shri P.L. Punia, former Principal Secretary to Chief Minister, Shri D.S. Bagga, Chief Secretary and Shri V.K. Gupta, former Secretary, Environment;
>
> (c) NPCC or the competent authority including the Central Government to hold inquiry against Shri S.C. Bali, Managing Director of NPCC;

(d) the State Government as well as the officers concerned of the Central Government are directed to see that departmental inquiry is completed within four months from today. The State of U.P. and the Central Government would appoint respective inquiry officers for holding inquiry, within a period of seven days from today;

(e) it would be open to the State Government if called for to pass order for suspension of the delinquent officers in accordance with the rules;

(f) for the officers and the persons involved in the matter, CBI is directed to lodge an FIR and make further investigation in accordance with law;

(g) CBI shall take appropriate steps for holding investigation against the Chief Minister Ms Mayawati and Naseemuddin Siddiqui, former Minister for Environment, U.P. and other officers involved;

(h) the Income Tax Department is also directed to cooperate in further investigation which is required to be carried out by CBI;

(i) CBI would take into consideration all the relevant Acts i.e. IPC/Prevention of Corruption Act and the Water (Prevention and Control of Pollution) Act, 1974 etc.;

(j) CBI to submit a self-contained note to the Chief Secretary to the Government of Uttar Pradesh as well as to the Cabinet Secretary, Union Government and to the Ministry concerned dealing with NPCC."

14. A perusal of the orders prior to the order dated 18.09.2003 and several directions in the order dated 18.09.2003 clearly show that this Court was concerned with illegality/irregularity committed by the officers/persons in carrying out the Taj Heritage Corridor Project. The main allegation relates to an amount of Rs. 17 crores which was

released by the State Government without proper sanction. It is also clear that in order to find out who cleared the project and for what purpose it was cleared without obtaining necessary sanction from the Department concerned and whether there was any illegality/irregularity committed by the officers/persons, this Court thought an inquiry by CBI was considered necessary. In such a situation, the CBI was directed to interrogate and verify their assets. As rightly pointed out by Mr. Harish Salve, there was no occasion for this Court to consider the alleged disproportionate assets of the petitioner separately that too from 1995 to 2003 when admittedly Rs. 17 crores were released in September, 2002.

15. A thorough scrutiny of all the orders including the specific directions dated 18.09.2003 clearly show that the same was confined only in respect to the case relating to Taj Corridor Project which was the subject-matter of reference before the Special Bench. It is relevant to point out para 13(f) of the order dated 18.09.2003 which makes it clear that the CBI could have lodged only one FIR No. R.C. 0062003A0018 dated 05.10.2003. In other words, inasmuch as there being no consideration of alleged disproportionate assets at any stage of the proceedings while dealing with the Taj Corridor matter, there could not have been and in fact there was no such direction to lodge another FIR being No. R.C. 0062003A0019 dated 05.10.2003 exclusively against the petitioner under the P.C. Act.

16. In this regard, learned senior counsel for the petitioner pressed into service a Constitution Bench decision rendered in the case of *State of West Bengal & Ors. vs. Committee for Protection of Democratic Rights, West Bengal & Ors.,* (2010) 3 SCC 571. After considering various constitutional provisions relating to the State and the Union as well as Section 6 of the DSPE Act, the Bench has concluded thus:

"69. In the final analysis, our answer to the question referred is that a direction by the High Court, in exercise

of its jurisdiction under Article 226 of the Constitution, to CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law. Being the protectors of civil liberties of the citizens, this Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly.

70. Before parting with the case, we deem it necessary to emphasise that despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self-imposed limitations on the exercise of these constitutional powers. The very plenitude of the power under the said articles requires great caution in its exercise. Insofar as the question of issuing a direction to CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. This extraordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations.

71. In Minor Irrigation & Rural Engg. Services, U.P. v. Sahngoo Ram Arya this Court had said that an order directing an enquiry by CBI should be passed only when the High Court, after considering the material on record, comes to a conclusion that such material does disclose a prima facie case calling for an investigation by CBI or any other similar agency. We respectfully concur with these observations."

17. As rightly pointed out that in the absence of any direction by this Court to lodge an FIR into the matter of alleged disproportionate assets against the petitioner, the Investigating Officer could not take resort to Section 157 of the Code of Criminal Procedure, 1973 (in short 'the Code') wherein the Officer-in-charge of a Police Station is empowered under Section 156 of the Code to investigate on information received or otherwise. Section 6 of the DSPE Act prohibits the CBI from exercising its powers and jurisdiction without the consent of the Government of the State. It is pointed out on the side of the petitioner that, in the present case, no such consent was obtained by the CBI and submitted that the second FIR against the petitioner is contrary to Section 157 of the Code and Section 6 of the DSPE Act. It is not in dispute that the consent was declined by the Governor of the State and in such circumstance also the second FIR No. R.C. 0062003A0019 dated 05.10.2003 is not sustainable.

18. Mr. Mohan Parasaran, learned ASG as well as Ms. Kamini Jaiswal, learned counsel for the intervener after taking us through the order dated 18.09.2003 and other orders submitted that the CBI was well within its power to pursue the second FIR No. R.C. 0062003A0019 dated 05.10.2003. Among various directions, Mr. Mohan Parasaran, learned ASG very much pressed into service the direction in para 13(g) of the order dated 18.09.2003. The said direction reads as under:-

"(g) CBI shall take appropriate steps for holding

investigation against the Chief Minister Ms Mayawati and Naseemuddin Siddiqui, former Minister for Environment, U.P. and other officers involved;"

According to Mr. Mohan Parasaran, liberty was granted by this Court to proceed against the petitioner. He also relied on para 9 of the order dated 25.10.2004 - *M.C. Mehta vs. Union of India and Others,* (2007) 1 SCC 137, which reads as under:-

"Re: FIR RC 0062003A0019

9. The further investigation report filed by CBI in this connection while indicating large-scale irregularities does not in fact show any link between such irregularities and the Taj Corridor matter which is the subject-matter of reference before the Special Bench. CBI therefore is at liberty to proceed with and take action on the basis of their investigation in respect of this FIR. In the event any link is disclosed in the course of such investigation between facts as found and the Taj Corridor Project, CBI will bring the same to the notice of this Court. In any event, CBI will be entitled to take action on the basis of the investigation as it may think fit."

In addition to the above, he also pressed into service para 4 of the order dated 19.07.2004 - *M.C. Mehta vs. Union of India and Others,* (2007) 1 SCC 136. The said order reads as under: -

"4. CBI is permitted further eight weeks' time to complete the investigation in respect of FIR No. RC 0062003A0018. As far as FIR No. RC 0062003A0019 is concerned, three months' time is granted."

In view of the argument of Mr. Mohan Parasaran as well as Ms. Kamini Jaiswal relying on the above directions, we have gone through all those orders meticulously. According to us, the entire issue revolves around the order dated 18.09.2003 passed by this Court as the FIR was filed immediately thereafter on

05.10.2003. The said FIR as well as the counter affidavit filed by the CBI states that the FIR has been filed as per the directions contained in the order dated 18.09.2003. A perusal of the same shows that the Assistant Registrar of this Court has been described as the Complainant. On going through all the orders, we are of the view that the said objection of the petitioner cannot be rejected. A perusal of the series of orders passed in W.P. No. 13381 of 1984 - *M.C. Mehta vs. Union of India and Others* clearly show that the order dated 18.09.2003 is preceded by other orders issued from time to time only in connection with Taj Heritage Corridor Project. While considering the directions issued in the order dated 18.09.2003, it is incumbent to refer the orders dated 16.07.2003, 21.08.2003 and 11.09.2003. We have already noted that those previous three orders passed by this Court state that the CBI was directed to interrogate the persons involved and also to verify their assets because it was alleged that the amount of Rs. 17 crores was released without proper sanction. It is relevant to mention that in the order dated 25.10.2003 (which we have already quoted in the earlier paras) this Court mentioned that it was not monitoring disproportionate assets case since no link could be found between the Taj Corridor matter and the assets of the petitioner. (para 9 of the order dated 25.10.2004) It is also relevant to refer the next order dated 07.08.2006 wherein the same was once again reiterated. It is true that in the order dated 25.10.2004, liberty was granted to the CBI that in the event any link is disclosed in the course of such investigation between the Taj Corridor Project and the assets, CBI is free to bring it to the notice of this Court. The fact remains that the investigation report filed by the CBI before this Court which was considered on 25.10.2004 shows that large-scale irregularities does not show any link between such irregularities and the Taj Corridor matter. The said finding/ conclusion by this Court was based on the investigation report of the CBI. In view of the same, we are satisfied that CBI cannot be permitted to take the view that two cases, namely, Taj Corridor and Disproportionate Assets case are same and the

investigation was done in both the cases as per the directions of this Court. After reading the entire orders dated 18.09.2003 and 25.10.2004, the stand of the CBI is to be rejected as unacceptable.

19. It is also brought to our notice that merely because various orders of this Court including the order dated 18.09.2003 has been communicated to various authorities in terms of the provisions of the rules of this Court, the CBI is not justified in putting the Assistant Registrar of this Court as informant/complainant. Further as rightly pointed out by Mr. Salve, the complainant/Assistant Registrar would not and cannot be a witness in the case to corroborate the statements made in the FIR No. R.C. 0062003A0019 dated 05.10.2003. As rightly pointed out, proceeding further, as if the said Assistant Registrar of this Court made a complaint cannot be sustained.

20. We have already pointed out after reading various orders of this Court which show that Taj Corridor was the subject matter of reference before the Special Bench. Various directions issued in the order dated 18.09.2003 have to be read in the light of the previous orders dated 16.07.2003, 21.08.2003 and 11.09.2003 as well as subsequent orders dated 25.10.2004 and 07.08.2006 wherein this Court has clarified that it was not monitoring the disproportionate assets case. We are satisfied that reading of all the orders of this Court clearly show the direction to lodge FIR was issued only with respect to Taj Corridor matter, more particularly, irregularities therein. In fact, the direction was confined to find out as to who cleared the project of Taj Corridor and for what purpose it was cleared and whether there was any illegality or irregularity committed by officers and other persons concerned in the State. We have already noted all those orders which clearly state that the CBI is free to interrogate and verify the assets of the officers/persons relating to release of Rs. 17 crores in connection with Taj Corridor matter.

21. As discussed above and after reading all the orders

of this Court which are available in the 'compilation', we are satisfied that this Court being the ultimate custodian of the fundamental rights did not issue any direction to the CBI to conduct a roving inquiry against the assets of the petitioner commencing from 1995 to 2003 even though the Taj Heritage Corridor Project was conceived only in July, 2002 and an amount of Rs. 17 crores was released in August/September, 2002. The method adopted by the CBI is unwarranted and without jurisdiction. We are also satisfied that the CBI has proceeded without proper understanding of various orders dated 16.07.2003, 21.08.2003, 18.09.2003, 25.10.2003 and 07.08.2003 passed by this Court. We are also satisfied that there was no such direction relating to second FIR, namely, FIR No. R.C. 0062003A0019 dated 05.10.2003. We have already referred to the Constitution Bench decision of this Court in Committee for Protection of Democratic Rights, West Bengal (supra) wherein this Court observed that only when this Court after considering material on record comes to a conclusion that such material does disclose a prima facie case calling for investigation by the CBI for the alleged offence, an order directing inquiry by the CBI could be passed and that too after giving opportunity of hearing to the affected person. We are satisfied that there was no such finding or satisfaction recorded by this Court in the matter of disproportionate assets of the petitioner on the basis of the status report dated 11.09.2003 and, in fact, the petitioner was not a party before this Court in the case in question. From the perusal of those orders, we are also satisfied that there could not have been any material before this Court about the disproportionate assets case of the petitioner beyond the Taj Corridor Project case and there was no such question or issue about disproportionate assets of the petitioner. In view of the same, giving any direction to lodge FIR relating to disproportionate assets case did not arise.

22. We finally conclude that anything beyond the Taj Corridor matter was not the subject-matter of reference before the Taj Corridor Bench. Since the order dated 18.09.2003 does

not contain any specific direction regarding lodging of FIR in the matter of disproportionate assets case against the petitioner, CBI is not justified in proceeding with the FIR No. R.C. 0062003A0019 dated 05.10.2003. In view of the above discussion, we are satisfied that the CBI exceeded its jurisdiction in lodging FIR No. R.C. 0062003A0019 dated 05.10.2003 in the absence of any direction from this Court in the order dated 18.09.2003 or in any subsequent orders.

23. Regarding the intervention application - I.A. No. 8 of 2010 filed by Shri Kamlesh Verma, though an objection was raised about his right to intervene in the matter, it is not in dispute that against the rejection of the sanction to proceed against the petitioner by the State, he had preferred a Writ Petition (C) No. 2019 of 2009 in the Allahabad High Court which is still pending. It is pointed out that intervener was not associated with the Taj Corridor matter before this Court at any stage when the orders dated 16.07.2003, 21.08.2003, 11.09.2003, 18.09.2003, 19.07.2004, 25.10.2004, 07.08.2006, 27.11.2006, 06.08.2007, 10.10.2007 and 27.04.2007 were passed. It is true that the intervener has no legal right to intervene in the matter of this kind where CBI has been prosecuting the case vigorously against the petitioner. Inasmuch as the intervener has challenged the order of the Governor of U.P. declining to grant sanction to prosecute the petitioner and the said matter is pending in the Lucknow Bench of the Allahabad High Court, in order to assist the Court, we heard his counsel Ms. Kamini Jaiswal. It is true that this Court has held that when investigating agency like CBI and Union of India are contesting the matter effectively, the third party was not permitted to canvass correctness of the judgment by way of PIL (*Union of India & Anr. vs. W.N. Chadha,* 1993 (Supp) 4 SCC 260) and *Janata Dal vs. H.S. Chowdhary & Ors.,* (1991) 3 SCC 756. While accepting the above principles reiterated in those decisions, in view of the peculiar facts that the intervener - Kamlesh Verma is pursuing his writ petition against the petitioner in the High Court, we heard his counsel to assist the

Court. In view of the above special circumstance, we allow I.A. No. 8 of 2010 and the same cannot be cited as a precedent for other cases.

24. In the light of the above discussion, we hold that in the absence of any specific direction from this Court in the order dated 18.09.2003 or any subsequent orders, the CBI has exceeded its jurisdiction in lodging FIR No. R.C. 0062003A0019 dated 05.10.2003. The impugned FIR is without jurisdiction and any investigation pursuant thereto is illegal and liable to be quashed, accordingly quashed. The writ petition is allowed.

B.B.B. Writ Petition Allowed.

SUBHASH POPATLAL DAVE
v.
UNION OF INDIA AND ANR.
(Writ Petition (CRL.) No. 137 of 2011)

JULY 10, 2012

[ALTAMAS KABIR, GYAN SUDHA MISRA AND J. CHELAMESWAR, JJ.]

Preventive Detention - Detention order - Right of a detenu to be provided with the grounds of detention prior to his arrest - Enactment of RTI Act - Effect - Whether under the RTI Act, a detenu is entitled, in assertion of his human rights, to receive the grounds under which he is to be detained, even before his detention, at the pre-execution stage - Held: Notwithstanding the provisions of the RTI Act, the State is not under any obligation to provide the grounds of detention to a detenu prior to his arrest and detention - The provisions of the Constitution prevail over any enactment of the legislature, which itself is a creature of the Constitution - Since clause (5) of Article 22 of the Constitution provides that the grounds for detention are to be served on a detenu after his detention, the provisions of s.3 of the RTI Act, cannot be applied to cases relating to preventive detention at the pre-execution stage - S.3 of the RTI Act has to give way to the provisions of Clause (5) of Article 22 of the Constitution - Constitution of India, 1950 - Article 22(5) - Right to Information Act, 2005 - s.3.

Preventive Detention - Detention order - Challenge to, at the pre-execution stage - Scope - Whether the five instances/ exceptions indicated in paragraph 30 of the Alka Subhash Gadia's case, under which a detention order could be challenged at the pre-execution stage were exhaustive or only illustrative - Held: The five examples indicated in Alka Subhash Gadia's case were intended to be exemplar and not exhaustive - To accept that it was the intention of the Hon'ble

Judges in Alka Subhash Gadia's case to confine the challenge to a detention at the pre-execution stage, only on the five exceptions mentioned therein, would amount to imposing restrictions on the powers of judicial review vested in the High Courts and the Supreme Court under Articles 226 and 32 of the Constitution - Exercise of powers vested in the superior Courts in judicially reviewing executive decisions and orders cannot be subjected to any restrictions by an order of the Court of law - In various pronouncements of the law by Supreme Court, detention orders have been struck down, even without the apprehension of the detenu, on the ground of absence of any live link between the incident for which the detenu was being sought to be detained and the detention order and also on grounds of staleness - These issues were not before the Hon'ble Judges deciding Alka Subhash Gadia's case - Law is dynamic - The most precious right of a citizen is his right to freedom and if the same is to be interfered with, albeit in the public interest, such powers have to be exercised with extra caution and not as an alternative to the ordinary laws of the land - Issue relating to the right of a detenu to challenge his detention at the pre-execution stage on grounds other than those set out in paragraph 30 of the judgment in Alka Subhash Gadia's case, requires further examination - Constitution of India, 1950 - Articles 32 and 226.

The instant Special Leave Petitions and Writ Petitions were all directed against orders of preventive detention at the pre-execution stage.

During the course of the hearing, it was submitted on behalf of some of the Petitioners that the decision rendered in Alka Subhash Gadia case that a preventive detention order could be challenged at the pre-execution stage on the five grounds enumerated in the judgment, was no longer good law on account of the subsequent enactment of the Right to Information Act, 2005 (RTI Act). A connected question which was raised was whether the

aforesaid decision in Alka Subhash Gadia's case was per incuriam, since it did not have the occasion to notice subsequent decisions on the same question. Another question which was raised was whether the five instances indicated in Alka Subhash Gadia's case, under which a detention order could be challenged at the pre-execution stage, was exhaustive or whether they were only illustrative.

Directing the Special Leave Petitions and the writ petitions to be listed again for final hearing and disposal, the Court

HELD:

Whether the R.T.I. Act applies in cases of preventive detention.

1.1. Article 22 of the Constitution provides for protection against arrest and detention in certain cases. Clauses (1) and (2) of Article 22 set out the manner in which a person arrested is to be dealt with and clause (1) makes it clear that no person who is arrested is to be detained in custody without being informed, as soon as may be, of the grounds for such arrest. Clause (2) provides that such a person who is arrested and detained in custody has to be produced before a Magistrate within a period of 24 hours of such arrest. However, an exception is made by clause (3), which provides that nothing in clauses (1) and (2) shall apply, amongst others, to any person who is arrested or detained under any law providing for preventive detention. Clause (4) thereafter sets out that no law providing for preventive detention shall authorize such detention for more than three months without following the procedure subsequently set out. Clause (5) of Article 22 is very relevant. From the opening words of the provision, it is clear that the

grounds on which the person is detained is to be communicated to him when the person has actually been detained. If one were to read clauses (1) to (6) of Article 22 as a whole, it is more than obvious that the scheme envisaged therein provides for the protection of a person arrested in connection with an offence by providing for his production before the Magistrate within 24 hours of his arrest and also to avail the services of a lawyer, but an exception has been carved out in relation to detention effected under preventive detention laws. A detenu is not required to be treated in the same manner as a person arrested in connection with the commission of an alleged offence. On the other hand, preventive detention laws provide for the detention of a person with the intention of preventing him from committing similar offences in the future, at least for a period of one year. Section 3 of the R.T.I. Act, 2005, provides that subject to the provisions of the Act, all citizens would have the right to information. Section 8, however, makes an exemption from disclosure of information. While setting out the instances in which there would be no obligation to give any citizen information in the situations enumerated in Sub-Section (1), Sub-Section (2) provides that notwithstanding anything in the Official Secrets Act, 1923, nor any of the exemptions permissible in accordance with Sub-Section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests. Even under Sub-Section (1) of Section 8 of the RTI Act, the legislature made an exception to the disclosure of information which could be contrary to the interests of the nation, subject to the provision that such information may also be allowed to be accessed in the public interest, which overweighed the personal interests of the citizen. Not much discourse is required with regard to the primacy of the provisions of the Constitution, vis-à-vis the enactments of the

legislature. The provisions of the Constitution will prevail over any enactment of the legislature, which itself is a creature of the Constitution. Since clause (5) of Article 22 provides that the grounds for detention are to be served on a detenu after his detention, the provisions of Section 3 of the R.T.I. Act, 2005, cannot be applied to cases relating to preventive detention at the pre-execution stage. In other words, Section 3 of the R.T.I. Act has to give way to the provisions of Clause (5) of Article 22 of the Constitution. Even the provisions relating to production of an arrested or detained person, contained in clauses (1) and (2) of Article 22 of the Constitution, have in their application been excluded in respect of a person detained under any preventive detention law. Notwithstanding the provisions of the R.T.I. Act, 2005, the State is not under any obligation to provide the grounds of detention to a detenu prior to his arrest and detention, notwithstanding the fact that in the cases of Choith Nanikram Harchandai and Suresh Hotwani & Anr., the grounds of detention had been provided to the detenu under the R.T.I. Act, 2005, at the pre-execution stage. The procedure followed under the R.T.I. Act, in respect of the said writ petitions cannot and should not be treated as a precedent in regard to the contention that under the R.T.I. Act, 2005, a detenu was entitled, in assertion of his human rights, to receive the grounds under which he was to be detained, even before his detention, at the pre-execution stage. [Paras 20, 21, 22 and 23] [82-B-D, G-H; 83-A-E; 84-C-H; 85-A-C]

Whether the five exceptions mentioned in Alka Subhash Gadia's case regarding the right to challenge an order of detention at the pre-execution stage, were exhaustive or not.

1.2. The decision in Alka Subhash Gadia's case, appears to suggest several things at the same time. The

Three-Judge Bench, while considering the challenge to the detention order passed against the detenu, at the pre-execution stage, and upholding the contention that such challenge was maintainable, also sought to limit the scope of the circumstances in which such challenge could be made. However, before arriving at their final conclusion on the said point, the learned Judges also considered the provisions of Articles 19 to 22 relating to fundamental freedoms conferred on citizens and the proposition that the fundamental rights under Chapter III of the Constitution have to be read as a part of an integrated scheme. Their Lordships emphasized that they were not mutually exclusive, but operated, and were subject to each other. Their Lordships held that it was not enough that the detention order must satisfy the tests of all the said rights so far as they were applicable to individual cases. Their Lordships also emphasized in particular that it was well-settled that Article 22(5) is not the sole repository of the detenu's rights. His rights are also governed by the other fundamental rights, particularly those enshrined in Articles 14, 19 and 21 of the Constitution and the nature of constitutional rights thereunder. Their Lordships were of the view that read together the Articles indicate that the Constitution permits both punitive and preventive detention, provided it is according to procedure established by law made for the purpose and if both the law and the procedure laid down by it are valid. It is in the aforesaid background that Their Lordships while examining the various decisions rendered on the subject, summed up the discussion in paragraph 30 of the judgment, wherein Their Lordships again reiterated that neither the Constitution, including the provisions of Article 22 thereof, nor the Act in question, places any restriction on the powers of the High Court and this Court to review judicially the order of detention. Their Lordships observed that the powers

under Article 226 and 32 are wide, and are untrammelled by any external restrictions, and can reach any executive action resulting in civil or criminal consequences. However, the said observations were, thereafter, somewhat whittled down by the subsequent observation that the Courts have over the years evolved certain self-restraints in exercising these powers. Such self-imposed restraints were not confined to the review of the orders passed under detention law only, but they extended to orders passed and decisions made under all laws. It was also observed that in pursuance of such self-evolved judicial policy and in conformity with the self-imposed internal restrictions that the Courts insist that the aggrieved person should first allow the due operation and implementation of the concerned law and exhaust the remedies provided by it before approaching the High Court and this Court to invoke their discretionary, extraordinary and equitable jurisdiction under Articles 226 and 32 respectively and that such jurisdiction by its very nature has to be used sparingly and in circumstances where no other efficacious remedy is available. However, having held as above, Their Lordships also observed that all the self-imposed restrictions in respect of detention orders would have to be respected as it would otherwise frustrate the very purpose for which such detention orders are passed for a limited purpose. Consequently, inspite of upholding the jurisdiction of the Court to interfere with such orders even at the pre-execution stage, Their Lordships went on to observe that the grounds on which the courts have interfered with the detention orders "at the pre-execution stage are necessarily very limited in scope and number, viz., where the courts are prima facie satisfied (i) that the impugned order is not passed under the Act under which it is purported to have been passed, (ii) that it is sought to be executed against a wrong person, (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague, extraneous and irrelevant grounds or (v) that the authority which passed it had no authority to do so. The refusal by the courts to use their extraordinary powers of judicial review to interfere with the detention orders prior to their execution on any other ground does not amount to the abandonment of the said power or to their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question." Nowhere was it indicated that challenge to the detention order at the pre-execution stage, can be made mainly on the aforesaid exceptions referred to hereinabove. By prefacing the five exceptions in which the Courts could interfere with an order of detention at the pre-execution stage, with the expression "viz", Their Lordships possibly never intended that the said five examples were to be exclusive. In common usage or parlance the expression "viz" means "in other words". There is no aura of finality attached to the said expression. The use of the expression suggests that the five examples were intended to be exemplar and not exclusive. On the other hand, the Hon'ble Judges clearly indicated that the refusal to interfere on any other ground did not amount to the abandonment of said power. This Court has not been able to read into the judgment in Alka Subhash Gadia's case any intention on the part of the Hon'ble Judges, who rendered the decision in that case, that challenge at the pre-execution stage would have to be confined to the five exceptions only and not in any other case. To accept that it was the intention of the Hon'ble Judges in Alka Subhash Gadia's case to confine the challenge to a detention at the pre-execution stage, only on the five exceptions mentioned therein, would amount to imposing restrictions on the powers of judicial review vested in the High Courts and the Supreme Court under Articles 226 and 32 of the Constitution. The exercise of

powers vested in the superior Courts in judicially reviewing executive decisions and orders cannot be subjected to any restrictions by an order of the Court of law. Such powers are untrammelled and vested in the superior Courts to protect all citizens and even non-citizens, under the Constitution, and may require further examination. [Paras 24, 25, 26 and 28] [85-D-H; 86-A-B, E-H; 87-A-H; 88-A-C, H; 89-A-D]

1.3. In the circumstances, while rejecting the contention regarding the right of a detenu to be provided with the grounds of detention prior to his arrest, this Court is of the view that the right of a detenu to challenge his detention at the pre-execution stage on grounds other than those set out in paragraph 30 of the judgment in Alka Subhash Gadia's case, requires further examination. There are various pronouncements of the law by this Court, wherein detention orders have been struck down, even without the apprehension of the detenu, on the ground of absence of any live link between the incident for which the detenu was being sought to be detained and the detention order and also on grounds of staleness. These are issues which were not before the Hon'ble Judges deciding Alka Subhash Gadia's case. Law is never static but dynamic, and to hold otherwise, would prevent the growth of law, especially in matters involving the right of freedom guaranteed to a citizen under Article 19 of the Constitution, which is sought to be taken away by orders of preventive detention, where a citizen may be held and detained not to punish him for any offence, but to prevent him from committing such offence. The most precious right of a citizen is his right to freedom and if the same is to be interfered with, albeit in the public interest, such powers have to be exercised with extra caution and not as an alternative to the ordinary laws of the land. [Para 29] [89-E-H; 90-A-B]

Addl. Secretary, Govt. of India vs. Alka Subhash Gadia **(1992) Supp. (1) SCC 496: 1990 (3) Suppl. SCR 583 - explained.**

Deepak Bajaj vs. State of Maharashtra **(2008) 16 SCC 14: 2008 (15) SCR 1062;** *Romesh Thappar vs. State of Madras* **(1950) SCR 594;** *D.A.V. College vs. State of Punjab* **(1972) 2 SCC 269;** *Haradhan Saha vs. State of West Bengal* **(1975) 3 SCC 198: 1975 (1) SCR 778;** *Olga Tellis & Ors. vs. Bombay Municipal Corporation* **(1985) 3 SCC 545: 1985 (2) Suppl. SCR 51;** *K.K. Kochunni vs. State of Madras* **(1959) Supp. (2) SCR 316;** *Francis Coralie Mullin vs. W.C. Khambra* **(1980) 2 SCC 275: 1980 (2) SCR 1095;** *Rajinder Arora vs. Union of India* **(2006) 4 SCC 796: 2006 (3) SCR 9;** *Yumman Ongbi Lembi Leima vs. State of Manipur* **(2012) 2 SCC 176;** *Rekha vs. State of Tamil Nadu* **(2011) 5 SCC 244: 2011 (4) SCR 740;** *Sayed Taher Bawamiya vs. Joint Secretary, Government of India* **(2000) 8 SCC 630;** *Union of India vs. Atam Prakash & Anr.* **(2009) 1 SCC 585: 2008 (16) SCR 607;** *Alpesh Navinchandra Shah vs. State of Maharashtra* **(2007) 2 SCC 777: 2007 (3) SCR 223;** *State of Maharashtra vs. Bhaurao Punjabrao Gawande* **(2008) 3 SCC 613: 2008 (3) SCR 967;** *Naresh Kumar Goyal vs. Union of India* **(2005) 8 SCC 276: 2005 (4) Suppl. SCR 17 and** *Union of India vs. Parasmal Rampuria* **(1998) 8 SCC 402 - referred to.**

Case Law Reference:

1990 (3) Suppl. SCR 583	**explained**	**Para 1**
2008 (15) SCR 1062	**referred to**	**Para 3**
(1950) SCR 594	**referred to**	**Para 5**
(1972) 2 SCC 269	**referred to**	**Para 5**
1975 (1) SCR 778	**referred to**	**Para 6**
1985 (2) Suppl. SCR 51	**referred to**	**Para 6**

(1959) Supp. (2) SCR 316	**referred to**	**Para 6**
1980 (2) SCR 1095	**referred to**	**Para 6**
2006 (3) SCR 9	**referred to**	**Para 7**
(2012) 2 SCC 176	**referred to**	**Para 7**
2011 (4) SCR 740	**referred to**	**Para 8**
(2000) 8 SCC 630	**referred to**	**Para 10**
2008 (16) SCR 607	**referred to**	**Para 10**
2007 (3) SCR 223	**referred to**	**Para 12**
2008 (3) SCR 967	**referred to**	**Para 12**
2011 (4) SCR 740	**referred to**	**Para 12**
2005 (4) Suppl. SCR 17	**referred to**	**Para 14**
(1998) 8 SCC 402	**referred to**	**Para 15**

CRIMINAL ORIGINAL JURISDICTION : Writ Petition (Crl.) Nos. 137 of 2011 etc.

Under Article 32 of the Constitution of India.

WITH

W.P. (Crl.) Nos. 138, 35, 142, 220, 249 of 2011, 11, 14 of 2012 & SLP (Crl.) Nos. 1909, 1938 of 2011, 2442, 2091-2092 of 2012.

P.P. Malhotra, ASG, Mukul Rohtagi, V.K. Bali, B.H. Marlapalle, Sujay N. Kantawala, Saurabh Kirpal, Sanjay Agarwal, Karan Bharioke, Rakesh Dahiya, G.K. Sarkar, Malabika Sarkar, D. Mahesh Babu, Nikhil Jain, Ravindra Keshavrao Adsure, Vikram Chaudhari, Gagandeep Sharma, Preeti Singh, Rakesh Dahiya, Ranjana Narayan, P.K. Dey, Chetan Chawla, Asha G. Nair, Arvind Kumar Sharma, B. Krishna Prasad for the appearing parties.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. These Special Leave Petitions and Writ Petitions are all directed against orders of preventive detention at the pre-execution stage. During the course of hearing, it was submitted on behalf of some of the Petitioners that the decision rendered in *Addl. Secretary, Govt. of India vs. Alka Subhash Gadia* [(1992) Supp. (1) SCC 496] that a preventive detention order could be challenged at the pre-execution stage on the five grounds enumerated in the judgment, was no longer good law on account of the subsequent enactment of the Right to Information Act, 2005, hereinafter referred to as the "R.T.I. Act", which came into force on 15th June, 2005. A connected question which was raised was whether the aforesaid decision in *Alka Subhash Gadia's* case (supra) was per incuriam, since it did not have the occasion to notice subsequent decisions on the same question. Another question which was raised was whether the five instances indicated in *Alka Subhash Gadia's* case (supra), under which a detention order could be challenged at the pre-execution stage, was exhaustive or whether they were only illustrative.

2. Since a decision on the points raised could effectively decide the matters without going into factual details, it was decided to decide the said questions as preliminary issues, before going into the matters on merit.

3. Appearing on behalf of some of the Petitioners, Mr. Mukul Rohatgi, learned Senior Advocate, urged that the five exceptions laid down in *Alka Subhash Gadia's* case (supra) were not exhaustive, but only illustrative, as was held by this Court in *Deepak Bajaj vs. State of Maharashtra* [(2008) 16 SCC 14]. Mr. Rohatgi submitted that it was well settled that the power of judicial review vested in the High Courts under Article 226 and in this Court under Article 32 of the Constitution, is part of the basic structure of the Constitution and it was inconceivable that such power of judicial review could be

restricted by amending the Constitution or by a judicial pronouncement.

4. Mr. Rohatgi contended that since Article 32 was included in Part III of the Constitution and was in itself a fundamental right, the exercise of jurisdiction thereunder by this Court could not be affected and/or restricted by the decision rendered in *Alka Subhash Gadia's* case (supra). Learned counsel urged that it was also inconceivable that by a judicial pronouncement, the jurisdiction of this Court to interfere with detention orders at a pre-execution stage only could be restricted to the five exceptions mentioned in *Alka Subhash Gadia's* case (supra) only, for all times to come.

5. Tracing the history of the powers exercised by this Court under Article 32 of the Constitution, Mr. Rohatgi firstly referred to the decision rendered by this Court in the case of *Romesh Thappar vs. State of Madras* [(1950) SCR 594], wherein it was observed that Article 32 provides a guaranteed remedy for the enforcement of the rights under Part III of the Constitution and this remedial right has itself been made a fundamental right by being included in Part III. Mr. Rohatgi then referred to the decision of this Court in *D.A.V. College vs. State of Punjab* [(1972) 2 SCC 269], wherein in paragraph 44, this Court observed that it was immaterial as to whether any fundamental right has been threatened or violated. So long as a prima facie case of such threat and violation was made out, a petition under Article 32 has to be entertained.

6. Various other judgments were also referred to by Mr. Rohatgi, of which it will be worthwhile to refer to the decision of this Court in *Haradhan Saha vs. State of West Bengal* [(1975) 3 SCC 198], *Olga Tellis & Ors. vs. Bombay Municipal Corporation* [(1985) 3 SCC 545] and *K.K. Kochunni vs. State of Madras* [(1959) Supp. (2) SCR 316]. All these judgments have held that judicial review of administrative action, even when fundamental rights are threatened, is permitted on grounds of relevance, reasonableness, necessity, delay, casualness and

for infringement of Articles 14, 19 and 21. In fact, it was in *K.K. Kochunni's* case (supra) that it was observed by the Constitution Bench that the right to enforce a fundamental right conferred by the Constitution was itself a fundamental right guaranteed by Article 32 of the Constitution and this Court could not refuse to entertain a petition under that Article simply because the Petitioner had/might have any other alternative legal remedy. The said position was further reiterated by another Constitution Bench in Haradhan Saha's case (supra), while dealing with a case involving preventive detention. It was observed that the essential concept of preventive detention is that the detention of a person is not to punish him for something he has done, but to prevent him from doing it again. It was also observed that there could be no parallel between prosecution in a Court of law and a detention order under the Act. While one is punitive, the other is preventive. Also referring to the decision of this Court in *Francis Coralie Mullin vs. W.C. Khambra* [(1980) 2 SCC 275], Mr. Rohatgi referred to the observations made in paragraph 5 of the judgment to the effect that the role of the Court in cases of preventive detention has to be one of eternal vigilance as no freedom is higher than personal freedom and no duty higher than to maintain it unimpaired. Furthermore, the Court's writ is the ultimate insurance against illegal detention and a detenu was, therefore, entitled to question the detention order even at the pre-execution stage, as was held in *Alka Subhash Gadia's* case (supra), on grounds other than those set out therein.

6. In support of his submission that circumstances had substantially changed on account of the advent of information technology, Mr. Rohatgi submitted that this Court had occasion to consider the challenge against orders of preventive detention on grounds outside those indicated in Alka Subhash Gadia's case (supra), wherein this Court had intervened and quashed the orders of detention on grounds, other than those indicated in *Alka Subhash Gadia's* case (supra).

7. In this connection, Mr. Rohatgi firstly referred to the

decision of this Court in *Rajinder Arora vs. Union of India* [(2006) 4 SCC 796], wherein this Court had held that the delay in passing of a detention order, without any explanation for such delay, was sufficient ground to set aside the detention order made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. Of course, it must be said that while quashing the detention order, Their Lordships related the facts of the said case with grounds 3 and 4 of the decision in *Alka Subhash Gadia's* case (supra). Reference was thereafter made by Mr. Rohatgi to a Three-Judge Bench decision of this Court, in which two of us (Altamas Kabir and J. Chelameswar, JJ) were parties, in the case of *Yumman Ongbi Lembi Leima vs. State of Manipur* [(2012) 2 SCC 176], in which the detention order was quashed, inter alia, on the ground that there was no proximate and live link between the activities of the detenu and the detention order. In the said matter, facts relating to the arrest of the detenu and subsequent release on bail more than 12 years before the offence in respect of which detention orders had been passed, were held to be irrelevant and/or improper for justification of an order of detention. Mr. Rohatgi pointed out that it was also held therein that mere apprehension that the detenu was likely to be released on bail, whereafter he would indulge in further prejudicial activities, was not sufficient to justify the detention order in the absence of any other ground.

8. The next decision referred to by Mr. Rohatgi was delivered by a Bench of three Judges of this Court in *Rekha vs. State of Tamil Nadu* [(2011) 5 SCC 244], wherein while disagreeing with some of the observations made in *Haradhan Saha's* case (supra), the Hon'ble Judges went on to hold that though in Haradhan Saha's case it had been held that the authorities could take recourse to both criminal proceedings and also preventive detention, it did not mean that such would be the law in all cases, even though in the view of the Court the criminal proceedings were sufficient to deal with the offences.

9. Having completed his submissions with regard to the exhaustive and/or illustrative nature of the five exceptions set out in *Alka Subhash Gadia's* case (supra), Mr. Rohatgi then turned his focus on the provisions of the R.T.I. Act under which, according to learned counsel, a detenu was entitled to receive a copy of the grounds of detention even though he had not been actually apprehended and detained pursuant to such detention order. Mr. Rohatgi submitted that in the cases of Choith Nanikram Harchandai and Suresh Hotwani, the grounds of detention had been provided to the detenu under the provisions of Section 3 of the aforesaid Act. Learned counsel submitted that the only prohibition to the grant of information has been set out in Section 8(h) and Section 24 of the said Act. Section 8(h) of the R.T.I. Act prohibits the disclosure of information which could impede the process of investigation or the apprehension and prosecution of offenders. Mr. Rohatgi submitted that it is obvious that the said provisions were confined to persons who are offenders and not detenus under a preventive detention law, who could not under the detention order be said to be an offender. Mr. Rohatgi urged that the only other restriction was under Section 24, wherein certain security and intelligence agencies of the Government have been exempted from the provisions of the Act. Learned counsel urged that under the first proviso to Section 24, information relating to human rights cannot be denied to the person seeking information since human rights had been defined in Section 2(e) of the Protection of Human Rights Act as being rights relating to life, liberty, equality and dignity, guaranteed by the Constitution. Mr. Rohatgi contended that the illegal detention would also amount to violation of human rights.

10. Mr. Rohatgi submitted that the Right to Information Act was not in existence, when decisions were rendered by this Court in *Alka Subhash Gadia's* case (supra) as also in the case of *Sayed Taher Bawamiya vs. Joint Secretary, Government of India* [(2000) 8 SCC 630] and in the case of *Union of India vs. Atam Prakash & Anr.* [2009) 1 SCC 585],

in which it was held that the grounds of challenge to a detention order at the pre-execution stage could only be confined to the five exceptions set out in *Alka Subhash Gadia's* case (supra).

11. Mr. Rohatgi submitted that having regard to the various circumstances which this Court had no occasion to consider in *Alka Subhash Gadia's* case (supra), it cannot be accepted that the challenge to preventive detention order at the pre-execution stage could not be made on any other ground other than the five exceptions mentioned in *Alka Subhash Gadia's* case (supra). Mr. Rohatgi urged that besides the above, the right of a detenu to information relating to the grounds of detention under Section 3 of the Right to Information Act, 2005, was also a circumstance which could not be taken into consideration by the Hon'ble Judges while deciding *Alka Subhash Gadia's* case (supra). Accordingly, in the changed circumstances, it cannot be held that apart from the five exceptions mentioned in *Alka Subhash Gadia's* case (supra), a detenu could not be denied the grounds of detention on the basis of which he was to be detained at the pre-execution stage.

12. In addition to the submissions made by Mr. Rohatgi, submissions were also advanced by Mr. Ravindra Keshavrao Adsure, Advocate, appearing for some of the Petitioners in these matters. In fact, Mr. Adsure is appearing in the lead matter, namely, Writ Petition (Crl.) No.137 of 2011, filed by Subhash Popatlal Dave, in which the detention order made against one Haresh Kalyandas Bhavsar on 18th August, 1997, was challenged. Mr. Adsure attempted to convince this Court that the decisions cited in *Alka Subhash Gadia's* case (supra) and *Sayed Taher Bawamiya's* case (supra), were per incuriam, since the Hon'ble Judges did not have the opportunity to consider the effects of the enactment of the Right to Information Act in 2005. Mr. Adsure made special mention of the Writ Petitions filed by Choith Nanikram Harchandai (Writ Petition (Crl) No.88 of 2010) and Suresh Hotwani & Anr. (Writ Petition

(Crl) No.35 of 2011), wherein the detention orders and grounds had been provided under the R.T.I. Act, 2005, before the same were executed. Following the same line of arguments advanced by Mr. Rohatgi, Mr. Adsure also laid stress on the observations made in Alka Subhash Gadia's case (supra) (paragraph 12) where other than the five exceptions ultimately culled out in paragraph 30 of the judgment, various other situations entertaining a petition for quashing of detention order have also been indicated. Mr. Adsure also referred to the decisions of this Court in (i) *Alpesh Navinchandra Shah vs. State of Maharashtra* [(2007) 2 SCC 777]; (ii) *State of Maharashtra vs. Bhaurao Punjabrao Gawande* [(2008) 3 SCC 613]; and (iii) *Rekha vs. State of Tamil Nadu* [(2011) 5 SCC 244], wherein the detention orders were set aside on the ground that the purpose for issuance of a detention order is to prevent the detenu from continuing his prejudicial activities for a period of one year, but not to punish him for something done in the remote past. Mr. Adsure contended that the very concept of preventive detention is to prevent a person from indulging in activities which were prejudicial to the State and society. However, there would have to be a nexus between the detention order and the alleged offence in respect whereof he was to be detained and in the absence of a live link between the two, the detention order could not be defended.

13. On the same lines, Mr. Adsure referred to the decision in *Rekha's* case (supra), wherein this Court had held that when the ordinary criminal law of the land is able to deal with a situation, then recourse to preventive detention law will be illegal. Mr. Adsure urged that the orders of detention which violated the aforesaid principles could not, therefore, be sustained and could also be challenged at the pre-execution stage.

14. Appearing on behalf of the Union of India, learned Additional Solicitor General, Mr. P.P. Malhotra, contended in response to the first point raised, that the grounds for

intervention at the pre-detention stage, as indicated in *Alka Subhash Gadia's* case (supra), are exhaustive and not illustrative, and had been so held in subsequent decisions of this Court, and in particular, the decision of a Three-Judge Bench in the case of *Sayed Taher Bawamiya* (supra). The learned ASG contended that in the said case it had also been sought to be argued that the exceptions in *Alka Subhash Gadia's* case (supra) were not exhaustive, but merely illustrative, but the Three-Judge Bench had rejected such contention upon holding that in *Alka Subhash Gadia's* case (supra), it is only in the five types of instances indicated, that the Courts may exercise its discretion and jurisdiction under Article 226 and 32 of the Constitution at the pre-execution stage. The learned ASG laid stress on the observations made in paragraph 7 of the judgment wherein the learned Judges had observed that in *Alka Subhash Gadia's* case (supra) it was only in the five types of instances that the Courts could exercise its discretion and jurisdiction at the pre-execution stage. Reference was also made to another Three-Judge Bench decision of this Court in *Naresh Kumar Goyal vs. Union of India* [(2005) 8 SCC 276], wherein it was, inter alia, observed that the refusal by the Courts to use their extraordinary powers of judicial review to interfere with the detention orders prior to their execution on any other ground, does not amount to the abandonment of the said power or to their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question.

15. The learned ASG also referred to the decision of this Court in *Union of India vs. Parasmal Rampuria* [(1998) 8 SCC 402], wherein this Court directed the detenu to surrender and thereafter to make a representation challenging the detention order, which could be examined on merits. The entire focus of the submissions made by the learned ASG was centered around the decision in *Sayed Taher Bawamiya's* case (supra) and he tried to make a distinction between the same and the decision in *Deepak Bajaj's* case (supra), which the learned ASG pointed out, was a decision of two Judges of this Court.

Even with regard to the decision in *Rajinder Arora's* case (supra), the learned ASG pointed out that the decision was based on ground nos.3 and 4 of the decision in *Alka Subhash Gadia's* case (supra).

16. As to the decision in *Rekha's* case (supra), the learned ASG pointed out that this was not a case of pre-detention, but a criminal appeal in which the orders of detention had been challenged. The learned ASG submitted that since the challenge was not at the pre-execution stage, the judgment in Rekha's case was not relevant in deciding the issue involved in this case.

17. As to the other decisions cited on behalf of the Petitioners, such as in *Romesh Thappar's* case (supra) and in *K.K. Kochunni's* case (supra), the learned ASG submitted that the said decisions relate to the width and scope of Articles 19 and 21 of the Constitution and there was no challenge therein that the decision in Alka Subhash Gadia's case (supra) was erroneous.

18. On the second point relating to applicability of the R.T.I. Act, 2005, the learned ASG submitted that while the Preamble to the Act stipulates that it had been passed to promote transparency and accountability in the working of every public authority, certain restrictions had been imposed on divulging certain information as indicated in Section 8 of the Act. Referring to clause (a) of Section 8 of the aforesaid Act, the learned ASG submitted that it had been stipulated that notwithstanding anything contained in the Act, there would be no obligation to any citizen to give information, disclosure of which would prejudicially affect the economic interest of the State, relations with foreign States or such information which would impede the process of investigation or the apprehension or prosecution of offenders. The learned ASG also pointed out that there was no obligation to provide information which relates to personal information, the disclosure of which has no relationship to any public activity or interest. While referring to

Section 24 of the Act, the learned ASG submitted that it guaranteed exemption to the agencies mentioned in the 2nd Schedule and the Central Economic Intelligence Bureau was one of them. Therefore, if a proposed detenu or his representative made an application for disclosure of grounds of detention, he would not be entitled to the same on the aforesaid grounds.

19. The learned ASG submitted that the decision rendered by the Bombay High Court in dismissing the Writ Petitions filed by Suresh Hotwani and Nitesh Ashok Sadarangani did not require any interference by this Court. The learned ASG lastly submitted that the provisions in the Constitution for detention are provided in Article 22 which sets out the provisions regarding protection against arrest and detention in certain cases. The learned ASG laid special stress on clause (b) of sub-clause (3), which indicates that nothing in clauses (1) and (2) would apply to any person who is arrested or detained under any law providing for preventive detention. Regarding sub-clause (5) of the aforesaid Article, the learned ASG submitted that when any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order is under an obligation to communicate to such person the grounds on which the order has been made, as quickly as possible, in order to afford him the earliest opportunity of making a representation against such order. The learned ASG submitted that detention or arrest was a pre-condition for service of the grounds of detention and it is only after such detention or arrest that a detenu could ask for a copy of the grounds of detention. The learned ASG submitted that the constitutional provisions would have an overriding effect over the Right to Information Act, and, accordingly, the submissions made both by Mr. Rohtagi and Mr. Adsure with regard to the right of a detenu to ask for grounds of detention under the R.T.I. Act was without any substance and was liable to be rejected. The learned ASG submitted that both the grounds raised on behalf of the Petitioners, as preliminary

grounds, were not valid and were liable to be rejected.

20. On the other question as to whether the R.T.I. Act applies in cases of preventive detention, we are unable to accept the submissions made by Mr. Rohatgi. Article 22 of the Constitution provides for protection against arrest and detention in certain cases. Clauses (1) and (2) of Article 22 set out the manner in which a person arrested is to be dealt with and clause (1) makes it clear that no person who is arrested is to be detained in custody without being informed, as soon as may be, of the grounds for such arrest. Clause (2) provides that such a person who is arrested and detained in custody has to be produced before a Magistrate within a period of 24 hours of such arrest. However, an exception is made by clause (3), which provides that nothing in clauses (1) and (2) shall apply, amongst others, to any person who is arrested or detained under any law providing for preventive detention. Clause (4) thereafter sets out that no law providing for preventive detention shall authorize such detention for more than three months without following the procedure subsequently set out. What is relevant for our consideration while deciding the above mentioned question is clause (5) of Article 22 which is extracted hereinbelow :-

> "(5). When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

21. It may immediately be noticed from the opening words of clause (5) that the grounds on which the person is detained is to be communicated to him when the person has actually been detained. (emphasis supplied) If one were to read clauses (1) to (6) of Article 22 as a whole, it is more than obvious that the scheme envisaged therein provides for the protection of a person arrested in connection with an offence

by providing for his production before the Magistrate within 24 hours of his arrest and also to avail the services of a lawyer, but an exception has been carved out in relation to detention effected under preventive detention laws. A detenu is not required to be treated in the same manner as a person arrested in connection with the commission of an alleged offence. On the other hand, preventive detention laws provide for the detention of a person with the intention of preventing him from committing similar offences in the future, at least for a period of one year. Section 3 of the R.T.I. Act, 2005, provides that subject to the provisions of the Act, all citizens would have the right to information. Section 8, however, makes an exemption from disclosure of information. While setting out the instances in which there would be no obligation to give any citizen information in the situations enumerated in Sub-Section (1), Sub-Section (2) provides that notwithstanding anything in the Official Secrets Act, 1923, nor any of the exemptions permissible in accordance with Sub-Section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests. There are two instances, which one can think of among the exemptions identified in Sub-Section (1), of which one is the exemption indicated in clause (a) of Sub-Section (1), which reads as follows :-

"8(1). Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,-

(a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;

(b) to (i) xxx xxx xxx

(j) information which relates to personal information the disclosure of which has no relationship to any

public activity or interest, or which would cause unwarranted invasion of the privacy of the individual, unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person."

22. Even under Sub-Section (1) of Section 8 of the above Act, the legislature made an exception to the disclosure of information which could be contrary to the interests of the nation, subject to the provision that such information may also be allowed to be accessed in the public interest, which overweighed the personal interests of the citizen. Not much discourse is required with regard to the primacy of the provisions of the Constitution, vis-à-vis the enactments of the legislature. It is also not necessary to emphasise the fact that the provisions of the Constitution will prevail over any enactment of the legislature, which itself is a creature of the Constitution. Since clause (5) of Article 22 provides that the grounds for detention are to be served on a detenu after his detention, the provisions of Section 3 of the R.T.I. Act, 2005, cannot be applied to cases relating to preventive detention at the pre-execution stage. In other words, Section 3 of the R.T.I. Act has to give way to the provisions of Clause (5) of Article 22 of the Constitution. Even the provisions relating to production of an arrested or detained person, contained in clauses (1) and (2) of Article 22 of the Constitution, have in their application been excluded in respect of a person detained under any preventive detention law.

23. We, therefore, agree with the learned ASG, Mr. P.P. Malhotra, that notwithstanding the provisions of the R.T.I. Act, 2005, the State is not under any obligation to provide the

grounds of detention to a detenu prior to his arrest and detention, notwithstanding the fact that in the cases of Choith Nanikram Harchandai and Suresh Hotwani & Anr., referred to hereinabove, the grounds of detention had been provided to the detenu under the R.T.I. Act, 2005, at the pre-execution stage. The procedure followed under the R.T.I. Act, in respect of the said writ petitions cannot and should not be treated as a precedent in regard to Mr. Rohatgi's contention that under the R.T.I. Act, 2005, a detenu was entitled, in assertion of his human rights, to receive the grounds under which he was to be detained, even before his detention, at the pre-execution stage.

24. As to the second point urged by Mr. Rohtagi as to whether the five exceptions mentioned in *Alka Subhash Gadia's* case (supra) regarding the right to challenge an order of detention at the pre-execution stage, were exhaustive or not, we are of the view that the matter requires consideration. The decision in *Alka Subhash Gadia's* case (supra), appears to suggest several things at the same time. The Three-Judge Bench, while considering the challenge to the detention order passed against the detenu, at the pre-execution stage, and upholding the contention that such challenge was maintainable, also sought to limit the scope of the circumstances in which such challenge could be made. However, before arriving at their final conclusion on the said point, the learned Judges also considered the provisions of Articles 19 to 22 relating to fundamental freedoms conferred on citizens and the proposition that the fundamental rights under Chapter III of the Constitution have to be read as a part of an integrated scheme. Their Lordships emphasized that they were not mutually exclusive, but operated, and were subject to each other. Their Lordships held that it was not enough that the detention order must satisfy the tests of all the said rights so far as they were applicable to individual cases. Their Lordships also emphasized in particular that it was well-settled that Article 22(5) is not the sole repository of the detenu's rights. His rights are also governed by the other fundamental rights, particularly those enshrined in

Articles 14, 19 and 21 of the Constitution and the nature of constitutional rights thereunder. Their Lordships were of the view that read together the Articles indicate that the Constitution permits both punitive and preventive detention, provided it is according to procedure established by law made for the purpose and if both the law and the procedure laid down by it are valid. Going on to consider the various decisions rendered by this Court in this regard, Their Lordships in paragraph 5 observed as follows :-

> "5. The neat question of law that falls for consideration is whether the detenu or anyone on his behalf is entitled to challenge the detention order without the detenu submitting or surrendering to it. As a corollary to this question, the incidental question that has to be answered is whether the detenu or the petitioner on his behalf, as the case may be, is entitled to the detention order and the grounds on which the detention order is made before the detenu submits to the order."

25. It is in the aforesaid background that Their Lordships while examining the various decisions rendered on the subject, summed up the discussion in paragraph 30 of the judgment, wherein Their Lordships again reiterated that neither the Constitution, including the provisions of Article 22 thereof, nor the Act in question, places any restriction on the powers of the High Court and this Court to review judicially the order of detention. Their Lordships observed that the powers under Article 226 and 32 are wide, and are untrammelled by any external restrictions, and can reach any executive action resulting in civil or criminal consequences. However, the said observations were, thereafter, somewhat whittled down by the subsequent observation that the Courts have over the years evolved certain self-restraints in exercising these powers. Such self-imposed restraints were not confined to the review of the orders passed under detention law only, but they extended to orders passed and decisions made under all laws. It was also

observed that in pursuance of such self-evolved judicial policy and in conformity with the self-imposed internal restrictions that the Courts insist that the aggrieved person should first allow the due operation and implementation of the concerned law and exhaust the remedies provided by it before approaching the High Court and this Court to invoke their discretionary, extraordinary and equitable jurisdiction under Articles 226 and 32 respectively and that such jurisdiction by its very nature has to be used sparingly and in circumstances where no other efficacious remedy is available. However, having held as above, Their Lordships also observed that all the self-imposed restrictions in respect of detention orders would have to be respected as it would otherwise frustrate the very purpose for which such detention orders are passed for a limited purpose. Consequently, inspite of upholding the jurisdiction of the Court to interfere with such orders even at the pre-execution stage, Their Lordships went on to observe as follows :-

> "The courts have the necessary power and they have used it in proper cases as has been pointed out above, although such cases have been few and the grounds on which the courts have interfered with them at the pre-execution stage are necessarily very limited in scope and number, viz., where the courts are prima facie satisfied (i) that the impugned order is not passed under the Act under which it is purported to have been passed, (ii) that it is sought to be executed against a wrong person, (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague, extraneous and irrelevant grounds or (v) that the authority which passed it had no authority to do so. The refusal by the courts to use their extraordinary powers of judicial review to interfere with the detention orders prior to their execution on any other ground does not amount to the abandonment of the said power or to their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question."

26. Nowhere has it been indicated that challenge to the

detention order at the pre-execution stage, can be made mainly on the aforesaid exceptions referred to hereinabove. By prefacing the five exceptions in which the Courts could interfere with an order of detention at the pre-execution stage, with the expression "viz", Their Lordships possibly never intended that the said five examples were to be exclusive. In common usage or parlance the expression "viz" means "in other words". There is no aura of finality attached to the said expression. The use of the expression suggests that the five examples were intended to be exemplar and not exclusive. On the other hand, the Hon'ble Judges clearly indicated that the refusal to interfere on any other ground did not amount to the abandonment of said power. It is only in *Sayed Taher Bawamiya's* case (supra) that another Three- Judge Bench considered the ratio of the decision of this Court in *Alka Subhash Gadia's* case (supra) and observed that the Courts have the power in appropriate cases to interfere with the detention orders at the pre-execution stage, but that the scope of interference was very limited. It was in such context that the Hon'ble Judges observed that while the detention orders could be challenged at the pre-execution stage, that such challenge could be made only after being prima facie satisfied that the five exceptions indicated in *Alka Subhash Gadia's* case (supra) had been fulfilled.

27. Their Lordships in paragraph 7 of the judgment held that the case before them did not fall under any of the five exceptions to enable the Court to interfere. Their Lordships also rejected the contention that the exceptions were not exhaustive and that the decision in *Alka Subhash Gadia's* case (supra) indicated that it is only in the five types of instances indicated in the judgment in *Alka Subhash Gadia's* case (supra) that the Courts may exercise its discretionary jurisdiction under Articles 226 and 32 of the Constitution at the pre-execution stage.

28. With due respect to the Hon'ble Judges, we have not been able to read into the judgment in *Alka Subhash Gadia's* case (supra) any intention on the part of the Hon'ble Judges,

who rendered the decision in that case, that challenge at the pre-execution stage would have to be confined to the five exceptions only and not in any other case. Both the State and the Hon'ble Judges relied on the decision in *Sayed Taher Bawamiya's* case (supra). As submitted by Mr. Rohatgi, to accept that it was the intention of the Hon'ble Judges in *Alka Subhash Gadia's* case (supra) to confine the challenge to a detention at the pre-execution stage, only on the five exceptions mentioned therein, would amount to imposing restrictions on the powers of judicial review vested in the High Courts and the Supreme Court under Articles 226 and 32 of the Constitution. The exercise of powers vested in the superior Courts in judicially reviewing executive decisions and orders cannot be subjected to any restrictions by an order of the Court of law. Such powers are untrammelled and vested in the superior Courts to protect all citizens and even non-citizens, under the Constitution, and may require further examination.

29. In such circumstances, while rejecting Mr. Rohatgi's contention regarding the right of a detenu to be provided with the grounds of detention prior to his arrest, we are of the view that the right of a detenu to challenge his detention at the pre-execution stage on grounds other than those set out in paragraph 30 of the judgment in *Alka Subhash Gadia's* case (supra), requires further examination. There are various pronouncements of the law by this Court, wherein detention orders have been struck down, even without the apprehension of the detenu, on the ground of absence of any live link between the incident for which the detenu was being sought to be detained and the detention order and also on grounds of staleness. These are issues which were not before the Hon'ble Judges deciding *Alka Subhash Gadia's* case (supra). Law is never static but dynamic, and to hold otherwise, would prevent the growth of law, especially in matters involving the right of freedom guaranteed to a citizen under Article 19 of the Constitution, which is sought to be taken away by orders of preventive detention, where a citizen may be held and detained

not to punish him for any offence, but to prevent him from committing such offence. As we have often repeated, the most precious right of a citizen is his right to freedom and if the same is to be interfered with, albeit in the public interest, such powers have to be exercised with extra caution and not as an alternative to the ordinary laws of the land.

30. In the light of the above, let the various Special Leave Petitions and the Writ Petitions be listed for final hearing and disposal on 7th August, 2012 at 3.00 p.m. This Bench be reconstituted on the said date, for the aforesaid purpose.

B.B.B. Matter adjourned.

JAGROOP SINGH
v.
STATE OF PUNJAB
(Criminal Appeal No. 67 of 2008)

JULY 20, 2012

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

Penal Code, 1860 - s.302 r/w ss.34 and 201 - Murder - Circumstantial evidence - Appreciation of - Three accused - Conviction of accused-appellant by courts below - Justification of - Held: Justified - Deceased was last seen with the accused persons - Appellant made extra-judicial confession before PW14 admitting his guilt - The confessional statement was totally voluntary and by no means tainted - Weapon used in the crime, spade, was recovered on the basis of disclosure statement made by the appellant - Disclosure statement was signed by PW14 and another witness - Procedure followed for discovery was absolutely in accord with law - Appellant gave no explanation as to how human blood could be found on the spade, which is used for agriculture - No substantial reason to disbelieve the disclosure statement and the recovery of the spade - Doctor who had conducted the post mortem had clearly opined that injuries on the person of the deceased could be caused by the blade of the spade and the said opinion went unrebutted - Though incriminating circumstances pointing to the guilt of the appellant had been put to him, yet he could not give any explanation u/s.313 CrPC except choosing the mode of denial - No trace of doubt that all the circumstances completed the chain and singularly pointed to the guilt of the accused persons.

Evidence Act, 1872 - ss. 24, 25 and 26 - Extra judicial confession - Appreciation of - Held: Extra-judicial confession, if true and voluntary, can be relied upon by the court to

convict the accused for commission of the crime alleged - Despite inherent weakness of extra-judicial confession as an item of evidence, it cannot be ignored when shown that such confession was made before a person who has no reason to state falsely and his evidence is credible - Corroboration of such evidence is required only by way of abundant caution.

In a case concerning the death of the 10 year old son of PW8, the trial court came to the conclusion that the death was homicidal in nature; that the deceased was last seen with the accused persons; that the accused had made extra-judicial confessions admitting the guilt; that the dead body of the deceased was recovered from the field of the father of accused-appellant; that the weapon used in the crime was recovered on the basis of the disclosure statement made by accused-appellant; that as per the report of Forensic Science Laboratory, the weapon used, spade, was found stained with human blood; and that the doctor who had conducted the post mortem had clearly stated that the injuries found on the body of the deceased could be caused by the seized weapon. On the aforesaid basis, the trial court came to hold that the prosecution had been able to prove the case against the accused persons beyond reasonable doubt and accordingly convicted the accused-appellant and co-accused 'BS' under Sections 302 read with Section 34 and 201 of IPC and sentenced them to rigorous imprisonment for life. In appeal, the High Court concurred with the view expressed by the trial court.

In appeal to this Court, the appellant challenged his conviction inter alia on the grounds: - (a) that the circumstances which weighed with the lower Courts, namely, last seen with the deceased, extra-judicial confession made by the accused before PW2, and PW14, and recovery of spade and body of the deceased near the field of the father of the accused-appellant at his

instance were unacceptable inasmuch as the testimony of witnesses were replete with improvement, embellishment and contradiction; (b) that the time gap between the point of time when the accused was last seen with the deceased and when the deceased was found dead was of long duration and, therefore, the said circumstance was liable to be ignored; (c) that the reliance on extra-judicial confession before PW2 and PW14 was unacceptable inasmuch as the confession was made after 18 days which made it absolutely dented; there was no earthly reason that the appellant would confess before PW2, since there was prior enmity between PW8 and the appellant and PW2, is a close relation of PW8 and that apart, there were improvements in the course of examination in court and the same made the extra-judicial confession, a weak piece of evidence, wholly unreliable and (d) that the circumstance pertaining to recovery of the weapon (spade) was not credible since there was incurable discrepancy with regard to the place of recovery; and further, though the seized earth and the weapon (which was found stained with human blood) were sent for examination, the report was silent as regards the matching of blood group with that of the deceased and such lack of corroboration made the said circumstance hollowed and the judgment of conviction sensitively vulnerable.

Inasmuch as the entire case rested on circumstantial evidence, the question which arose for consideration in the instant appeal was whether the circumstances of the case established the guilt of the accused-appellant beyond reasonable doubt.

Dismissing the appeal, the Court

HELD:

Reliability and credibility of the 'last seen' theory as propounded by the prosecution.

1.1. The testimony of PWs-8, 10 and 17 are relevant for the purpose of arriving at the conclusion whether the circumstance of 'last seen' has been established. PW8, the father of the deceased, has categorically stated that his son had accompanied accused 'J' ['J' was found to be a juvenile and accordingly produced before the appropriate forum]. There is nothing on record to disbelieve the said testimony. As regards the testimony of PW17, the omissions and the improvements highlighted are absolutely minor. The only omission is that he had not stated that they were going to the field of the appellant. As regards the improvement he has made that the accused persons had told him why he was speaking ill of them, these aspects do not affect the core of the prosecution case. Though the evidence of PW10 was criticised on the base that he had stated before the police that he had seen the accused persons and not before anyone else whereas the PW8 had stated the he had said so before him, the aforesaid discrepancy cannot be regarded to have created any dent in the prosecution story. [Paras 20, 21] [108-G-H; 109-A; 110-E-H; 111-A]

1.2. As per the material on record, the informant (PW8) searched for his son in the village in the late evening and next day in the morning, he went to the fields and the dead body was found. The post-mortem report indicates that the death had occurred within 24 hours. Thus, the duration is not so long as to defeat or frustrate the version of the prosecution. Therefore, there can be no trace of doubt that the deceased was last seen in the company of the accused persons. [Para 22] [111-B-C]

Sharad Birdhichand Sarda v. State of Maharashtra **AIR 1984 SC 1622: 1985 (1) SCR 88;** *Padala Veera Reddy v. State of Andhra Pradesh and others* **1989 Supp (2) SCC 706;**

Ramreddy Rajesh Khanna Reddy and another v. State of A.P. **(2006) 10 SCC 172: 2006 (3) SCR 348;** *Balwinder Singh v. State of Punjab* **AIR 1996 SC 607: 1995 (5) Suppl. SCR 10;** *Harishchandra Ladaku Thange v. State of Maharashtra* **AIR 2007 SC 2957: 2007 (9) SCR 562;** *State of U.P. v. Ashok Kumar Srivastava* **AIR 1992 SC 840: 1992 (1) SCR 37;** *Ram Singh v. Sonia and Ors.* **AIR 2007 SC 1218: 2007 (2) SCR 651;** *Ujagar Singh v. State of Punjab* **(2007) 13 SCC 90: 2007 (13) SCR 653;** *State Rep. by Inspector of Police v. Saravanan and anr.* **AIR 2009 SC 152: 2008 (14) SCR 405 and** *Sunil Kumar Sambhudayal Gupta (Dr.) and others v. State of Maharashtra* **(2010) 13 SCC 657: 2010 (15) SCR 452 - relied on.**

Shivaji Sahebrao Bobade v. State of Maharashtra **(1973) 2 SCC 793: 1974 (1) SCR 489 - referred to.**

Extra- judicial confession

2.1. Extra judicial confession, if true and voluntary, can be relied upon by the court to convict the accused for the commission of the crime alleged. Despite inherent weakness of extra-judicial confession as an item of evidence, it cannot be ignored when shown that such confession was made before a person who has no reason to state falsely and his evidence is credible. The evidence in the form of extra-judicial confession made by the accused before the witness cannot be always termed to be tainted evidence. Corroboration of such evidence is required only by way of abundant caution. If the court believes the witness before whom the confession is made and is satisfied that it was true and voluntarily made, then the conviction can be founded on such evidence alone. The aspects which have to be taken care of are the nature of the circumstances, the time when the confession is made and the credibility of the witnesses who speak for such a confession. That apart, before relying on the confession, the court has to be satisfied

that it is voluntary and it is not the result of inducement, threat or promise as envisaged under Section 24 of the Evidence Act or brought about in suspicious circumstances to circumvent Sections 25 and 26. [Para 24] [112-A-E]

2.2. In the instant case, there is no dispute that the confession was made before PW14 after 18 days. The fact remains that PW14 was not in the village and three days after his arrival in the village, the confession was made before him. He has clearly deposed that accused 'J' and appellant had confessed before him about the crime and he had produced them before the ASI. True it is, he has improved his version in the cross-examination that he has strained relationship with the complainant which he had not stated in his statement under Section 161 Cr.P.C but the same cannot make the testimony tainted. Barring that, there is nothing in the cross-examination to discredit his testimony. That apart, there is no suggestion that he had not produced the appellant before the police. There may be some relationship between the informant and this witness but the evidence is totally clear and the confessional statement is voluntary and, in no way, appears to be induced and gets further strengthened by the fact that he produced them before the police. There is no suggestion whatsoever that he had applied any kind of force. It is borne out from that record that accused 'BS' had absconded and the appellant along with accused 'J' came to PW8 and confessed and 'BS' confessed before PW-10. In the confessional statement, he has stated about the place where the spade was hidden and led to the recovery to which PW14 is a witness. Appreciated from these angles, it is clear that the said confessional statement inspires confidence as the same is totally voluntary and by no means tainted. [Para 26] [113-C-H; 114-A]

Gura Singh v. State of Rajasthan **(2001) 2 SCC 205: 2000 (5) Suppl. SCR 408 and** *Sahadevan & Another v. State of Tamil Nadu* **2012 AIR SCW 3206- relied on.**

Rao Shiv Bahadur Singh v. State of Vindhya Pradesh **AIR 1954 SC 322;** *Maghar Singh v. State of Punjab* **AIR 1975 SC 1320;** *Narayan Singh v. State of M.P.* **AIR 1985 SC 1678;** *Kishore Chand v. State of H.P.* **AIR 1990 SC 2140;** *Baldev Raj v. State of Haryana* **AIR 1991 SC 37;** *Sk. Yusuf v. State of W.B.* **(2011) 11 SCC 754: 2011 (8) SCR 83 and** *Pancho v. State of Haryana* **(2011) 10 SCC 165 : AIR 2012 SC 523: 2011 (12) SCR 1173 - referred to.**

Recovery of the weapon of offence

3. In the case at hand, the accused led to recovery of the spade from the wheat field near the heap of sticks. The disclosure statement has been signed by PW14 and another witness. The procedure followed for discovery is absolutely in accord with law and has not been challenged. The accused persons were arrested after 18 days and recovery was made at that time. The blood stain found on the weapon has been found in the serological report as human blood. The accused have not given explanation how human blood could be found on the spade used for agriculture which was recovered at their instance. Thus viewed, there is no substantial reason to disbelieve the disclosure statement and the recovery of the weapon used. The doctor, who conducted the post mortem, has clearly opined that the injuries on the person of the deceased could be caused by the weapon (blade of such spade) and the said opinion has gone unrebutted. [Paras 27, 28 and 29] [114-B-C; G; 115-B, E-F]

Sattatiya Alias Satish Rajanna Kartalla v. State of Maharashtra **(2008) 3 SCC 210: 2007 (11) SCR 238 - distinguished.**

John Pandian v. State Represented by Inspector of Police, Tamil Nadu **(2010) 14 SCC 129 - relied on.**

4. Another aspect is to be taken note of. Though the incriminating circumstances pointing to the guilt of the accused had been put to him, yet he could not give any explanation under Section 313 CrPC except choosing the mode of denial. [Para 30] [115-F-G]

State of Maharashtra v. Suresh **(2000) 1 SCC 471: 1999 (5) Suppl. SCR 215 - referred to.**

5. The prosecution is not required to meet any and every hypothesis put forward by the accused. In the instant case, all the three circumstances which have been established by the prosecution complete the chain. There can be no trace of doubt that the circumstances have been proven beyond reasonable doubt and singularly lead to the guilt of the accused persons. There is no infirmity in the judgment of conviction and order of sentence recorded by the trial court which has been affirmed by the High Court. [Paras 31 and 32] [116-D-F]

Sucha Singh and another v. State of Punjab **(2003) 7 SCC 643: 2003 (2) Suppl. SCR 35 - relied on.**

Case Law Reference:

1985 (1) SCR 88	**relied on**	**Para 13**
1974 (1) SCR 489	**referred to**	**Para 13**
1989 Supp (2) SCC 706	**relied on**	**Para 14**
2006 (3) SCR 348	**relied on**	**Para 14**
1995 (5) Suppl. SCR 10	**relied on**	**Para 15**
2007 (9) SCR 562	**relied on**	**Para 16**
1992 (1) SCR 37	**relied on**	**Para 17**

2007 (2) SCR 651	**relied on**	**Para 18**
2007 (13) SCR 653	**relied on**	**Para 19**
2008 (14) SCR 405	**relied on**	**Para 21**
2010 (15) SCR 452	**relied on**	**Para 21**
2000 (5) Suppl. SCR 408	**relied on**	**Para 24**
AIR 1954 SC 322	**referred to**	**Para 24**
AIR 1975 SC 1320	**referred to**	**Para 24**
AIR 1985 SC 1678	**referred to**	**Para 24**
AIR 1990 SC 2140	**referred to**	**Para 24**
AIR 1991 SC 37	**referred to**	**Para 24**
AIR SCW 3206	**relied on**	**Para 25**
2011 (8) SCR 83	**referred to**	**Para 25**
2011 (12) SCR 1173	**referred to**	**Para 25**
2007 (11) SCR 238	**distinguished**	**Para 27**
(2010) 14 SCC 129	**relied on**	**Para 28**
1999 (5) Suppl. SCR 215	**referred to**	**Para 30**
2003 (2) Suppl. SCR 35	**relied on**	**Para 31**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 67 of 2008.

From the Judgment & Order dated 23.11.2005 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 199/DB of 1997.

Nikhil Goel, Marsook Bafaki (for Sheela Goel) for the Appellant.

Jayant K. Sud, AAG, Kuldip Singh for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. This appeal preferred by special leave under Article 136 of the Constitution of India calls in question the judgment of conviction and order of sentence passed by the Division Bench of the High Court of Punjab and Haryana in Criminal Appeal No. 199/DB of 1997 whereby the High Court has affirmed the conviction and confirmed the sentence passed by the learned Sessions Judge, Faridkot, in Sessions Trial No. 31 of 1992 wherein he had found that the appellant along with one Bikkar Singh was guilty of the offences punishable under Sections 302 read with Section 34 and 201 of the Indian Penal Code 1860 (for short 'the IPC') and sentenced the accused persons to suffer rigorous imprisonment for life and to pay a fine of Rs.500/-, in default of payment of fine, to undergo further rigorous imprisonment for two months each on the first count and rigorous imprisonment for three years and to pay a fine of Rs.200/-, in default, to suffer further rigorous imprisonment for one month each on the second score with the stipulation that both the substantive sentences shall be concurrent.

2. The factual matrix giving rise to the trial is that about 3.15 p.m. on 2.4.1991, when Sukhdev Singh, PW-8, was feeding fodder to his cattle at his house, accused Jagsir Singh came to his house and asked his son, Jagjit Singh @ Jagga, to accompany him for plucking flowers from the field. Jagjit Singh, a 10 year old boy, accompanied him. As the boy did not return home till evening, the complainant went to the house of Jagroop Singh, Uncle of Jagsir Singh, to enquire about his son. As the doors were not opened and there was no response he searched for his son in the village but could not find him. On the next day, in the morning he proceeded with the co-villagers to search for the boy in the fields. After he reached the fields of Santosh Singh, he found some freshly dug earth near a heap of sticks. Being suspicious, all of them dug out the earth and

found the dead body of Jagjit Singh lying buried over there having injury marks on the head. Sukhdev Singh left his brother Gurmail Singh there for guarding the body and proceeded towards the police station. On the way near the bus stand he met ASI Surjit Singh who recorded his statement and accompanied him to the fields of Jagroop Singh. The investigating officer prepared the inquest report, recovered the blood stained weapon of offence and sample of earth smeared with blood, prepared two distinct sealed parcels thereof, Exhibits P-1 and P-2, and sent the dead body for post mortem. In the FIR, it was stated that the deceased had been murdered by Jagsir Singh with the aid and assistance of other persons and they had buried the dead body.

3. As the factual narration would reveal, on 21.4.1992, Jagroop Singh and Jagsir Singh made an extra judicial confession before Natha Singh, PW 14, and accused Bikkar Singh made an extra-judicial confession before Zora Singh, PW-2, and both Natha Singh and Zora Singh produced the accused persons before the police. After being arrested, they led to the discovery of one `Kassi' (spade) which was buried under the ground near the place wherefrom the dead body was recovered. The seized weapon was sent for chemical analysis examination in the forensic science laboratory and after completing the investigation, the investigating officer placed the charge-sheet before the concerned Magistrate, who committed the matter to the Court of Session for trial of offences under Section 302 read with Section 34 and 201 of IPC. Be it noted, in the course of investigation, it was found that Jagsir Singh was a juvenile and was produced before the appropriate forum at Bhatinda.

4. Both the accused persons denied the charge and pleaded false implication due to animosity.

5. The prosecution, to prove its case, examined Dr. Devinder Mittal, the autopsy surgeon as PW-1, Zora Singh, PW-2, Sukhdev Singh, PW-8, Gurdev Singh, PW-10, Natha

Singh, PW-14, Balwinder Singh, PW-17 and ASI Surjit Singh, PW-18, as principal witnesses. The rest of the witnesses are formal witnesses. The reports of the Forensic Science Laboratory and many other documents were brought on record and marked as exhibits.

6. The defence chose not to adduce any evidence.

7. The learned trial Judge, on appreciation of the evidence brought on record, came to hold that the death of the deceased Jagjit Singh was homicidal in nature; that the deceased was last seen with the accused persons; that the accused had made extra-judicial confessions admitting the guilt; that the dead body of the deceased was recovered from the field of the father of accused Jagroop Singh; that the weapon used in the crime was recovered on the basis of the disclosure statement made by accused Jagroop Singh; that as per the report of Forensic Science Laboratory, the weapon used, spade, was found stained with human blood; and that the doctor who had conducted the post mortem had clearly stated that the injuries found on the body of the deceased could be caused by the seized weapon. On the aforesaid basis, he came to hold that the prosecution had been able to prove the case against the accused persons beyond reasonable doubt and accordingly recorded the conviction and imposed the sentence.

8. On an appeal being preferred, the High Court reappreciated the evidence and came to hold that the circumstantial evidence from all spectrums led to the only conclusion that the accused persons had committed the crime and concurred with the view expressed by the learned trial Judge.

9. We have heard Mr. Nikhil Goel, learned counsel for the appellant, and Mr. Jayant K. Sood, learned Additional Advocate General for the respondent-State.

10. The learned counsel for the appellant has raised the following contentions: -

(a) The learned trial Judge as well as the High Court has not appreciated the evidence brought on record in proper perspective keeping in view the parameters laid down by this Court in various authorities relating to restriction of conviction on circumstantial evidence and hence, the judgments are unsustainable in law.

(b) The circumstances which have weighed with the Courts, namely, last seen with the deceased, the extra-judicial confession made by the accused before Zora Singh, PW-2, and Natha Singh, PW-14, and recovery of spade and body of the deceased near the field of the father of the accused-appellant at his instance are unacceptable inasmuch as the testimony of witnesses are replete with improvement, embellishment and contradiction.

(c) The time gap between the point of time when the accused was last seen with the deceased and when the deceased was found dead is of long duration and, therefore, the said circumstance is to be ignored.

(d) The reliance on extra-judicial confession before Zora Singh, PW-2 and Natha Singh, PW-14 is unacceptable inasmuch as the confession was made after 18 days which makes it absolutely dented. There is no earthly reason that the appellant would confess before Zora Singh, PW-2, since there was prior enmity between the informant and the appellant and Zora Singh, PW-2, is a close relation of the father of the deceased. That apart, there are improvements in the course of

examination in court and the same makes the extra-judicial confession, a weak piece of evidence, wholly unreliable.

(e) The circumstance pertaining to recovery of the weapon is not to be given any credence. There is incurable discrepancy with regard to the place of recovery. Further, though the seized earth and the weapon were sent for examination, the report is silent as regards the matching of blood group with that of the deceased and such lack of corroboration makes the said circumstance hollowed and that makes the judgment of conviction sensitively vulnerable.

11. The learned counsel for the respondent combated the aforesaid proponements. The learned counsel has advanced the following submissions:-

(i) The attack on the last seen circumstance on the foundation that there is a long duration between the last seen and when the dead body was found is totally untenable inasmuch as the opinion in the post mortem report is that the death had occurred within twenty four hours. That apart, the testimony of PW 10 and 17 is unimpeachable since they have stood embedded in their stand.

(ii) The circumstance of extra-judicial confession cannot be disregarded despite some improvements in the version of Natha Singh, PW 14, as there is no suggestion that his version is tainted. Quite apart from that, after abscondance of the accused Bikkar Singh, he came and confessed before Zora Singh and the present appellant along with Jagsir Singh before Natha Singh who produced them before the Police and there is nothing on record to state that either Zora Singh,

PW-2, or Natha Singh, PW-14, applied any force.

(iii) There is no reason to doubt the disclosure statement and leading to recovery on the ground that the weapon was recovered in the nearby field but not in the field of the appellant and there has been no matching of blood stains with that of the appellant's blood.

(iv) Both the High Court and the trial court have kept themselves alive to the parameters of circumstances and there can be no trace of doubt that all the circumstances cumulatively prove the guilt of the accused beyond reasonable doubt, for there are no such flaws which would compel a court of law to disregard the vital circumstance and entertain pleas artificially grafted by imagination.

12. As is evincible, the entire case rests on circumstantial evidence. Before we analyse and appreciate the circumstances that have weighed with the trial Court and the High Court, we think it apposite to refer to certain authorities pertaining to delineation of cases that hinge on circumstantial evidence.

13. In *Sharad Birdhichand Sarda v. State of Maharashtra*[1], a three-Judge Bench has laid down five golden principles which constitute the "panchsheel" in respect of a case based on circumstantial evidence. Referring to the decision in *Shivaji Sahebrao Bobade v. State of Maharashtra*[2], it was opined that it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between `may be' and `must be' is long and divides vague conjectures from sure conclusions. Thereafter, the Bench proceeded to lay down that the facts so established should be consistent only with the hypothesis of the guilt of the

1. AIR 1984 SC 1622
2. AIR 1973 SC 2622 = (1973) 2 SCC 793.

accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty; that the circumstances should be of a conclusive nature and tendency; that they should exclude every possible hypothesis except the one to be proved; and that there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

14. In *Padala Veera Reddy v. State of Andhra Pradesh and others*[3], this Court held that when a case rests upon circumstantial evidence, the following tests must be satisfied: (SCC pp. 710-11, para 10)

"(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

The similar view has been reiterated in *Ramreddy Rajesh Khanna Reddy and another v. State of A.P.*[4].

3. 1989 Supp (2) SCC 706 : 1991 SCC (CRI) 407.
4. (2006) 10 SCC 172.

15. In *Balwinder Singh v. State of Punjab*[5], it has been laid down that the circumstances from which the conclusion of guilt is to be drawn should be fully proved and those circumstances must be conclusive in nature to connect the accused with the crime. All the links in the chain of events must be established beyond reasonable doubt and the established circumstances should be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In a case based on circumstantial evidence, the Court has to be on its guard to avoid the danger of allowing suspicion to take the place of legal proof and has to be watchful to avoid the danger of being swayed by emotional considerations, however strong they may be, to take the place of proof.

16. In *Harishchandra Ladaku Thange v. State of Maharashtra*[6], while dealing with the validity of inferences to be drawn from circumstantial evidence, it has been emphasised that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person and further the circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances.

17. In *State of U.P. v. Ashok Kumar Srivastava*[7], emphasis has been laid that it is the duty of the Court to take care while evaluating circumstantial evidence. If the evidence adduced by the prosecution is reasonably capable of two inferences, the one in favour of the accused must be accepted. That apart, the circumstances relied upon must be established and the cumulative effect of the established facts must lead to a

5. AIR 1996 SC 607.

6. AIR 2007 SC 2957.

7. AIR 1992 SCW 640 = AIR 1992 SC 840.

singular hypothesis that the accused is guilty.

18. In *Ram Singh v. Sonia and Ors.*[8], while referring to the settled proof pertaining to circumstantial evidence, this Court reiterated the principles about the caution to be kept in mind by Court. It has been stated therein that in a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The Court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. It has also been indicated that when the important link goes, the chain of circumstances gets snapped and the other circumstances cannot in any manner, establish the guilt of the accused beyond all reasonable doubts.

19. In *Ujagar Singh v. State of Punjab*[9], after referring to the aforesaid principles pertaining to the evaluation of circumstantial evidence, this Court stated that it must nonetheless be emphasised that whether a chain is complete or not would depend on the facts of each case emanating from the evidence and no universal yardstick should ever be attempted.

20. Keeping in view the aforesaid principles, we shall presently proceed to scrutinize and evaluate the circumstances whether the said circumstances establish the guilt of the accused beyond reasonable doubt. First, we shall advert to the reliability and credibility of the 'last seen' theory as propounded by the prosecution. The testimony of PWs-8, 10 and 17 are relevant to be seen for the purpose of arriving at the conclusion whether the circumstance of 'last seen' has been established. PW-8 is the father of the deceased. He has stated that Jagsir Singh, who was residing with Jagroop Singh, his maternal

8. AIR 2007 SC 1218.

9. (2007) 13 SCC 90.

uncle, came to his house and asked Jagjit Singh to accompany him to pluck Genda (marigold) flowers in the field. Jagjit accompanied him. PW-10, Gurdev Singh, has deposed that about 4.00 p.m. when he was going from village Jita Singh Wala to village Mari Mustafa to see his daughter, near a turning outside village Jita Singh Wala, he found that Roop Singh, Bikkar Singh and Jagsir Singh along with deceased Jagjit Singh were proceeding towards the fields. In the cross-examination, he has stated that the road by which the three accused were taking the deceased was known to him as he had earlier gone on that passage and at that time he did not suspect anything. The learned counsel for the appellant has submitted that there is a material contradiction in the statement of Gurdev Singh, PW-10, and that of Sukhdev Singh, PW-8, inasmuch as Gurdev Singh had stated that for the first time he made a disclosure about seeing the deceased in the company of the accused persons whereas Sukhdev Singh had stated that while he was searching for Jagjit Singh, Gurdev Singh told him that he had seen the accused going together with the deceased. Keeping the appreciation and analysis of this evidence in abeyance, it is apt to scan the testimony of PW-17. Balwinder Singh, PW-17, has testified that on 2.4.1991, about 4.00 p.m., he was going to the bus-stand of village Kotla Raika. When he reached the house of Jagroop Singh, he saw all the three accused along with the deceased going towards the field of Jagroop Singh who was carrying a spade with him. He had enquired from Jagjit Singh why he was accompanying the accused with whom they were not on good terms, to which he replied that he had no hostility with his companions and he was going to pluck the flowers. Thereafter, Jagroop Singh told why he was talking ill of them. The learned counsel for the appellant has criticised the evidence of this witness on the ground that he has been convicted of murder of the appellant's brother and he had made two improvements in his statement recorded under Section 161 Cr.P.C. inasmuch as when he has deposed, he had stated before the police that the accused and deceased were going towards the field of Jagroop Singh and further he

has stated before the police that the accused had told him why he was talking ill.

21. The contention of the learned counsel for the appellant basically is that there are omissions and improvements in the versions of the witnesses and of such magnitude that they affect the prosecution case. In *State Rep. by Inspector of Police v. Saravanan and anr.*[10], it has been stated that the contradictions/omissions must be of such nature which materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements which do not affect the core of the prosecution case should not be made a ground to reject the evidence of the witness in entirety. In *Sunil Kumar Sambhudayal Gupta (Dr.) and others v. State of Maharashtra*[11], it has been laid down that the omissions which amount to contradictions in material particulars, i.e., go to the root of the case/materially affect the trial or core of the prosecution case, render the testimony of the witness liable to be discredited. Keeping in view the aforesaid principles, when the evidence of these three witnesses are scrutinized, we find that PW 8, the father of the deceased, has categorically stated that his son had accompanied the accused Jagsir. There is nothing on record to disbelieve the said testimony. As regards the testimony of PW-17, the omissions and the improvements which have been highlighted are absolutely minor. In fact, to appreciate the same, we have anxiously perused the statement recorded under Section 161 of the Cr.P.C. and the deposition in Court. We find that this witness has clearly stated that all of them were going towards the field. The only omission is that he had not stated that they were going to the field of Jagroop. As regards the improvement he has made that the accused persons had told him why he was speaking ill of them, in our considered view, these aspects do not affect the core of the prosecution case. The evidence of PW-10, Gurdev Singh, is criticised on the base that he had stated before the police that

10. AIR 2009 SC 152.

11. (2010) 12 SCC 657.

he had seen the accused persons and not before anyone else whereas the complainant had stated the he had said so before him. The aforesaid discrepancy cannot be regarded to have created any dent in the prosecution story.

22. Quite apart from the above, what is argued is that there is a long gap between the last seen and recovery of the dead body of the deceased. As per the material on record, the informant searched for his son in the village in the late evening and next day in the morning, he went to the fields and the dead body was found. The post-mortem report indicates that the death had occurred within 24 hours. Thus, the duration is not so long as to defeat or frustrate the version of the prosecution. Therefore, there can be no trace of doubt that the deceased was last seen in the company of the accused persons.

23. The second circumstance pertains to extra- judicial confession. Mr. Goel, learned counsel for the appellant, has vehemently criticized the extra-judicial confession on the ground that such confession was made after 18 days of the occurrence. That apart, it is submitted that the father of Natha Singh and grand-father of the deceased are real brothers and, therefore, he is an interested witness and to overcome the same, he has deposed in Court that he has strained relationship with the informant, though he had not stated so in the statement recorded under Section 161 of Cr.PC.

24. The issue that emanates for appreciation is whether such confessional statement should be given any credence or thrown overboard. In this context, we may refer with profit to the authority in *Gura Singh v. State of Rajasthan*[12] wherein, after referring to the decisions in *Rao Shiv Bahadur Singh v. State of Vindhya Pradesh*[13], *Maghar Singh v. State of Punjab*[14], *Narayan Siingh V. State of M.P.*[15], *Kishore Chand*

12. (2001) 2 SCC 205.
13. AIR 1954 SC 322.
14. AIR 1975 SC 1320
15. AIR 1985 SC 1678.

v. State of H.P.[16] and *Baldev Raj v. State of Haryana*[17], it has been opined that it is the settled position of law that extra judicial confession, if true and voluntary, can be relied upon by the court to convict the accused for the commission of the crime alleged. Despite inherent weakness of extra-judicial confession as an item of evidence, it cannot be ignored when shown that such confession was made before a person who has no reason to state falsely and his evidence is credible. The evidence in the form of extra-judicial confession made by the accused before the witness cannot be always termed to be tainted evidence. Corroboration of such evidence is required only by way of abundant caution. If the court believes the witness before whom the confession is made and is satisfied that it was true and voluntarily made, then the conviction can be founded on such evidence alone. The aspects which have to be taken care of are the nature of the circumstances, the time when the confession is made and the credibility of the witnesses who speak for such a confession. That apart, before relying on the confession, the court has to be satisfied that it is voluntary and it is not the result of inducement, threat or promise as envisaged under Section 24 of the Act or brought about in suspicious circumstances to circumvent Sections 25 and 26.

25. Recently, in *Sahadevan & Another v. State of Tamil Nadu*[18], after referring to the rulings in *Sk. Yusuf v. State of W.B.*[19] and *Pancho v. State of Haryana*[20], a two-Judge Bench has laid down that the extra-judicial confession is a weak evidence by itself and it has to be examined by the court with greater care and caution; that it should be made voluntarily and should be truthful; that it should inspire confidence; that an extra-judicial confession attains greater credibility and evidentiary

16. AIR 1990 SC 2140.
17. AIR 1991 SC 37.
18. 2012 AIR SCW 3206.
19. (2011) 11 SCC 754.
20. (2011) 10 SCC 165 : AIR 2012 SC 523.

value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence; that for an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities; and that such statement essentially has to be proved like any other fact and in accordance with law.

26. Keeping in view the aforesaid parameters, the criticism advanced against the evidence of Natha Singh, PW-14, and acceptance thereof have to appreciated. There is no dispute that the confession was made before Natha Singh after 18 days. The fact remains that Natha Singh was not in the village and three days after his arrival in the village, the confession was made before him. He has clearly deposed that Jagsir Singh and Roop Singh alias Jagroop Singh had confessed before him. The appellant Jagroop Singh had confessed about the crime and he had produced them before the ASI. True it is, he has improved his version in the cross-examination that he has strained relationship with the complainant which he had not stated in his statement under Section 161 Cr.P.C but the same cannot make the testimony tainted. Barring that, there is nothing in the cross-examination to discredit his testimony. That apart, there is no suggestion that he had not produced the appellant before the police. There may be some relationship between the informant and this witness but the evidence is totally clear and the confessional statement is voluntary and, in no way, appears to be induced and gets further strengthened by the fact that he produced them before the police. There is no suggestion whatsoever that he had applied any kind of force. It is borne out from that record that Bikkar Singh, another accused, had absconded and the present appellant along with Jagsir Singh came to Natha Singh and confessed and Bikkar Singh confessed before Gurdev Singh, PW-10. In the confessional statement, he has stated about the place where the spade was hidden and led to the recovery to which Natha Singh is a witness. Appreciated from these angles, we are of the considered opinion that the said

confessional statement inspires confidence as the same is totally voluntary and by no means tainted.

27. The next circumstance is leading to recovery of the weapon as is seen from the evidence. The accused led to recovery of the spade from the wheat field near the heap of sticks. The disclosure statement has been signed by Natha Singh and another witness, namely, Lal Chand. The procedure followed for discovery is absolutely in accord with law and has not been challenged. The learned counsel for the appellant has submitted that the recovery of the weapon does not aid and assist the prosecution version. It is urged that though human blood is found on the spade, yet the blood group was not matched. In support of the said stand, he has commended us to the decision in *Sattatiya Alias Satish Rajanna Kartalla v. State of Maharashtra*[21]. In the said case, the occurrence had taken place on 1.10.1994 and the accused was arrested on 3.10.1994. He had led to recovery of his blood stained clothes and that of the deceased and the weapon used in the crime and all the articles were sent for chemical examination. The clothes of the deceased were found having human blood of 'O' group. It was contended that the blood group was not matched. This Court did not believe the recovery of the weapon due to various reasons. Further, it opined that though blood stains were found on the clothes and the weapon used, yet the same could not be linked with the blood of the deceased, and, therefore, there was serious lacuna that the human blood stains present on the clothes of the accused and the weapon were sufficient to link the accused with the murder.

28. In the case at hand, the accused persons were arrested after 18 days and recovery was made at that time. The blood stain found on the weapon has been found in the serological report as human blood. In the case of *Sattatiya* (supra), the recovery was doubted and additionally, non-matching of blood group was treated to be a lacuna. It is worth noting that the

21. (2008) 3 SCC 210.

clothes and the weapon were sent immediately for chemical examination. Here the weapon was sent after 18 days as the recovery was made after that period. The accused have not given explanation how human blood could be found on the spade used for agriculture which was recovered at their instance. In this context, we may profitably reproduce a passage from *John Pandian v. State Represented by Inspector of Police, Tamil Nadu*[22] :-

> "The discovery appears to be credible. It has been accepted by both the courts below and we find no reason to discard it. This is apart from the fact that this weapon was sent to the forensic science laboratory (FSL) and it has been found stained with human blood. Though the blood group could not be ascertained, as the results were inconclusive, the accused had to give some explanation as to how the human blood came on this weapon. He gave none. This discovery would very positively further the prosecution case."

29. Thus viewed, we do not find any substantial reason to disbelieve the disclosure statement and the recovery of the weapon used. It is apt to mention here that the doctor, who has conducted the post mortem, has clearly opined that the injuries on the person of the deceased could be caused by the weapon (blade of such spade) and the said opinion has gone unrebutted.

30. Another aspect is to be taken note of. Though the incriminating circumstances which point to the guilt of the accused had been put to the accused, yet he could not give any explanation under Section 313 of the Code of Criminal Procedure except choosing the mode of denial. In *State of Maharashtra v. Suresh*[23], it has been held that when the attention of the accused is drawn to such circumstances that

22. (2010) 14 SCC 129.

23. (2000) 1 SCC 471.

inculpated him in the crime and he fails to offer appropriate explanation or gives a false answer, the same can be counted as providing a missing link for completing the chain of circumstances. We may hasten to add that we have referred to the said decision only to highlight that the accused has not given any explanation whatsoever as regards the circumstances put to him under Section 313 of the Code of Criminal Procedure.

31. From the aforesaid analysis, we are of the convinced opinion that all the three circumstances which have been established by the prosecution complete the chain. There can be no trace of doubt that the circumstances have been proven beyond reasonable doubt. It is worthy to remember that in *Sucha Singh and another v. State of Punjab*[24], it has been stated that the prosecution is not required to meet any and every hypothesis put forward by the accused. A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some inevitable flaws because human beings are prone to err, it is argued that it is too imperfect. The present case is one where there is no trace of doubt that all circumstances complete the chain and singularly lead to the guilt of the accused persons.

32. In view of the aforesaid premised reasons, we do not find any infirmity in the judgment of conviction and order of sentence recorded by the learned trial Judge which has been affirmed by the High Court and, accordingly, the appeal, being devoid of substance, stands dismissed.

B.B.B. Appeal dismissed.

24. (2003) 7 SCC 643.

STATE OF BIHAR & ANR.
v.
ARVIND KUMAR & ANR.
(Criminal Appeal Nos. 1075-76 of 2012)

JULY 23, 2012

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

Essential Commodities Act, 1955 - ss. 3, 6-A, 7 and 10 - Seizure of wheat - From the premises of respondent - No one came forward to claim the seized material - FIR u/ss. 7 and 10 of the Act and u/ss. 421/424 IPC - Writ petition seeking quashing of FIR and in the alternative order for release of wheat - High Court directing release of wheat - Respondents' application for release of wheat dismissed by CJM on the ground that they failed to prove their ownership over the seized material - Respondents' Petition against the order of CJM allowed by High Court - On appeal, held: The question of ownership over the seized goods being a question of fact could not have been gone into by High Court in its revisional or extra-ordinary jurisdiction - High Court dealt with the matter in complete disregard of the legislation - A court cannot issue a direction contrary to law nor can it direct an authority to act in contravention of the statutory provisions - Penal Code, 1860 - ss. 421/424 IPC - Public Distribution System (Control) Order, 2001 - Clause 6(a) - Jurisdiction.

Upon receiving secret information, officials raided the flour mill of the respondents and found wheat being off-loaded from a truck. Appellants seized 5923 bags of wheat. The seized material made it apparent that there had been diversion of grains of Food Corporation of India, for the purpose of black marketing. No one came forward to claim the seized material. FIR was lodged u/ss. 7 and 10 of Essential Commodities Act, 1955 and u/ss. 421/424 IPC against the respondents.

Respondents filed a writ petition for quashing of FIR and in the alternative for release of the confiscated goods. High Court allowed the petition directing release of the confiscated goods observing that continuing seizure of the confiscated articles like wheat for a long time might not be justified. When the respondents made an application before Chief Judicial Magistrate for release of the wheat, the same was dismissed on the ground that they failed to produce any document to show their ownership over the seized material. Respondents then again approached the High Court filing an application against the order of CJM, and the same was allowed. Therefore the instant appeal was filed against both the orders of the High Court.

Allowing the appeals, the Court

HELD: 1. The Essential Commodities Act was enacted to safeguard public interest, considering it necessary in the interests of the general public to control the production, supply and distribution of, trade and commerce in, certain commodities through the legislation. It was in light of the aforesaid public policy that Section 3 of the Act empowers the Government to issue notifications and once a notification is issued, it further enables the competent authority to confiscate the goods under Section 6-A and prosecution leading to the punishment provided u/s. 7 of the Act. The Collector has been empowered u/s. 6-A, if it is so found to be expedient, to sell the seized commodity which is subject to natural decay, at a controlled price or by public auction or to dispose off them through the Public Distribution System to avoid artificial shortages, maintain price line and secure equitable distribution thereof through fair price shops as it is in the interest of the general public. [Para 6] [124-A-E]

2. The High Court has not even taken a *prima facie*

view that the State Government has not issued any order/ notification u/s. 3 of the Act though the FIR made a reference to clause 6(a) of the Public Distribution System (Control) Order, 2001 issued u/s. 3. Respondent also referred to the said Control Order 2001 in the writ petition filed by them. More so, the question of ownership of the goods seized is a question of fact which ought not to have been gone into by the High Court in its revisional or extra-ordinary jurisdiction. Further, there is nothing on record on the basis of which the issue of ownership was decided by the High Court. There was no cogent material on record before the High Court on the basis of which direction to release the goods so seized could be issued. The High Court has dealt with the issue in the most casual and caviler manner, without any application of mind showing complete disregard of the legislature enacting the said provisions for general welfare. [Paras 7 and 8] [124-E-H; 125-A]

Shambhu Dayal Agarwala v. State of West Bengal and Anr. **(1990) 3 SCC 549: 1990 (2) SCR 987;** *Oma Ram v. State of Rajasthan and Ors.* **(2008) 5 SCC 502: 2008 (6) SCR 747 - relied on.**

3. The petition was filed before the High Court for quashing of the FIR and alternatively for releasing the seized items and the High Court without giving any reason whatsoever disposed of the petition observing that continuing seizure of the seized items for a long time may not be justified as the seized good was wheat. This was the only reason given by the High Court without any consideration of the averments made on behalf of the parties and further, without considering the requirement of the statutory provisions. [Para 10] [126-B-D]

4. In the subsequent order dealing with the ownership of the wheat, the High Court has only taken note of the fact that as the respondents herein were

prepared to furnish adequate/sufficient security to the satisfaction of the court below, for release of the wheat in question, the wheat could have been released by the CJM. There was no justification for the High Court to issue directions for released of such material merely because applicant could furnish the security. Any stranger or third party may give sufficient security and get the seized goods released in his favour. Such a course is not permissible even while deciding an application u/s. 451/457 Cr.P.C. A person having no title/ ownership over the seized material may get the same released on furnishing security and then sell it in black market and earn profits several times greater than the amount of security furnished by him. The order of release which defeats the very purpose for which the Act was enacted, should not have been passed. [Para 11] [126-E-H; 127-A-B]

5. The High Court has totally ignored the fact that any order passed u/s. 6-A is appealable u/s. 6-C of the Act. Therefore, to consider such an application for release of the said goods was totally unwarranted at least at that stage. [Para 12] [127-C]

6. Generally, no court has the competence to issue a direction contrary to law and nor can the court direct an authority to act in contravention of statutory provisions. The courts are meant to enforce the rule of law and not to pass the orders or directions which are contrary to what has been injected by law. [Para 13] [127-D-E]

Manish Goel v. Rohini Goel **AIR 2010 SC 1099: 2010 (2) SCR 414;** *Vice Chancellor,University of Allahabad and Ors. v. Dr. Anand Prakash Mishra and Ors.* **(1997) 10 SCC 264:1996 (10) Suppl. SCR 175;** *Karnataka State Road Transport Corporation v. Ashrafulla Khan and Ors.* **AIR 2002 SC 629: 2002 (1) SCR 194 - relied on.**

7. The impugned orders passed by High Court are set aside and the case is remanded back to the High Court to consider afresh after examining all the factual and legal issues involved in the said case. [Para 14] [127-F-G]

Case Law Reference:

1990 (2) SCR 987	**Relied on**	**Para 9**
2008 (6) SCR 747	**Relied on**	**Para 9**
2010 (2) SCR 414	**Relied on**	**Para 13**
1996 (10) Suppl. SCR 175	**Relied on**	**Para 13**
2002 (1) SCR 194	**Relied on**	**Para 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1075-1076 of 2012.

From the Judgment & Order dated 15.03.2011 of the High Court of Patna in Cr. WJC No. 215 of 2011 and final Judgment & Order dated 29.04.2011 in Cr. Misc. No. 14629 of 2011.

Gopal Singh, Manish Kumar for the Appellants.

Nagendra Rai, Gaurav Agrawal, Shankar Narayanan for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J.

Leave granted.

1. These appeals have been preferred against the impugned judgments and orders dated 15.3.2011 in Cr.WJC No. 215 of 2011 and dated 29.4.2011 in Crl. Misc. No. 14629 of 2011 of the Patna High Court, by which a huge quantity of wheat seized by the appellant from the premises of the respondents under the provisions of Essential Commodities

Act, 1955 (hereinafter referred to as 'EC Act') has been released.

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

A. On 15.2.2011, a secret information was received by the department of the appellants in respect of illegal storage of subsidized food grains of Public Distribution Scheme by the respondents which led to the raid upon the premises of M/s Harsh Tejas Nutrition Pvt. Ltd., (Flour Mill of the respondents) situate at Patna, New Bypass Road near Petrol Pump. The Sub-Divisional Officer, Patna City and other officers from the local police raided the premises of the said flour mill and found off loading of wheat from Truck bearing registration No. BHI 1899. The driver and other workers fled away. It was found that the grains bags had the seal of Food Corporation of India, (hereinafter called `FCI'), U.P. Government Food Department, Food and Supply Department, Haryana; and Government of Punjab. The seized material made it apparent that there had been diversion of FCI grains for the purpose of black marketing. Appellants seized 5923 bags filled with more than 2991 quintals wheat.

B. None from the company where the raid was conducted came forward to claim the seized material or to justify the storage of same. Thus, the FIR bearing case No. 15/2011 dated 18.2.2011 was lodged under Sections 7 and 10 of the EC Act in addition to the appropriate Sections 421/424 of the Indian Penal Code, 1860 (hereinafter called 'IPC') in respect of the said seizure.

C. The respondents herein preferred Criminal Writ Petition No. 215/2011 for quashing confiscation proceedings and/or release of the confiscated goods.

D. The High Court allowed the said writ petition within a very short span vide order dated 15.3.2011 and subject to

certain procedural compliances observed that continuing seizure of the seized articles for a long time may not be justified and therefore the High Court issued direction for release of the said wheat.

E. The respondent approached the Chief Judicial Magistrate, Patna, for releasing the wheat in pursuance of the order passed by the High Court on 15.3.2011 by moving an application. The learned CJM dismissed the application of the respondent on 7.4.2011 on the ground that he could not produce any document which may show their ownership to the said seized material.

F. The respondent again approached the High Court by filing Criminal Miscellaneous No. 14692/2011 which had been allowed vide order dated 29.4.2011.

Hence, these appeals.

3. Mr. Gopal Singh, learned counsel appearing for the State of Bihar has submitted that the orders had been passed by the High Court in a mechanical manner in utter disregard of the statutory provisions of the EC Act, particularly, the provisions of Sections 6-A and 6-E. Therefore, the impugned judgments and orders dated 15.3.2011 and 29.4.2011 are liable to be set aside.

4. On the contrary, Mr. Nagendra Rai, learned senior counsel appearing for the respondents has vehemently opposed the appeals contending that Sections 6-A and 6-E apply only where the goods are seized in pursuance of an order issued under Section 3 of the EC Act. In the instant case, no order had ever been issued under Section 3, therefore, the said provisions are not attracted. Respondents were able to show their ownership in respect of the seized materials. The High Court in the impugned judgments made it clear that release of the wheat was only an interim measure subject to the final decision in the case. Therefore, no interference is warranted

by the court, 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 EC Act was enacted to safeguard the public interest considering it necessary in the interests of the general public to control the production, supply and distribution of, trade and commerce in, certain commodities through the legislation. It was in the light of the aforesaid public policy that Section 3 of the EC Act empowered the Government to issue notifications and once a notification is issued, it enables the competent authority to confiscate the goods under Section 6-A and prosecution leading to punishment provided under Section 7 of the EC Act. The Collector has been empowered under Section 6-A, if it is found to be expedient to sell the seized commodity which is subject to natural decay, at a controlled price or by public auction or dispose of through Public Distribution System to avoid artificial shortages, maintain the price line and secure equitable distribution thereof through fair price shops as it is in the interest of the general public.

7. Admittedly, the High Court has not even taken a prima facie view that the State Government had not issued twice any order/notification under Section 3 of EC Act though the FIR made reference to clause 6(a) of the Public Distribution System (Control) Order, 2001 issued under Section 3 of the EC Act. Respondent also referred to the said Control Order 2001 in Para 3 of the Crl.W.J.C. No. 215 of 2011 filed by them. More so, the question of ownership of the goods seized is a question of fact which ought not to have been gone into by the High Court in its revisional or extra-ordinary jurisdiction. Further, there is nothing on record on the basis of which the issue of ownership has been decided by the High Court. There was no cogent material on record before the High Court on the basis of which direction to release the goods so seized could be issued.

8. We are at pains to observe that the High Court has dealt

with the issue in most casual and caviler manner without any application of mind showing complete disregard of the legislature enacting the provisions for general welfare.

9. This Court while dealing with a similar issue in *Shambhu Dayal Agarwala v. State of West Bengal & Anr.,* (1990) 3 SCC 549, held that whenever any essential commodity is seized, pending confiscation under Section 6-A, the Collector has no power to order release of the commodity in favour of the owner. Having regard to the scheme of the Act, the object and purpose of the statute and the mischief it seeks to guard, it was further held that the word "release" in Section 6-E is used in the limited sense of release for sale etc. so that the same becomes available to the consumer public. The court held as under:

> "... No unqualified and unrestricted power has been conferred on the Collector of releasing the commodity in the sense of returning it to the owner or person from whom it was seized even before the proceeding for confiscation stood completed and before the termination of the prosecution in the acquittal of the offender. Such a view would render Clause (b) of Section 7(1) totally nugatory and would completely defeat the purpose and object of the Act. The view that the Act itself contemplates a situation which would render Section 7(1)(b) otiose where the essential commodity is disposed of by the Collector under Section 6-A(2) is misconceived. Section 6-A does not empower the Collector to give an option to pay, in lieu of confiscation of essential commodity, a fine not exceeding the market value of the commodity on the date of seizure, as in the case of any animal, vehicle, vessel or other conveyance seized along with the essential commodity. Only a limited power of sale of the commodity in the manner prescribed by Section 6-A(2) is granted. The power conferred by Section 6-A(2) to sell the essential commodity has to be exercised in public interest for

> maintaining the supplies and for securing the equitable distribution of the essential commodity."

The said judgment was followed and approved by this Court after explaining the scope of the statutory provisions in *Oma Ram v. State of Rajasthan & Ors.,* (2008) 5 SCC 502.

10. What we found shocking in the instant case is that the petition was filed before the High Court for quashing of the FIR and alternatively for releasing the seized items and the High Court without giving any reason whatsoever disposed of the petition observing as under:

> "Considering the submissions of the parties, in the opinion of the court, continuing the seizure of the seized items for a long time may not be justified at least the seizure of the wheat."

This is the only reason given by the High Court without even considering what were the averments on behalf of the parties and without considering the requirement of the statutory provisions.

11. In the subsequent order dealing with the ownership of the wheat the High Court has only taken note of the fact that as the respondents herein were prepared to furnish adequate/ sufficient security to the satisfaction of the court below for release of the wheat in question, the wheat could have been released by the CJM. In case the learned CJM came to the conclusion after appreciating the evidence on record that the respondents/applicants were not in a position to show any document which may show their ownership to the wheat, there was no justification for the High Court to issue directions for release of such material merely because applicant could furnish the security.

If it is so, any stranger or third party may give sufficient security and get the seized goods release in his favour. Such a course is not permissible even while deciding the application

under Section 451/457 of the Code of Criminal Procedure, 1973. A person having no title/ownership over the seized material may get the same released on furnishing security and sell it in black market and earn profit several times more than the amount of security furnished by him. We fail to understand as how such an order of release which defeat the very purpose for which the EC Act was enacted, could be passed.

12. The High Court has totally ignored the fact that any order passed under Section 6-A is appealable under Section 6-C of the EC Act. Therefore, to consider such an application for release of the goods was totally unwarranted at least at that stage.

13. In *Manish Goel v. Rohini Goel,* AIR 2010 SC 1099, this Court has held that generally, no Court has competence to issue a direction contrary to law nor the Court can direct an authority to act in contravention of the statutory provisions. The courts are meant to enforce the rule of law and not to pass the orders or directions which are contrary to what has been injected by law. (See also: *Vice Chancellor, University of Allahabad & Ors. v. Dr. Anand Prakash Mishra & Ors.,* (1997) 10 SCC 264; and *Karnataka State Road Transport Corporation v. Ashrafulla Khan & Ors.,* AIR 2002 SC 629).

14. Learned counsel for the parties are not in a position to reveal the status of the criminal proceedings initiated against the respondents. In such a fact-situation, as has been suggested by learned counsel for the parties we set aside the aforesaid judgments and orders dated 15.3.2011 and 29.4.2011 and remand the case back to the High Court to consider afresh after examining all factual and legal issues involved in the case. Till the disposal of the case afresh, interim order passed by this Court on 31.10.2011 shall remain operative.

The appeals stand disposed of accordingly.

K.K.T. Appeals allowed.

SHUDHAKAR
v.
STATE OF M.P.
(Criminal Appeal No. 2472 of 2009)

JULY 24, 2012

[SWATANTER KUMAR AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Evidence Act, 1872 - s.32 - Multiple dying declarations - Which one should be believed by the Court - Principles governing such determination - Death of appellant's wife due to severe burn injuries - Deceased made three dying declarations - Naib Tehsildar, DW1, recorded the first dying declaration wherein deceased stated that she received the burn injuries from a stove while cooking food - Second and third dying declarations were recorded by Tehsildar (PW9) and Sub-Inspector (PW7), respectively, in both of which deceased stated that appellant had put kerosene oil on her and set her on fire and further that earlier she had given wrong statement on the tutoring of appellant - Conviction of appellant u/s.302 IPC - Challenge to - Held: In cases where multiple dying declarations are involved and such declarations are either contradictory or at variance with each other to a large extent, the test of common prudence would be to first examine which of the dying declarations is corroborated by other prosecution evidence - Further, the attendant circumstances, the condition of the deceased at the relevant time, the medical evidence, the voluntariness and genuineness of the statement made by the deceased, physical and mental fitness of the deceased and possibility of the deceased being tutored are some of the factors which would guide the exercise of judicial discretion by the Court in such matters - In the instant case, on examination of the evidence, it is clear that the first dying declaration, which had completely absolved the appellant,

was not voluntary and not made by free will of the deceased - Relatives of appellant were present at the time of making the first dying declaration and deceased had stated wrongly on the tutoring of appellant - Further, before recording the dying declaration, DW1 had not obtained fitness certificate from the doctor on duty - The second and third dying declarations, which implicated the appellant, however, had been recorded after due certification by the doctor and were also authentic, voluntary and duly corroborated by other prosecution witnesses including the medical evidence, and, thus, could safely be made the basis for conviction - Conviction of appellant accordingly sustained - Penal Code, 1860 - s.302.

Evidence Act, 1872 - s.32 - Dying declaration - Admissibility and evidentiary value of - Held: 'Dying declaration' is the last statement made by a person at a stage when he is in serious apprehension of his death and expects no chances of his survival - At such time, it is expected that a person will speak the truth and only the truth - Normally in such situations the courts attach the intrinsic value of truthfulness to such statement - Once such statement has been made voluntarily, it is reliable and is not an attempt by the deceased to cover up the truth or falsely implicate a person, then the courts can safely rely on such dying declaration and it can form the basis of conviction - More so, where the version given by the deceased as dying declaration is supported and corroborated by other prosecution evidence, there is no reason for the courts to doubt the truthfulness of such dying declaration.

Evidence Act, 1872 - s.114 - Adverse inference under - When arises - Held: Question of presumption in terms of s.114 only arises when an evidence is withheld from the Court and is not produced by any of the parties to the lis.

Criminal Trial - Onus of proof - On prosecution and on defence - Held: The prosecution has to prove its case beyond

any reasonable doubt while the defence has to prove its case on the touchstone of preponderance of probabilities.

The appellant's wife received severe burn injuries and was admitted in the hospital where she ultimately died. It was alleged by the prosecution that the appellant had assaulted his wife and poured kerosene oil on her and thereafter, put her ablaze by lighting a match stick. Before her death, the appellant's wife made three dying declarations. The Naib Tehsildar, DW1, recorded the first dying declaration (Exhibit D/2). In her first dying dec*+laration, the deceased did not implicate appellant and stated that she received the burn injuries from a stove while cooking food. Two hours later, the second declaration (Exhibit P-12) was recorded by the Tehsildar (PW9) . The third dying declaration (Exhibit P-6) was recorded by Sub-Inspector (PW7) in presence of two independent witnesses, 'BK' and 'AR'. In the two subsequent dying declarations recorded by PW9 and PW7, respectively, the deceased specifically implicated the accused by stating that he had put kerosene oil on her and set her on fire and further stating that earlier she had given wrong statement on the tutoring of the appellant.

The trial court convicted the appellant under Section 302 IPC and sentenced him to rigorous imprisonment for life. The conviction and sentence was affirmed by the High Court.

The appellant inter alia contended before this Court that since the first dying declaration had completely absolved him, the subsequent dying declarations could not be made the basis of his conviction; that the first dying declaration should be preferred as it is the most genuine statement made by the deceased and in the present case it entitled the appellant for an order of acquittal.

Thus, an important question of criminal jurisprudence as to in a case of multiple variable dying declarations, which of the dying declaration would be taken into consideration by the Court, what principles shall guide the judicial discretion of the Court or whether such contradictory dying declarations would unexceptionally result in prejudice to the case of the prosecution, arose for consideration in the instant appeal.

Dismissing the appeal, the Court

HELD: 1. It is a settled principle of law that the prosecution has to prove its case beyond any reasonable doubt while the defence has to prove its case on the touchstone of preponderance of probabilities. Despite such a concession, the accused-appellant has miserably failed to satisfy the court by proving his stand which itself was vague, uncertain and, to some extent, even contradictory. [Para 9] [140-C-D]

2. The 'dying declaration' is the last statement made by a person at a stage when he is in serious apprehension of his death and expects no chances of his survival. At such time, it is expected that a person will speak the truth and only the truth. Normally in such situations the courts attach the intrinsic value of truthfulness to such statement. Once such statement has been made voluntarily, it is reliable and is not an attempt by the deceased to cover up the truth or falsely implicate a person, then the courts can safely rely on such dying declaration and it can form the basis of conviction. More so, where the version given by the deceased as dying declaration is supported and corroborated by other prosecution evidence, there is no reason for the courts to doubt the truthfulness of such dying declaration. [Para 20] [149-B-D]

Laxman v. State of Maharashtra **(2002) 6 SCC 710;** *Bhajju @ Karan v. State of M.P.* **(2012) 4 SCC 327;** *Surinder Kumar v. State of Haryana* **(2011) 10 SCC 173: 2001 (12) SCR 1205;** *Chirra Shivraj v. State of Andhra Pradesh* **(2010) 14 SCC 444: 2010 (15) SCR 673** *and Govindaraju @ Govinda v. State of Sriramapuram P.S. & Anr.* **(2012) 4 SCC 722 - referred to.**

Muthu Kutty v. State **(2005) 9 SCC 113: 2004 (6) Suppl. SCR 222 - cited.**

3.1. In cases where multiple dying declarations are involved and such declarations are either contradictory or at variance with each other to a large extent, the test of common prudence would be to first examine which of the dying declarations is corroborated by other prosecution evidence. Further, the attendant circumstances, the condition of the deceased at the relevant time, the medical evidence, the voluntariness and genuineness of the statement made by the deceased, physical and mental fitness of the deceased and possibility of the deceased being tutored are some of the factors which would guide the exercise of judicial discretion by the Court in such matters. [Para 21] [149-E-G]

3.2. In the instant case, after examining the evidence it is clear that the first dying declaration was not voluntary and not made by free will of the deceased for the following reasons: i) When the deceased was brought to the hospital, she was accompanied by the accused-appeellant and other relations. While her statement Exhibit D-2 was recorded by DW1, Naib Tehsildar, the accused-appellant and his relations were present by the side of the deceased; ii) DW1, though mentions in his statement that the deceased was fully conscious, chose not to obtain any fitness certificate from the doctor on duty. In spite of it being a rule of caution, in the peculiar

facts of the present case where the deceased had suffered 97 per cent burn injuries, DW1 should have obtained the fitness certificate from the doctor; iii) The statement of the deceased was totally tilted in favour of her husband and the version put forward was that she had caught fire from the stove while cooking. This appears to be factually incorrect inasmuch as if she had caught fire from the stove, the question of the mattress and other items catching fire, which were duly seized and recovered by the Investigating Officer, would not have arisen; iv) Furthermore, within a short while, after her first statement, she changed her view. Exhibit P12, the second dying declaration, was recorded at 6.30 p.m. on the same day after due certification by the doctor that she was conscious and in a fit condition to make the statement. This statement was recorded by PW9, the Tehsildar. In his statement, PW9 has categorically stated that he was directed by the SDM to record the dying declaration. He had even prepared memo, Exhibit P-13, and sent the same to the Police Station. He specifically stated that the deceased was in a great pain and was groaning. She was not even fully conscious. According to him, he was not even informed of recording of the fact of the previous dying declaration. He had carried with him the memo issued by the SDM for recording the statement of the deceased. No such procedure was adhered to by DW1. All these proceedings are conspicuous by their very absence in the exhibited documents and the statement of the said witnesses; v) The third dying declaration which was recorded by PW7, Sub-Inspector, was also recorded after due certification and in presence of the independent witnesses 'BK' and 'AR'. Furthermore, PW6 gave the complete facts right from the place of occurrence to the recording of dying declaration of the deceased. He categorically denied the suggestion that the deceased had stated to him that she caught fire from the stove. Rather, he asserted that the

deceased had specifically told him that the accused had put her on fire; vi)The second and third dying declarations of the deceased are quite in conformity with each other and are duly supported by PW6, PW7, PW9 and the medical evidence produced on record. The accused, having suffered 97 per cent burns, could not have been fully conscious and painless, as stated by DW1. According to DW2, the doctor, the accused could suffer the injuries that he suffered when the deceased would have pushed him back when he was attempting to burn the deceased; vii) Besides all this, the accused had admitted the deceased to be his wife and they were living together and that she caught fire. It was expected of him to explain to the Court as to how she had caught the fire. Strangely, he did not state the story of his wife catching fire from the stove in his statement under Section 313 CrPC, though the trend of cross-examination of the prosecution witnesses on his behalf clearly indicates that stand; viii) The theory of the deceased catching fire from the stove is neither probable nor possible in the facts of the present case. The kind of burn injuries she suffered clearly shows that she was deliberately put on fire, rather than being injured as a result of accidental fire; ix) Besides the deceased had herself stated the reason behind her falsely making the first declaration. According to her, her husband was likely to lose his job if she implicated him. It is clear from the record that the relatives of the accused were present at the time of making the first dying declaration and the deceased had stated wrongly on the tutoring of her husband; x) The recoveries from the place of occurrence clearly show a struggle or fight between the deceased and the accused before she suffered the burn injuries and xi) Another significant aspect of the present case is that the deceased had also made a dying declaration, even prior to the three written dying declarations, to PW1, the landlady and PW6. She had categorically stated to

these witnesses when death was staring her in the eyes that she was burnt by her husband by pouring kerosene oil on her. Both these witnesses successfully stood the subtle cross-examination conducted by the counsel appearing for the accused. There is no reason to disbelieve these witnesses who were well known to both, the deceased as well as the accused. [Para 23] [155-D-H; 156-A-H; 157-A-H; 158-A-E]

3.3. In conclusion, the second and third dying declarations are authentic, voluntary and duly corroborated by other prosecution witnesses including the medical evidence. These dying declarations, read in conjunction with the statement of the prosecution witnesses, can safely be made the basis for conviction of the accused. [Para 24] [158-F-G]

Lakhan v. State of M.P. **(2010) 8 SCC 514: 2010 (9) SCR 705;** *Nallam Veera Stayanandam and Others v. Public Prosecutor, High Court of A.P.* **(2004) 10 SCC 769 and** *Sher Singh & Anr. v. State of Punjab* **(2008) 4 SCC 265: 2008 (2) SCR 959 - referred to.**

4. The argument that the first dying declaration recorded by DW1 had not been produced on record by the prosecution and, therefore, an adverse inference should be drawn against the prosecution in terms of Section 114 of the Evidence Act , is without any merit. This document has not only been produced but has even been critically examined by the Trial Court as well as the High Court. It is a settled principle of law of evidence that the question of presumption in terms of Section 114 of the Evidence Act only arises when an evidence is withheld from the Court and is not produced by any of the parties to the lis. [Para 25] [158-G-H; 159-A]

5. There is no infirmity in the appreciation of evidence and law in the concurrent judgments of the courts below. [Para 26] [159-B]

Case Law Reference:

(2002) 6 SCC 710	**referred to**	**Para 14**
2004 (6) Suppl. SCR 222	**cited**	**Para 14**
2010 (9) SCR 705	**referred to**	**Para 15**
(2012) 4 SCC 327	**referred to**	**Para 16**
2001 (12) SCR 1205	**referred to**	**Para 16**
2010 (15) SCR 673	**referred to**	**Para 17**
(2012) 4 SCC 722	**referred to**	**Para 19**
(2004) 10 SCC 769	**referred to**	**Para 22**
2008 (2) SCR 959	**referred to**	**Para 22**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2472 of 2009.

From the Judgment & Order dated 26.11.2007 of the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No. 827 of 1996.

Nirmal Chopra for the Appellant.

Sidhartha Dave, Jemtiben AO, Vibha Datta Makhija for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. An important question of criminal jurisprudence as to in a case of multiple variable dying declarations, which of the dying declaration would be taken into consideration by the Court, what principles shall guide the judicial discretion of the Court or whether such contradictory dying declarations would unexceptionally result in prejudice to the case of the prosecution, arises in the present case.

2. The facts as brought out in the case of the prosecution

are that the accused Shudhakar was married to the deceased Ratanmala and they used to live at Ganesh Chowk Seoni, Tehsil and District Seoni, Madhya Pradesh. They were living in the house of one Krishna Devi Tiwari. The accused was suspicious about the character of his wife Ratanmala. On the date of occurrence, i.e., 25th July, 1995, there was argument between the husband and the wife in consequence to which the accused assaulted Ratanmala. Thereafter, he poured kerosene oil on her and put her ablaze by lighting a match stick due to which there was smoke in the house. The people living nearby gathered around the house upon seeing the smoke and finding Ratanmala in burning condition, took her to the hospital wherein she was admitted by PW8, Dr. M.N. Tiwari and was occupying bed No.10 of the surgical ward of the district hospital. Except the upper portion, her entire body had been burnt. Her body was smelling of kerosene. The injuries were fresh. According to the medical evidence, they were caused within five hours and the burn injuries were fatal for life. As per the statement of PW4, Dr. H.V. Jain, one Dr. Smt. A. Verma, lady doctor, gynaecologist had accompanied him for the post mortem of the dead body of the deceased which was brought by Constable Bhoje Lal from Seoni. Statement of PW4 clearly shows that upon post mortem examination, Rigor Mortis was found on the entire dead body. Both the eyes were closed, superficial burns were present on the entire body. The skin had separated at a number of places. The body was burnt between 97 per cent to 100 per cent. There were burn injuries on the skull and occipital region. The cause of death was shock and hipobolamar which was caused due to severe burn injuries and due to fluid loss.

3. It is the case of the prosecution that Ratanmala had told the people gathered there that the accused had burnt her by pouring kerosene oil on her. When she reached the hospital, the doctor had informed the police. The doctors also informed the Naib Tehsildar, DW1, who came to the hospital and recorded the first dying declaration (Exhibit D/2) of the deceased Ratanmala at 4.35 p.m. on 25th July, 1995. In her first dying

declaration, she did not implicate her husband and stated that she received the burn injuries from a stove while cooking food. Before her death, two more dying declarations were recorded in the hospital. One (the second) declaration (Exhibit P-12) was recorded by Rajiv Srivastava, Tehsildar (PW9) at 6.30 p.m. on the same date. In relation thereto, Dr. Jain had endorsed the certificate of fitness of the deceased to make the statement. The third dying declaration (Exhibit P-6) was recorded by Sub-Inspector D.C. Doheria, (PW7) in presence of two independent witnesses, Bharat Kumar and Abdul Rehman. In these two subsequent dying declarations recorded by PW9 and PW7, respectively, the deceased had specifically implicated the accused by clearly stating that he had put kerosene oil on her and set her on fire. The reason for not implicating her husband in her first dying declaration was that there was every likelihood that his husband would lose the job.

4. Unfortunately, she succumbed to the burn injuries and died in the hospital itself. Inquest proceedings were carried out. The Investigating Officer prepared the site plan and the body of the deceased was subject to post mortem which was performed by PW4, Dr. H.V. Jain. The Investigating Officer recovered matches as well as burnt match, broken mangalsutra and burnt saree from the place of occurrence. Among certain other articles recovered from the site, one can was also recovered in which about one litre of kerosene oil was still remaining.

5. Now, we may discuss some of the prosecution witnesses. PW1, Krishna Bai Tiwari is the landlady in whose house the accused and the deceased used to live. According to her, quarrels used to take place between the husband and the wife and even cooked food used to be left behind in their house. The accused frequently used to be under the influence of liquor. About 4-6 days prior to the date of occurrence, she had been called by the deceased to request the accused to have food. According to this witness, on the date of occurrence,

the deceased had requested her to accompany her to the bank for opening an account, which she had done and a bank account in the name of the deceased was opened. Thereafter, she went upstairs but after some time, the boys of the locality told her that smoke was coming out from the room upstairs. When she went upstairs along with other people, she saw the deceased in flames. They doused the flames in the mattress in an attempt to save the deceased. On being asked, Ratanmala told her that she had been burnt by the accused by pouring kerosene oil on her.

6. PW3, Gunwant, father of the deceased, is another witness who stated that the deceased often told him that the accused, after drinking liquor, used to beat her. The sister of the accused had come and informed him that the deceased had received burn injuries and was admitted to the hospital.

7. PW5, Rajender Dubey, is a witness who was present near the house of the accused at the time of the occurrence and after seeing the fire, he had gone up to the house of the accused and saw that smell of kerosene was coming from the room. The deceased's body was burnt and she told him that her husband had poured kerosene on her body and set her on fire. To similar effect is the statement of PW6, Mohan Lal Yadav. This witness, however, added that the accused was trying to extinguish the fire. Further, as already noticed, PW7, D.C. Daharia, had recorded her statement (Exhibit P-6). Even the accused was stated to be present at the time of recording of the third dying declaration and she clarified that she had not received burn injuries from the stove, as said by her earlier. We have already noticed the evidence of the doctors.

8. It is evident that the defence had examined two witnesses, namely, DW1, Sumer Singh, Naib Tehsildar and DW2, Dr. S.L. Multani. DW1 had recorded the first dying declaration of the deceased. According to this witness and as per Exhibit D2, the statement recorded by him, it is clear that he did not take the certification of the doctor prior to the

recording of the statement to the effect that she was in a fit state of mind to make the statement. Exhibit P12 was the second dying declaration that was recorded and Kamat Prasad Sonadia, the witness was present at the time of recording of this dying declaration. DW2, Dr. S.L. Multani who was examined by the defence also stated that if a person tries to burn another and the burnt person pushes, then it is possible to suffer such injuries as had been suffered by the accused.

9. It is a settled principle of law that the prosecution has to prove its case beyond any reasonable doubt while the defence has to prove its case on the touchstone of preponderance and probabilities. Despite such a concession, the accused has miserably failed to satisfy the court by proving his stand which itself was vague, uncertain and, to some extent, even contradictory.

10. Exhibit P12, the second declaration of the deceased can be usefully referred to at this stage as under :

"Certified that Ratnabai W/o Sudhakar admitted in FSW is fully conscious to give her statement.

Sd/-

25.7.95.

6.30 P.M.

What is your name :- Ratna Time 6.30

Husband's name	:	Sudhakar
Age and place of	:	21 Years Ganesh
Residence	:	Chowk.
What happened	:	My husband Sudhakar burnt me.
Shy burnt	:	Today I had gone along with mother to get passbook prepared. After

returning back, my husband quarreled with me and gave filthy abuses and said that you are a bad character and that you have illicit relationship. After that my husband pour kerosene oil over me and set me on fire. Earlier I had given wrong statement on tutoring of my husband.

Sd/-
25.7.95
Time 6.30 P.M.

Certified that Pt was conscious to giver her statement.

Sd/- 25.7.95
Time 6.45"

11. To similar effect is the third dying declaration, however, in some more detail, which was recorded in presence of witnesses by the Investigating Officer. After the prosecution evidence was concluded, the statement of the accused under Section 313 of the Code of Criminal Procedure, 1973 (CrPC) was recorded wherein the accused admitted the fact that the deceased was his wife and she died because of burn injuries. Rest of the incriminating circumstances and evidence put to him were disputed and denied by the accused. However, in answer to question number 13, as to whether he would like to say something in his defence, he stated that his wife Ratanmala died in a fire incident and he had made efforts to save her and in that process he also suffered some injuries. The accused denied that he had put her on fire and deposed that he was innocent.

12. The learned Trial Court found that the prosecution had been able to prove its case beyond reasonable doubt and, thus, held the accused guilty of an offence under Section 302 IPC and punished him to undergo imprisonment for life and to pay a fine of Rs.5,000/-, in default thereof to undergo one year's rigorous imprisonment.

13. Upon the appeal preferred by the accused, the High Court affirmed the judgment of conviction and order of sentence and dismissed the appeal, giving rise to the present appeal.

14. The main argument advanced by the learned counsel appearing for the appellant, while impugning the judgment under appeal, is that the deceased had made various dying declarations. The first dying declaration had completely absolved the accused. Recording of subsequent dying declarations (Exhibit D2) could not be made the basis of conviction keeping in view the facts and circumstances of the present case. Reliance was placed upon the judgment of this Court in the case of *Laxman v. State of Maharashtra* [(2002) 6 SCC 710] to contend that the first dying declaration should be believed and accused be acquitted as it was not necessary that there should be due certification by the doctor as a condition precedent to recording of the dying declaration. It has also been argued that the prosecution concealed from the Court and did not itself produce the first dying declaration which has been proved by DW1. Thus, presumption under Section 114 of the Indian Evidence Act, 1872 (for short the 'the Evidence Act') should be drawn against the prosecution and benefit be given to the accused. The first dying declaration should be preferred as it is the most genuine statement made by the deceased and in the present case will entitle the accused for an order of acquittal by this Court. Reliance has been placed upon the judgment of this Court in the case of *Muthu Kutty v. State* [(2005) 9 SCC 113] in that regard.

15. To the contrary, the argument on behalf of the State is that the first dying declaration is based on falsehood and was

made under the influence of the family members of the accused. The second and third dying declarations had been recorded after due certification by the doctor and are duly corroborated by other prosecution evidence. The deceased herself has provided the reason why she had made the first dying declaration which was factually incorrect. While placing reliance upon the judgment of this Court in the case of *Lakhan v. State of M.P.* [(2010) 8 SCC 514], it has been contended that in the case of contradictory dying declarations, the one which is proved and substantiated by other evidence should be believed. Since Exhibit P12 is the true dying declaration of the deceased, the accused has rightly been convicted under Section 302 IPC and the present appeal is liable to be dismissed.

16. We may, now, refer to some of the judgments of this Court in regard to the admissibility and evidentiary value of a dying declaration. In the case of *Bhajju @ Karan v. State of M.P.* [(2012) 4 SCC 327], this Court clearly stated that Section 32 of the Evidence Act was an exception to the general rule against admissibility of hearsay evidence. Clause (1) of Section 32 makes statement of the deceased admissible, which has been generally described as dying declaration. The court, in no uncertain terms, held that it cannot be laid down as an absolute rule of law that dying declaration cannot form the sole basis of conviction unless it is corroborated by other evidence. The dying declaration, if found reliable, could form the basis of conviction. This principle has also earlier been stated by this Court in the case of *Surinder Kumar v. State of Haryana* (2011) 10 SCC 173 wherein the Court, while stating the above principle, on facts and because of the fact that the dying declaration in the said case was found to be shrouded by suspicious circumstances and no witness in support thereof had been examined, acquitted the accused. However, the Court observed that when a dying declaration is true and voluntary, there is no impediment in basing the conviction on such a declaration, without corroboration.

17. In the case of *Chirra Shivraj v. State of Andhra Pradesh* [(2010) 14 SCC 444], the Court expressed a caution that a mechanical approach in relying upon the dying declaration just because it is there, is extremely dangerous. The court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by other persons and where these ingredients are satisfied, the Court expressed the view that it cannot be said that on the sole basis of a dying declaration, the order of conviction could not be passed.

18. In the case of *Laxman* (supra), the Court while dealing with the argument that the dying declaration must be recorded by a Magistrate and the certificate of fitness was an essential feature, made the following observations. The court answered both these questions as follows:

> "3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either

tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and

truthful nature of the declaration can be established otherwise."

19. In *Govindaraju @ Govinda v. State of Sriramapuram P.S. & Anr.* [(2012) 4 SCC 722], the court inter alia discussed the law related to dying declaration with some elaboration: -

"23. Now, we come to the second submission raised on behalf of the appellant that the material witness has not been examined and the reliance cannot be placed upon the sole testimony of the police witness (eyewitness).

24. It is a settled proposition of law of evidence that it is not the number of witnesses that matters but it is the substance. It is also not necessary to examine a large number of witnesses if the prosecution can bring home the guilt of the accused even with a limited number of witnesses. In *Lallu Manjhi v. State of Jharkhand* (2003) 2 SCC 401, this Court had classified the oral testimony of the witnesses into three categories:

(a) wholly reliable;

(b) wholly unreliable; and

(c) neither wholly reliable nor wholly unreliable.

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

25. Equally well settled is the proposition of law that where there is a sole witness to the incident, his evidence has to be accepted with caution and after testing it on the touchstone of evidence tendered by other witnesses or evidence otherwise recorded. The evidence of a sole witness should be cogent, reliable and must essentially fit into the chain of events that have been stated by the

prosecution. When the prosecution relies upon the testimony of a sole eyewitness, then such evidence has to be wholly reliable and trustworthy. Presence of such witness at the occurrence should not be doubtful. If the evidence of the sole witness is in conflict with the other witnesses, it may not be safe to make such a statement as a foundation of the conviction of the accused. These are the few principles which the Court has stated consistently and with certainty.

26. Reference in this regard can be made to *Joseph v. State of Kerala* (2003) 1 SCC 465 and *Tika Ram v. State of M.P.* (2007) 15 SCC 760. Even in *Jhapsa Kabari v. State of Bihar* (2001) 10 SCC 94, this Court took the view that if the presence of a witness is doubtful, it becomes a case of conviction based on the testimony of a solitary witness. There is, however, no bar in basing the conviction on the testimony of a solitary witness so long as the said witness is reliable and trustworthy.

27. In *Jhapsa Kabari* (supra), this Court noted the fact that simply because one of the witnesses (a fourteen-year-old boy) did not name the wife of the deceased in the fardbeyan, it would not in any way affect the testimony of the eyewitness i.e. the wife of the deceased, who had given a graphic account of the attack on her husband and her brother-in-law by the accused persons. Where the statement of an eyewitness is found to be reliable, trustworthy and consistent with the course of events, the conviction can be based on her sole testimony. There is no bar in basing the conviction of an accused on the testimony of a solitary witness as long as the said witness is reliable and trustworthy.

28. In the present case, the sole eyewitness is stated to be a police officer i.e. PW 1. The entire case hinges upon the trustworthiness, reliability or otherwise of the testimony of this witness. The contention raised on behalf of the

appellant is that the police officer, being the sole eyewitness, would be an interested witness, and in that situation, the possibility of a police officer falsely implicating innocent persons cannot be ruled out.

29. Therefore, the first question that arises for consideration is whether a police officer can be a sole witness. If so, then with particular reference to the facts of the present case, where he alone had witnessed the occurrence as per the case of the prosecution.

30. It cannot be stated as a rule that a police officer can or cannot be a sole eyewitness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidence, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people; in that event, no credibility can be attached to the statement of such witness.

31. This Court in *Girja Prasad* (2007) 7 SCC 625 while particularly referring to the evidence of a police officer said that it is not the law that police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption applies as much in favour of a police officer as any other person. There is also no rule of law which lays down that no conviction can be recorded on the testimony of a police officer even if such evidence is otherwise reliable and trustworthy. The rule of prudence may require more careful scrutiny of their evidence. If such a presumption is raised against the police officers without exception, it will be an attitude which could neither do credit to the magistracy nor good to the

public, it can only bring down the prestige of the police administration."

20. The 'dying declaration' is the last statement made by a person at a stage when he in serious apprehension of his death and expects no chances of his survival. At such time, it is expected that a person will speak the truth and only the truth. Normally in such situations the courts attach the intrinsic value of truthfulness to such statement. Once such statement has been made voluntarily, it is reliable and is not an attempt by the deceased to cover up the truth or falsely implicate a person, then the courts can safely rely on such dying declaration and it can form the basis of conviction. More so, where the version given by the deceased as dying declaration is supported and corroborated by other prosecution evidence, there is no reason for the courts to doubt the truthfulness of such dying declaration.

21. Having referred to the law relating to dying declaration, now we may examine the issue that in cases involving multiple dying declarations made by the deceased, which of the various dying declarations should be believed by the Court and what are the principles governing such determination. This becomes important where the multiple dying declarations made by the deceased are either contradictory or are at variance with each other to a large extent. The test of common prudence would be to first examine which of the dying declarations is corroborated by other prosecution evidence. Further, the attendant circumstances, the condition of the deceased at the relevant time, the medical evidence, the voluntariness and genuineness of the statement made by the deceased, physical and mental fitness of the deceased and possibility of the deceased being tutored are some of the factors which would guide the exercise of judicial discretion by the Court in such matters. In the case of *Lakhan* (supra), this Court provided clarity, not only to the law of dying declaration, but also to the question as to which of the dying declarations has to be preferably relied upon by the Court in deciding the question of guilt of the accused under

the offence with which he is charged. The facts of that case were quite similar, if not identical to the facts of the present case. In that case also, the deceased was burnt by pouring kerosene oil and was brought to the hospital by the accused therein and his family members. The deceased had made two different dying declarations, which were mutually at variance. The Court held as under :

> "9. The doctrine of dying declaration is enshrined in the legal maxim nemo moriturus praesumitur mentire, which means "a man will not meet his Maker with a lie in his mouth". The doctrine of dying declaration is enshrined in Section 32 of the Evidence Act, 1872 (hereinafter called as "the Evidence Act") as an exception to the general rule contained in Section 60 of the Evidence Act, which provides that oral evidence in all cases must be direct i.e. it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.
>
> 10. This Court has considered time and again the relevance/probative value of dying declarations recorded under different situations and also in cases where more than one dying declaration has been recorded. The law is that if the court is satisfied that the dying declaration is true and made voluntarily by the deceased, conviction can be based solely on it, without any further corroboration. It is neither a rule of law nor of prudence that a dying declaration cannot be relied upon without corroboration. When a dying declaration is suspicious, it should not be relied upon without having corroborative evidence. The court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased must be in a fit state of mind to make the declaration and must identify

the assailants. Merely because a dying declaration does not contain the details of the occurrence, it cannot be rejected and in case there is merely a brief statement, it is more reliable for the reason that the shortness of the statement is itself a guarantee of its veracity. If the dying declaration suffers from some infirmity, it cannot alone form the basis of conviction. Where the prosecution version differs from the version given in the dying declaration, the said declaration cannot be acted upon. (Vide *Khushal Rao v. State of Bombay*[1]*, Rasheed Beg v. State of M.P., K. Ramachandra Reddy v. Public Prosecutor, State of Maharashtra v. Krishnamurti Laxmipati Naidu, Uka Ram v. State of Rajasthan, Babulal v. State of M.P., Muthu Kutty v. State, State of Rajasthan v. Wakteng* and *Sharda v. State of Rajasthan.*)

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23. The second dying declaration was recorded by Shri Damodar Prasad Mahure, Assistant Sub-Inspector of Police (PW 19). He was directed by the Superintendent of Police on telephone to record the statement of the deceased, who had been admitted in the hospital. In that statement, she had stated as under:

> "On Sunday, in the morning, at about 5.30 a.m., my husband Lakhan poured the kerosene oil from a container on my head as a result of which kerosene oil spread over my entire body and that he (Lakhan) put my sari afire with the help of a chimney, due to which I got burnt."

She had also deposed that she had written a letter to her parents requesting them to fetch her from the matrimonial home as her husband and in-laws were harassing her. The said dying declaration was recorded after getting a certificate from the doctor stating that she was in a fit physical and mental condition to give the statement.

24. As per the injury report and the medical evidence it remains fully proved that the deceased had the injuries on the upper part of her body. The doctor, who had examined her at the time of admission in hospital, deposed that she had burn injuries on her head, face, chest, neck, back, abdomen, left arm, hand, right arm, part of buttocks and some part of both the thighs. The deceased was 65% burnt. At the time of admission, the smell of kerosene was coming from her body.

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26. Undoubtedly, the first dying declaration had been recorded by the Executive Magistrate, Smt Madhu Nahar (DW 1), immediately after admission of the deceased Savita in the hospital and the doctor had certified that she was in a fit condition of health to make the declaration. However, as she had been brought to the hospital by her father-in-law and mother-in-law and the medical report does not support her first dying declaration, the trial court and the High Court have rightly discarded the same.

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30. Thus, in view of the above, we reach the following inescapable conclusions on the questions of fact:

(c) The second dying declaration was recorded by a police officer on the instruction of the Superintendent of Police after getting a certificate of fitness from the doctor, which is corroborated by the medical evidence and is free from any suspicious circumstances. More so, it stands corroborated by the oral declaration made by the deceased to her parents, Phool Singh (PW 1), father and Sushila (PW 3), mother.

22. In the case of *Nallam Veera Stayanandam and Others v. Public Prosecutor,* High Court of A.P. [(2004) 10 SCC 769],

this Court, while declining to except the findings of the Trial Court, held that the Trial Court had erred because in the case of multiple dying declarations, each dying declaration has to be considered independently on its own merit so as to appreciate its evidentiary value and one cannot be rejected because of the contents of the other. In cases where there is more than one dying declaration, it is the duty of the court to consider each one of them in its correct perspective and satisfy itself which one of them reflects the true state of affairs. Similarly, in the case *Sher Singh & Anr. v. State of Punjab* [(2008) 4 SCC 265], the Court held that absence of doctor's certification is not fatal if the person recording the dying declaration is satisfied that the deceased was in a fit state of mind and the requirement of doctor's certificate is essentially a rule of caution. The Court, while dealing with the case involving two dying declarations observed that the first dying declaration could not be relied upon as it was not free and voluntary and second statement was more probable and natural and mere contradiction with the first will not be fatal to the case of the prosecution. The Court held as under :

> "16. Acceptability of a dying declaration is greater because the declaration is made in extremity. When the party is at the verge of death, one rarely finds any motive to tell falsehood and it is for this reason that the requirements of oath and cross-examination are dispensed with in case of a dying declaration. Since the accused has no power of cross-examination, the court would insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court should ensure that the statement was not as a result of tutoring or prompting or a product of imagination. It is for the court to ascertain from the evidence placed on record that the deceased was in a fit state of mind and had ample opportunity to observe and identify the culprit. Normally, the court places reliance on the medical evidence for reaching the conclusion whether the person

making a dying declaration was in a fit state of mind, but where the person recording the statement states that the deceased was in a fit and conscious state, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of mind of the declarant, the dying declaration is not acceptable. What is essential is that the person recording the dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement without there being the doctor's opinion to that effect, it can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certificate by the doctor is essentially a rule of caution and, therefore, the voluntary and truthful nature of a statement can be established otherwise.

17. In the present case, the first dying declaration was recorded on 18-7-1994 by ASI Hakim Singh (DW 1). The victim did not name any of the accused persons and said that it was a case of an accident. However, in the statement before the court, Hakim Singh (DW 1) specifically deposed that he noted that the declarant was under pressure and at the time of recording of the dying declaration, her mother-in-law was present with her. In the subsequent dying declaration recorded by the Executive Magistrate Rajiv Prashar (PW 7) on 20-7-1994, she stated that she was taken to the hospital by the accused only on the condition that she would make a wrong statement. This was reiterated by her in her oral dying declaration and also in the written dying declaration recorded by SI Arvind Puri (PW 8) on 22-7-1994. The first dying declaration exonerating the accused persons made immediately after she was admitted in the hospital was under threat and duress that she would be admitted in the hospital only if she would give a statement in favour of the accused persons in order to save her in-laws and husband. The first dying declaration does not appear to be coming from a

person with free mind without there being any threat. The second dying declaration was more probable and looks natural to us. Although it does not contain the certificate of the doctor that she was in a fit state of mind to give the dying declaration but the Magistrate who recorded the statement had certified that she was in a conscious state of mind and in a position to make the statement to him. Mere fact that it was contrary to the first declaration would not make it untrue. The oral dying declaration made to the uncle is consistent with the second dying declaration implicating the accused persons stating about their involvement in the commission of crime. The third dying declaration recorded by the SI on the direction of his superior officer is consistent with the second dying declaration and the oral dying declaration made to her uncle though with some minor inconsistencies. The third dying declaration was recorded after the doctor certified that she was in a fit state of mind to give the statement."

23. Examining the evidence in the present case in light of the above-stated principles, we have no hesitation in holding that the first dying declaration was not voluntary and made by free will of the deceased. This we say so for variety of reasons:

1) When the deceased was brought to the hospital, she was accompanied by the accused and other relations. While her statement Exhibit D-2 was recorded by DW1, Naib Tehsildar, the accused and his relations were present by the side of the deceased.

2) DW1, though mentions in his statement that the deceased was fully conscious, chose not to obtain any fitness certificate from the doctor on duty. In spite of it being a rule of caution, in the peculiar facts of the present case where the deceased had suffered 97 per cent burn injuries, DW1 should have

obtained the fitness certificate from the doctor.

3) The statement of the deceased was totally tilted in favour of her husband and the version put forward was that she had caught fire from the stove while cooking. This appears to be factually incorrect inasmuch as if she had caught fire from the stove, the question of the mattress and other items catching fire, which were duly seized and recovered by the Investigating Officer, would not have arisen.

4) Furthermore, within a short while, after her first statement, she changed her view. Exhibit P12, the second dying declaration, was recorded at 6.30 p.m. on the same day after due certification by the doctor that she was conscious and in a fit condition to make the statement. This statement was recorded by PW9, the Tehsildar. In his statement, PW9 has categorically stated that he was directed by the SDM to record the dying declaration. He had even prepared memo, Exhibit P-13, and sent the same to the Police Station. He specifically stated that the deceased was in a great pain and was groaning. She was not even fully conscious. According to him, he was not even informed of recording of the fact of the previous dying declaration. He had carried with him the memo issued by the SDM for recording the statement of the deceased. No such procedure was adhered to by DW1. All these proceedings are conspicuous by their very absence in the exhibited documents and the statement of the said witnesses.

5) The third dying declaration which was recorded by PW7, Sub-Inspector, was also recorded after due certification and in presence of the independent witnesses Bharat Kumar and Abdul Rehman.

Furthermore, PW6 gave the complete facts right from the place of occurrence to the recording of dying declaration of the deceased. He categorically denied the suggestion that the deceased had stated to him that she caught fire from the stove. Rather, he asserted that the deceased had specifically told him that the accused had put her on fire.

6) The second and third dying declarations of the deceased are quite in conformity with each other and are duly supported by PW6, PW7, PW9 and the medical evidence produced on record. The accused, having suffered 97 per cent burns, could not have been fully conscious and painless, as stated by DW1. According to DW2, the doctor, the accused could suffer the injuries that he suffered when the deceased would have pushed him back when he was attempting to burn the deceased.

7) Besides all this, the accused had admitted the deceased to be his wife and they were living together and that she caught fire. It was expected of him to explain to the Court as to how she had caught the fire. Strangely, he did not state the story of his wife catching fire from the stove in his statement under Section 313 CrPC, though the trend of cross-examination of the prosecution witnesses on his behalf clearly indicates that stand.

8) We have already discussed that the theory of the deceased catching fire from the stove is neither probable nor possible in the facts of the present case. The kind of burn injuries she suffered clearly shows that she was deliberately put on fire, rather than being injured as a result of accidental fire.

9) Besides the deceased had herself stated the

reason behind her falsely making the first declaration. According to her, her husband was likely to lose his job if she implicated him. It is clear from the record that the relations of the accused were present at the time of making the first dying declaration and the deceased had stated wrongly on the tutoring of her husband.

10) The recoveries from the place of occurrence clearly show a struggle or fight between the deceased and the accused before she suffered the burn injuries.

11) In addition to the above, another significant aspect of the present case is that the deceased had also made a dying declaration, even prior to the three written dying declarations, to PW1, the landlady and PW6. She had categorically stated to these witnesses when death was staring her in the eyes that she was burnt by her husband by pouring kerosene oil on her. Both these witnesses successfully stood the subtle cross-examination conducted by the counsel appearing for the accused. We see no reason to disbelieve these witnesses who were well known to both, the deceased as well as the accused.

24. Thus, in our considered view, the second and third dying declarations are authentic, voluntary and duly corroborated by other prosecution witnesses including the medical evidence. These dying declarations, read in conjunction with the statement of the prosecution witnesses, can safely be made the basis for conviction of the accused.

25. The argument that the first dying declaration recorded by DW1 had not been produced on record by the prosecution and, therefore, an adverse inference should be drawn against the prosecution in terms of Section 114 of the Evidence Act ,is without any merit. This document has not only been produced

but has even been critically examined by the Trial Court as well as the High Court. It is a settled principle of law of evidence that the question of presumption in terms of Section 114 of the Evidence Act only arises when an evidence is withheld from the Court and is not produced by any of the parties to the lis.

26. As a result of the above discussion, we find no infirmity in the appreciation of evidence and law in the concurrent judgments of the courts. Hence, we dismiss this appeal.

B.B.B. Appeal dismissed.

RAMPAL SINGH
v.
STATE OF UP
(Criminal Appeal No. 2114 of 2009)

JULY 24, 2012

[SWATANTER KUMAR AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Penal Code, 1860 - s.304 Part I / s.302 - Death of person due to gunshot injury - Classification of the offence - Determination of appropriate penal provision - Deceased had constructed a 'ladauri' - Accused-appellant broke the 'ladauri' and started throwing garbage on the vacant land of deceased - This led to altercation between the appellant and the deceased and they also grappled with each other - Appellant went to his house, took out a rifle and from a roof in the neighbourhood, shot at the deceased which ultimately resulted in his death - Conviction of appellant u/s.302 with life imprisonment by courts below - Propriety - Held: The appellant and the deceased were related to each other and there was no previous animosity between them - The entire incident happened within a very short span of time - It was in a state of anger that the appellant shot at the deceased - But before shooting at the deceased, the appellant had asked DW1 (who was talking to deceased at that time) to keep away - On this, the deceased had provoked the appellant by asking him to shoot if he had the courage - It was upon this provocation that the appellant fired the shot which hit the deceased in his stomach and ultimately resulted in his death - The appellant committed the offence without any pre-meditation - However, he was a person from the armed forces and knew the consequences of using a rifle - He had taken a clear aim at the lower part of the body, i.e. the stomach of the deceased - The offence was committed with the intent of causing a bodily injury which could result in death of the

deceased - It was thus not a case of knowledge simplicitor but of intention ex facie - Conviction of appellant accordingly altered from that u/s.302 to one u/s.304 Part I - Appellant sentenced to 10 years rigorous imprisonment along with fine of Rs 10,000/-.

Penal Code, 1860 - ss.300, 302 and 304 - Culpable homicide - When amounting to murder and when not amounting to murder - Distinction between the two parts of s.304 - Legal principles governing the distinction between ss.300, 302 on the one hand and s.304, Part I and II on the other - Discussed.

The prosecution case was that there was altercation between the appellant and his relative 'RKS', and they even grappled with each other as the appellant had demolished the ladauri constructed by 'RKS' and had started throwing garbage on his vacant land; that though appellant and 'RKS' were thereafter separated by DW1 and another person, but while DW1 was talking to 'RKS', the appellant climbed on a roof in the neighbourhood armed with a rifle and warned DW1 to keep away saying that he wanted to shoot 'RKS' on which the latter remarked that he could shoot at him if he had the courage and on this, the appellant shot at 'RKS' with his rifle and ran away. 'RKS' was brought to the hospital. A bullet wound was found in the right side of his abdomen. Subsequently, on account of the said injury, 'RKS' developed infection and died. The trial court convicted the appellant under Section 302 IPC and sentenced him to life imprisonment. The conviction and the sentence was affirmed by the High Court.

In the instant appeal, the appellant did not question the correctness of the concurrent findings of the courts below holding him guilty. The only contention raised by him was that even as per the case of the prosecution, taken at its best, the only offence that the appellant could

be said to have committed would be that under Part II of Section 304 IPC and not under Section 302 IPC.

Disposing of the appeal the Court,

HELD:

Distinction between ss.300, 302 IPC on the one hand and s.304, Part I and II IPC on the other.

1.1. Sections 299 and 300 IPC deal with the definition of 'culpable homicide' and 'murder', respectively. In terms of Section 299 IPC, 'culpable homicide' is described as an act of causing death (i) with the intention of causing death or (ii) with the intention of causing such bodily injury as is likely to cause death, or (iii) with the knowledge that such an act is likely to cause death. As is clear from a reading of this provision, the former part of it, emphasises on the expression 'intention' while the latter upon 'knowledge'. Both these are positive mental attitudes, however, of different degrees. The mental element in 'culpable homicide', that is, the mental attitude towards the consequences of conduct is one of intention and knowledge. Once an offence is caused in any of the three stated manners noted-above, it would be 'culpable homicide'. Section 300, however, deals with 'murder' although there is no clear definition of 'murder' in Section 300 IPC. 'Culpable homicide' is the genus and 'murder' is its species and all 'murders' are 'culpable homicides' but all 'culpable homicides' are not 'murders'. Another classification is 'culpable homicide not amounting to murder', punishable under Section 304 IPC. There is again a very fine line of distinction between the cases falling under Section 304, Part I and Part II, IPC. [Paras 10, 11] [174-D-H]

1.2. Section 300 IPC proceeds with reference to Section 299 IPC. 'Culpable homicide' may or may not

amount to 'murder', in terms of Section 300 IPC. When a 'culpable homicide is murder', the punitive consequences shall follow in terms of Section 302 IPC while in other cases, that is, where an offence is 'culpable homicide not amounting to murder', punishment would be dealt with under Section 304 IPC. [Para 13] [175-E-G]

1.3. Section 300 IPC states what kind of acts, when done with the intention of causing death or bodily injury as the offender knows to be likely to cause death or causing bodily injury to any person, which is sufficient in the ordinary course of nature to cause death or the person causing injury knows that it is so imminently dangerous that it must in all probability cause death, would amount to 'murder'. It is also 'murder' when such an act is committed, without any excuse for incurring the risk of causing death or such bodily injury. The Section also prescribes the exceptions to 'culpable homicide amounting to murder'. The explanations spell out the elements which need to be satisfied for application of such exceptions, like an act done in the heat of passion and without pre-mediation. Where the offender whilst being deprived of the power of self-control by grave and sudden provocation causes the death of the person who has caused the provocation or causes the death of any other person by mistake or accident, provided such provocation was not at the behest of the offender himself, 'culpable homicide would not amount to murder'. This exception itself has three limitations. All these are questions of facts and would have to be determined in the facts and circumstances of a given case. [Para 15] [177-D-H; 178-A]

1.4. Section 300 IPC states both, what is murder and what is not. First finds place in Section 300 in its four stated categories, while the second finds detailed mention in the stated five exceptions to Section 300. The legislature in its wisdom, thus, covered the entire gamut

of culpable homicide that 'amounting to murder' as well as that 'not amounting to murder' in a composite manner in Section 300 of IPC. Sections 302 and 304 of IPC are primarily the punitive provisions. They declare what punishment a person would be liable to be awarded, if he commits either of the offences. An analysis of these two Sections must be done having regard to what is common to the offences and what is special to each one of them. The offence of culpable homicide is thus an offence which may or may not be murder. If it is murder, then it is culpable homicide amounting to murder, for which punishment is prescribed in Section 302 IPC. Section 304 IPC deals with cases not covered by Section 302 IPC and it divides the offence into two distinct classes, that is (a) those in which the death is intentionally caused; and (b) those in which the death is caused unintentionally but knowingly. The first clause of this section includes only those cases in which offence is really 'murder', but mitigated by the presence of circumstances recognized in the exceptions to section 300 IPC, the second clause deals only with the cases in which the accused has no intention of injuring anyone in particular. In the former case the sentence of imprisonment is compulsory and the maximum sentence admissible is imprisonment for life. In the latter case, imprisonment is only optional, and the maximum sentence only extends to imprisonment for 10 years. [Paras 18, 19] [179-E-H; 180-A-C]

1.5. Where the act committed is done with the clear intention to kill the other person, it will be a murder within the meaning of Section 300 IPC and punishable under Section 302 IPC but where the act is done on grave and sudden provocation which is not sought or voluntarily provoked by the offender himself, the offence would fall under the exceptions to Section 300 IPC and is punishable under Section 304 IPC. Another fine tool

which would help in determining such matters is the extent of brutality or cruelty with which such an offence is committed. An important corollary is the marked distinction between the provisions of Section 304 Part I and Part II of IPC. Linguistic distinction between the two Parts of Section 304 is evident from the very language of this Section. There are two apparent distinctions, one in relation to the punishment while other is founded on the intention of causing that act, without any intention but with the knowledge that the act is likely to cause death. It is neither advisable nor possible to state any straight-jacket formula that would be universally applicable to all cases for such determination. Every case essentially must be decided on its own merits. The Court has to perform the very delicate function of applying the provisions of the IPC to the facts of the case with a clear demarcation as to under what category of cases, the case at hand falls and accordingly punish the accused. [Paras 20, 21] [180-D-H; 181-A]

1.6. Classification of an offence into either Part of Section 304 IPC is primarily a matter of fact. This would have to be decided with reference to the nature of the offence, intention of the offender, weapon used, the place and nature of the injuries, existence of pre-meditated mind, the persons participating in the commission of the crime and to some extent the motive for commission of the crime. The evidence led by the parties with reference to all these circumstances greatly helps the court in coming to a final conclusion as to under which penal provision of the Indian Penal Code, 1860 the accused is liable to be punished. This can also be decided from another point of view, i.e., by applying the 'principle of exclusion'. This principle could be applied while taking recourse to a two-stage process of determination. Firstly, the Court may record a preliminary finding if the accused had committed an offence punishable under the

substantive provisions of Section 302 IPC, that is, 'culpable homicide amounting to murder'. Then secondly, it may proceed to examine if the case fell in any of the exceptions detailed in Section 300 IPC. This would doubly ensure that the conclusion arrived at by the court is correct on facts and sustainable in law. Such a determination would better serve the ends of criminal justice delivery. This is more so because presumption of innocence and right to fair trial are the essence of our criminal jurisprudence and are accepted as rights of the accused. [Para 23] [181-F-H; 182-A-D]

State of Andhra Pradesh v. Rayavarapu Punnayya and Anr. **(1976) 4 SCC 382: 1977 (1) SCR 601;** *Abdul Waheed Khan @ Waheed and Others v. State of A.P.* **(2002) 7 SCC 175: 2002 (1) Suppl. SCR 703;** *Virsa Singh v. State of Punjab* **AIR 1958 SC 465: 1958 SCR 1495;** *Rajwant and Anr. v. State of Kerala* **AIR 1966 SC 1874;** *Phulia Tudu & Anr. v. State of Bihar (now Jharkhand)* **AIR 2007 SC 3215: 2007 (9) SCR 997;** *Vineet Kumar Chauhan v. State of U.P.* **(2007) 14 SCC 660: 2007 (13) SCR 727;** *Ajit Singh v. State of Punjab* **(2011) 9 SCC 462: 2011 (12) SCR 375 and** *Mohinder Pal Jolly v. State of Punjab* **1979 AIR SC 577: 1979 (2) SCR 805 - referred to.**

Fatta v. Emperor **1151. C. 476 - referred to.**

Penal Law of India by **Dr. Hari Singh Gour, Volume 3, 2009 - referred to.**

2.1. In the instant appeal, both the accused-appellant and the deceased 'RKS' were related to each other. Both were serving in the Indian Army. They had come on leave to their home and it was when the deceased was about to return to the place of his posting that the unfortunate incident occurred. The whole dispute was with regard to construction of ladauri by the deceased to prevent

garbage from being thrown on his open land. However, the appellant had broken the ladauri and thrown garbage on the vacant land of the deceased. Rather than having a pleasant parting from their respective families and between themselves, they raised a dispute which led to death of one of them. When asked by the deceased as to why he had done so, the appellant entered into a heated exchange of words. They, in fact, grappled with each other and the deceased had thrown the appellant on the ground. It was with the intervention of DW1 and an uncle of the deceased that they were separated and were required to maintain their cool. However, the appellant went to his house and climbed to the roof with a rifle in his hands when others, including the deceased, were talking to each other. Before shooting at the deceased, the appellant had asked DW1 to keep away from the deceased. On this, the deceased provoked the appellant by asking him to shoot if he had the courage. Upon this, the appellant fired one shot which hit the deceased in his stomach. This version of the prosecution case is completely established by eye-witnesses, medical evidence and the recovery of the weapon of crime. The appellant has, thus, rightly confined his submissions with regard to alteration of the offence from that under Section 302 to the one under Section 304 Part II of IPC. [Para 24] [182-E-H; 183-A-C]

2.2. PW1 is the wife of the deceased 'RKS'. From the statement of PW1, it is clear that there was heated exchange of words between the deceased and the appellant. The deceased had thrown the appellant on the ground. They were separated by DW1 and an uncle of the deceased. She also admits that her husband had told the appellant that he could shoot at him if he had the courage. It was upon this provocation that the appellant fired the shot which hit the deceased in his stomach and ultimately resulted in his death. [Para 26] [184-E-F]

2.3. Another very important aspect is that it was not a case of previous animosity. There is nothing on record to show that the relation between the families of the deceased 'RKS' and the appellant was not cordial. On the contrary, there is evidence that the relations between them were cordial, as deposed by PW1. The dispute between the parties arose with a specific reference to the ladauri. It is clear that the appellant had not committed the crime with any pre-meditation. There was no intention on his part to kill. The entire incident happened within a very short span of time. The deceased and the appellant had had an altercation and the appellant was thrown on the ground by the deceased, his own relation. It was in that state of anger that the appellant went to his house, took out the rifle and from a distance, i.e., from the roof of Muneshwar, he shot at the deceased. But before shooting, he expressed his intention to shoot by warning DW1 to keep away. He actually fired in response to the challenge that was thrown at him by the deceased. It is true that there was knowledge on the part of the appellant that if he used the rifle and shot at the deceased, the possibility of the deceased being killed could not be ruled out. He was a person from the armed forces and was fully aware of consequences of use of fire arms. But this is not necessarily conclusive of the fact that there was intention on the part of the appellant to kill the deceased. The intention probably was to merely cause bodily injury. However, the Court cannot overlook the fact that the appellant had the knowledge that such injury could result in death of the deceased. He only fired one shot at the deceased and ran away. That shot was aimed at the lower part of the body, i.e. the stomach of the deceased. As per the statement of PW2 (the doctor who conducted the post-mortem), there was a stitched wound obliquely placed on the right iliac tossa which shows the part of the body the appellant aimed at. This evidence, examined in its entirety, shows that without any pre-meditation, the

appellant committed the offence. The same, however, was done with the intent to cause a bodily injury which could result in death of the deceased. [Paras 27, 28] [184-E-H; 185-A-F]

2.4. The appellant was a person from the armed forces and knew the consequences of using a rifle. He had not fired indiscriminately but took a clear aim at the deceased. For modification of conviction from Section 302 IPC to Part II of Section 304 IPC, not only should there be an absence of the intention to cause death but also an absence of intention to cause such bodily injury that in the ordinary course of things is likely to cause death. The present case was not a case of knowledge simplicitor but that of intention ex facie. The conviction of the appellant is accordingly altered from that under Section 302 IPC to the one under Section 304 Part I IPC. The appellant is sentenced to ten years rigorous imprisonment alongwith a fine of Rs.10,000/-, and in default of payment of fine, to undergo simple imprisonment for one month. [Paras 30, 31] [186-D-G]

Vineet Kumar Chauhan v. State of U.P. **(2007) 14 SCC 660: 2007 (13) SCR 727 and** *Aradadi Ramudu @ Aggiramudu vs. State, through Inspe tor of Police* **(2012) 5 SCC 134 - referred to.**

Case Law Reference:

1977 (1) SCR 601	**referred to**	**Para 12**
2002 (1) Suppl. SCR 703	**referred to**	**Para 13**
1958 SCR 1495	**referred to**	**Para 13**
AIR 1966 SC 1874	**referred to**	**Para 13**
2007 (9) SCR 997	**referred to**	**Para 14**
2007 (13) SCR 727	**referred to**	**Paras 16, 29**
2011 (12) SCR 375	**referred to**	**Para 18**

1979 (2) SCR 805	**referred to**	**Para 22**
1151. C. 476	**referred to**	**Para 19**
(2012) 5 SCC 134	**referred to**	**Para 30**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2114 of 2009.

From the Judgment & Order dated 15.05.2007 of the High Court of Judicature at Allahabad in Crl. Appeal No. 1371 of 1982.

Manish Bhandari, Omkar Shrivastava, Rameshwar Prasad Goyal for the Appellant.

Irshad Ahmad, AAG, Anuvrat Sharma, Alka Sinha, Kabir Dixit for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The present appeal is directed against the judgment of a Division Bench of the High Court of Judicature at Allahabad dated 15th May, 2007. Vide the impugned judgment, the High Court affirmed the judgment of conviction and order of sentence passed by the VIII Additional Sessions Judge, Mainpuri awarding life imprisonment to the appellant Rampal Singh for an offence punishable under Section 302 of the Indian Penal Code, 1860 (for short 'the Code').

2. Necessary facts, eschewing unnecessary details, can be stated at the very outset.

3. According to the prosecution, one Jograj Singh and Chhatar Singh were uterine brothers. Anurag Singh, Rajesh Singh and Amar Singh were sons of Jograj Singh. Ram Kumar Singh (deceased) was the son of Rajesh Singh. Rampal Singh (the appellant) and Ram Saran Singh (DW1) are the grand sons of Chhatar Singh. Rampal Singh and the deceased both were

serving in the Army as Lans Naik. Two months prior to the date of incident, the deceased had come to his village on leave from Agra where he was posted. He erected a Ladauri on his vacant land. After expiry of the term of leave, he went back to join his duty. Rampal Singh had also come on leave. He had broken the Ladauri constructed by the deceased and started throwing garbage on the vacant land. Five days prior to the date of occurrence, the deceased had again come to his village on leave. Upon expiry of the term of his leave on 13th February, 1978, he was returning to Agra on his duty. Meanwhile, Amar Singh, uncle of the deceased came to his house with another person of village Dhaniapur and they all were chatting. Rampal Singh, the appellant, also reached there. The deceased enquired from him about the reason for demolishing his Ladauri and throwing garbage on his land. Some altercation took place between them. They even grappled with each other. The deceased threw the appellant on the ground. Ram Saran also reached the spot and he, along with Amar Singh, separated the appellant and the deceased. Ram Saran, who was examined in the Court as DW1 also started talking to the deceased who was standing alongside a pillar on his verandah. The appellant went to his house and climbed on the roof of Muneshwar armed with a rifle and from there he asked his brother Ram Saran to keep away as he wanted to shoot the deceased. Consequently, the deceased remarked as to whether the appellant had the courage to shoot him. On this, the appellant shot at the deceased with his rifle and ran away. Ram Saran and others helped the injured and called a village compounder who filled the injury with dough (Aata). The deceased then was carried to Bewar and from there he was brought to Military Hospital in Fatehgarh where he got admitted at 9.00 p.m. on the same day.

4. In the hospital, he was examined by Major Dr. Laxmi Jhingaran, PW3, who prepared the medical report. She found the bullet wound in the right side in the abdomen of the deceased and prepared an injury report (Exhibit Ka-2). Upon

inquiry, the deceased told her that the appellant had shot at him at 2.00 p.m. Resultantly, she prepared a report and sent it to the Station Officer, Kotwali Fatehgarh (Exhibit Ka-3) for taking necessary action. On receiving this information, Ram Sharwan Upadhyaya, PW4, SI of Kotwali Fatehgarh proceeded to the Military Hospital. He made inquiry from the deceased who told him that the appellant had fired at him with his rifle with the intention to kill him. In furtherance to this, PW4 made a report (Exhibit Ka-6) to the Station Officer giving result of his inquiry and asked him that a case under Section 307 of the Code needs to be registered. Upon this basis, the First Information Report (FIR) (Exhibit Ka-7) was prepared at 11.55 p.m. on that day by Constable Shiv Karan Singh who also registered the case as G.D. No.14 (Exhibit Ka-8).

5. On 13th February, 1978 itself, the deceased had made a dying declaration which was recorded by Lieutenant Colonel Basu (Exhibit Ka-4) wherein he stated that he had been shot at by the appellant with rifle at about 2.00 p.m. on 13th February 1978, when he was coming out of his house. Subsequently, on account of the said injury, the deceased developed infection and died on 17th February, 1978 at 7.00 a.m. An information was sent vide Exhibit Ka-5 to the Station Officer, Kotwali District Fatehgarh by Lieutenant Colonel Officer Commanding N. Basu to arrange for post mortem examination of the deceased in the district hospital. Upon receipt of the information, the body of the deceased was taken from the mortuary of the Military Hospital and sent for post mortem. Dr. A.K. Rastogi, PW2, conducted the post mortem on the body of the deceased and submitted his report vide Exhibit Ka-1. He had found the gun shot wound and was of the opinion that the deceased died due to shock and toxemia as a result of ante-mortem injuries.

6. Thereafter, the investigation of the case was entrusted to Shri Vedi Singh, Sub-Inspector Police Station Bewar, PW6. He recorded the statement of various witnesses, inspected the site with the help of other persons and prepared a site plan

(Exhibit Ka-17). After receiving the post mortem report on 1st March, 1978, he further recorded the statement of other witnesses which, amongst others, included the wife of the deceased, Smt. Sneh Lata, PW1, and her father, Virendra Singh, PW5. On 25th July, 1978 the Investigating Officer made a request to the Military Unit at Delhi to hand over custody of the appellant, who had surrendered there on 3rd May, 1978. The Investigating Officer also obtained leave certificate of the appellant Exhibit Ka-19, which shows that the appellant had proceeded on 60 days leave on from 2nd January 1978 and reported on duty on 3rd May, 1978. The appellant was handed over to the Investigating Officer, who then produced him before the Magistrate and submitted the charge sheet (Exhibit Ka-20). Upon committal, charge under Section 302 of the Code was framed against the appellant for which he was tried and finally convicted, as afore-noticed, to suffer imprisonment for life.

7. Learned counsel appearing for the appellant has not questioned before us the correctness of the concurrent findings of the courts holding him guilty of the said criminal offence. The only contention raised before us is that even as per the case of the prosecution, taken at its best, the only offence that the appellant could be said to have committed would be that under Part II of Section 304 of the Code and not under Section 302 of the Code. To substantiate this argument, learned counsel appearing for the appellant has taken us through the statements of PW1, PW2, PW3 and other circumstances besides arguing that the gun fire by the appellant was the result of a provocation which transpired suddenly at the spot and there was no pre-meditation on the part of the appellant to commit murder of his brother, the deceased.

8. In response, the learned counsel appearing for the State relied upon the findings returned by the High Court holding that once both the appellant and the deceased were separated, there was no reason for the appellant to climb on the roof and shoot the deceased. It clearly shows the intent to commit murder of the deceased and it was not a result of any sudden

provocation covered under Section 304 of the Code. According to learned counsel, the concurrent judgments do not call for any interference.

9. Having completed narration of the facts and noticed the precise contentions raised before us in the present appeal, we may now refer to the law on the subject. We are of the opinion that elucidative discussion on the legal principles governing the distinction between Sections 300, 302 of the Code on the one hand and Section 304, Part I and Part II of the Code on the other, would be necessary to precisely answer the questions raised.

10. Sections 299 and 300 of the Code deal with the definition of 'culpable homicide' and 'murder', respectively. In terms of Section 299, 'culpable homicide' is described as an act of causing death (i) with the intention of causing death or (ii) with the intention of causing such bodily injury as is likely to cause death, or (iii) with the knowledge that such an act is likely to cause death. As is clear from a reading of this provision, the former part of it, emphasises on the expression 'intention' while the latter upon 'knowledge'. Both these are positive mental attitudes, however, of different degrees. The mental element in 'culpable homicide', that is, the mental attitude towards the consequences of conduct is one of intention and knowledge. Once an offence is caused in any of the three stated manners noted-above, it would be 'culpable homicide'. Section 300, however, deals with 'murder' although there is no clear definition of 'murder' in Section 300 of the Code. As has been repeatedly held by this Court, 'culpable homicide' is the genus and 'murder' is its species and all 'murders' are 'culpable homicides' but all 'culpable homicides' are not 'murders'.

11. Another classification that emerges from this discussion is 'culpable homicide not amounting to murder', punishable under Section 304 of the Code. There is again a very fine line of distinction between the cases falling under Section 304, Part I and Part II, which we shall shortly discuss.

12. In the case of *State of Andhra Pradesh v. Rayavarapu Punnayya and Anr.* (1976) 4 SCC 382, this Court while clarifying the distinction between these two terms and their consequences, held as under: -

> "12. In the scheme of the penal Code, 'culpable homicide' is genus and 'murder' its species. All 'murder' is 'culpable homicide' but not vice-versa. Speaking generally, 'culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called 'culpable homicide of the first degree'. This is the greatest form of culpable homicide, which is defined in Section 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the first part of Section 304. Then, there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304."

13. Section 300 of the Code proceeds with reference to Section 299 of the Code. 'Culpable homicide' may or may not amount to 'murder', in terms of Section 300 of the Code. When a 'culpable homicide is murder', the punitive consequences shall follow in terms of Section 302 of the Code while in other cases, that is, where an offence is 'culpable homicide not amounting to murder', punishment would be dealt with under Section 304 of the Code. Various judgments of this Court have dealt with the cases which fall in various classes of firstly, secondly, thirdly and fourthly, respectively, stated under Section 300 of the Code. It would not be necessary for us to deal with that aspect of the case in any further detail. Of course, the principles that have been stated in various judgments like *Abdul Waheed Khan @ Waheed and Others v. State of A.P.* [(2002) 7 SCC 175], *Virsa Singh v. State of Punjab* [AIR 1958 SC 465] and *Rajwant and*

Anr. v. State of Kerala [AIR 1966 SC 1874] are the broad guidelines and not cast-iron imperatives. These are the cases which would provide precepts for the courts to exercise their judicial discretion while considering the cases to determine as to which particular clause of Section 300 of the Code they fall in.

14. This Court has time and again deliberated upon the crucial question of distinction between Sections 299 and 300 of the Code, i.e., 'culpable homicide' and 'murder' respectively. In the case of *Phulia Tudu & Anr. v. State of Bihar (now Jharkhand)* [AIR 2007 SC 3215], the Court noticed that confusion is caused if courts, losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of these sections. The Court provided the following comparative table to help in appreciating the points of discussion between these two offences :

"Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done -	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done -
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or

(3) with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

KNOWLEDGE

(c) with the knowledge that the act is likely to cause death.

(4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse or incurring the risk of causing death or such injury as is mentioned above."

15. Section 300 of the Code states what kind of acts, when done with the intention of causing death or bodily injury as the offender knows to be likely to cause death or causing bodily injury to any person, which is sufficient in the ordinary course of nature to cause death or the person causing injury knows that it is so imminently dangerous that it must in all probability cause death, would amount to 'murder'. It is also 'murder' when such an act is committed, without any excuse for incurring the risk of causing death or such bodily injury. The Section also prescribes the exceptions to 'culpable homicide amounting to murder'. The explanations spell out the elements which need to be satisfied for application of such exceptions, like an act done in the heat of passion and without pre-mediation. Where the offender whilst being deprived of the power of self-control by grave and sudden provocation causes the death of the person who has caused the provocation or causes the death of any other person by mistake or accident, provided such provocation was not at the behest of the offender himself,

'culpable homicide would not amount to murder'. This exception itself has three limitations. All these are questions of facts and would have to be determined in the facts and circumstances of a given case.

16. This Court in the case of *Vineet Kumar Chauhan v. State of U.P.* (2007) 14 SCC 660 noticed that academic distinction between 'murder' and 'culpable homicide not amounting to murder' had vividly been brought out by this Court in *State of A.P. v. Rayavarapu Punnayya* [(1976) 4 SCC 382], where it was observed as under:

> ".....that the safest way of approach to the interpretation and application of Section 299 and 300 of the Code is to keep in focus the key words used in various clauses of the said sections. Minutely comparing each of the clauses of section 299 and 300 of the Code and the drawing support from the decisions of the court in Virsa Singh v. State of Punjab and Rajwant Singh v. State of Kerala, speaking for the court, Justice RS Sarkaria, neatly brought out the points of distinction between the two offences, which have been time and again reiterated. Having done so, the court said that wherever the Court is confronted with the question whether the offence is murder or culpable homicide not amounting to murder, on the facts of a case, it would be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be that the accused has done an act by doing which he has caused the death of another. Two, if such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to culpable homicide as defined in section 299. If the answer to this question is in the negative, the offence would be culpable homicide not amounting to murder, punishable under the First or Second part of Section 304, depending respectively, on whether this second or the third clause of Section 299 is applicable. If this question is found in the positive, but the cases come

within any of the exceptions enumerated in Section 300, the offence would still be culpable homicide not amounting to murder, punishable under the first part of Section 304 of the Code. It was, however, clarified that these were only broad guidelines to facilitate the task of the court and not cast-iron imperative."

17. Having noticed the distinction between 'murder' and 'culpable homicide not amounting to murder', now we are required to explain the distinction between the application of Section 302 of the Code on the one hand and Section 304 of the Code on the other.

18. In *Ajit Singh v. State of Punjab* [(2011) 9 SCC 462], the Court held that in order to hold whether an offence would fall under Section 302 or Section 304 Part I of the Code, the courts have to be extremely cautious in examining whether the same falls under Section 300 of the Code which states whether a culpable homicide is murder, or would it fall under its five exceptions which lay down when culpable homicide is not murder. In other words, Section 300 states both, what is murder and what is not. First finds place in Section 300 in its four stated categories, while the second finds detailed mention in the stated five exceptions to Section 300. The legislature in its wisdom, thus, covered the entire gamut of culpable homicide that 'amounting to murder' as well as that 'not amounting to murder' in a composite manner in Section 300 of the Code. Sections 302 and 304 of the Code are primarily the punitive provisions. They declare what punishment a person would be liable to be awarded, if he commits either of the offences.

19. An analysis of these two Sections must be done having regard to what is common to the offences and what is special to each one of them. The offence of culpable homicide is thus an offence which may or may not be murder. If it is murder, then it is culpable homicide amounting to murder, for which punishment is prescribed in Section 302 of the Code. Section 304 deals with cases not covered by Section 302 and it divides

the offence into two distinct classes, that is (a) those in which the death is *intentionally* caused; and (b) those in which the death is caused *unintentionally* but knowingly. In the former case the sentence of imprisonment is compulsory and the maximum sentence admissible is imprisonment for life. In the latter case, imprisonment is only optional, and the maximum sentence only extends to imprisonment for 10 years. The first clause of this section includes only those cases in which offence is really 'murder', but mitigated by the presence of circumstances recognized in the exceptions to section 300 of the Code, the second clause deals only with the cases in which the accused has no intention of injuring anyone in particular. In this regard, we may also refer to the judgment of this Court in the case of *Fatta v. Emperor,* 1151. C. 476 (Refer : Penal Law of India by Dr. Hari Singh Gour, Volume 3, 2009)

20. Thus, where the act committed is done with the clear intention to kill the other person, it will be a murder within the meaning of Section 300 of the Code and punishable under Section 302 of the Code but where the act is done on grave and sudden provocation which is not sought or voluntarily provoked by the offender himself, the offence would fall under the exceptions to Section 300 of the Code and is punishable under Section 304 of the Code. Another fine tool which would help in determining such matters is the extent of brutality or cruelty with which such an offence is committed.

21. An important corollary to this discussion is the marked distinction between the provisions of Section 304 Part I and Part II of the Code. Linguistic distinction between the two Parts of Section 304 is evident from the very language of this Section. There are two apparent distinctions, one in relation to the punishment while other is founded on the intention of causing that act, without any intention but with the knowledge that the act is likely to cause death. It is neither advisable nor possible to state any straight-jacket formula that would be universally applicable to all cases for such determination. Every case

essentially must be decided on its own merits. The Court has to perform the very delicate function of applying the provisions of the Code to the facts of the case with a clear demarcation as to under what category of cases, the case at hand falls and accordingly punish the accused.

22. A Bench of this Court in the case of *Mohinder Pal Jolly v. State of Punjab* [1979 AIR SC 577], stating this distinction with some clarity, held as under :

> "11. A question arises whether the appellant was guilty under Part I of Section 304 or Part II. If the accused commits an act while exceeding the right of private defence by which the death is caused either with the intention of causing death or with the intention of causing such bodily injury as was likely to cause death then he would be guilty under Part I. On the other hand if before the application of any of the Exceptions of Section 300 it is found that he was guilty of murder within the meaning of clause "4thly", then no question of such intention arises and only the knowledge is to be fastened on him that he did indulge in an act with the knowledge that it was likely to cause death but without any intention to cause it or without any intention to cause such bodily injuries as was likely to cause death. There does not seem to be any escape from the position, therefore, that the appellant could be convicted only under Part II of Section 304 and not Part I."

23. As we have already discussed, classification of an offence into either Part of Section 304 is primarily a matter of fact. This would have to be decided with reference to the nature of the offence, intention of the offender, weapon used, the place and nature of the injuries, existence of pre-meditated mind, the persons participating in the commission of the crime and to some extent the motive for commission of the crime. The evidence led by the parties with reference to all these circumstances greatly helps the court in coming to a final conclusion as to under which penal provision of the Code the

accused is liable to be punished. This can also be decided from another point of view, i.e., by applying the 'principle of exclusion'. This principle could be applied while taking recourse to a two-stage process of determination. Firstly, the Court may record a preliminary finding if the accused had committed an offence punishable under the substantive provisions of Section 302 of the Code, that is, 'culpable homicide amounting to murder'. Then secondly, it may proceed to examine if the case fell in any of the exceptions detailed in Section 300 of the Code. This would doubly ensure that the conclusion arrived at by the court is correct on facts and sustainable in law. We are stating such a proposition to indicate that such a determination would better serve the ends of criminal justice delivery. This is more so because presumption of innocence and right to fair trial are the essence of our criminal jurisprudence and are accepted as rights of the accused.

24. Having examined the principles of law applicable to the cases like the one in hand, now we would turn to the present case. We have already noticed that both the accused and the deceased were related to each other. Both were serving in the Indian Army. They had come on leave to their home and it was when the deceased was about to return to the place of his posting that the unfortunate incident occurred. The whole dispute was with regard to construction of *ladauri* by the deceased to prevent garbage from being thrown on his open land. However, the appellant had broken the *ladauri* and thrown garbage on the vacant land of the deceased. Rather than having a pleasant parting from their respective families and between themselves, they raised a dispute which led to death of one of them. When asked by the deceased as to why he had done so, the appellant entered into a heated exchange of words. They, in fact, grappled with each other and the deceased had thrown the appellant on the ground. It was with the intervention of DW1, Ram Saran and Amar Singh that they were separated and were required to maintain their cool. However, the appellant went to his house and climbed to the roof of Muneshwar with a

rifle in his hands when others, including the deceased, were talking to each other. Before shooting at the deceased, the appellant had asked his brother to keep away from him. On this, the deceased provoked the appellant by asking him to shoot if he had the courage. Upon this, the appellant fired one shot which hit the deceased in his stomach. This version of the prosecution case is completely established by eye-witnesses, medical evidence and the recovery of the weapon of crime. The learned counsel appearing for the appellant has, thus, rightly confined his submissions with regard to alteration of the offence from that under Section 302 to the one under Section 304 Part II of the Code.

25. At this stage, it would be relevant to refer to the statement of one of the most material witnesses which will aid the Court in arriving at a definite conclusion. Smt. Snehlata, who was examined as PW1, is the wife of the deceased. After giving the introductory facts leading to the incident, she stated as under :

> "In the meantime, Amar Singh, my uncle-in-law (Chachiya Sasur) came there and one man from Dhaniyapur also came there. My husband started talking with them and by that time the accused who is present in the court, came there. My husband told him that why's you have started using as your Goora in our land why you have demolished our ladauri which was constructed by us. On this issue, there was heated discussion in between my husband and Rampal Singh and my husband has thrown the accused on the ground. By that time, his son Ramsaran came there and thereafter he and Amar Singh have separated both of them. Ramsaran has made the accused understand and he started talking with him. My husband got down from the thatch and stood up by the help of pillar and he started talking with these people and in the meantime, Rampal had left for his house. Then one of people saw that the accused present in the court, has climbed on the roof of Munishwar and stood towards wall which is situated towards the southern side of my house and he further told that our land which is vacant land, in the Munder of the wall situated east side of the same, where he was standing, he told to his brother go aside, I will fire bullet. On this, his brother said that are you going mad. On this, my husband told that have you courage to shoot at me. On this the accused said that see his courage and saying this, the accused fired bullet which hit my husband. On the said bullet hit, my husband fell down and then the accused climbed down from the stairs and fled away. Thereafter, Ramsaran etc. have helped my husband and they called the compounder from village. The compounder had made wet Aata and sealed/filled the wound of my husband and he advised to immediately take him to some big hospital and thereafter, we took my husband to Bewar. My husband said the report will be lodged on some other day, first you take me to the Army Hospital, Fatehgarh. On the same very day at about quarter to nine O'clock, we had taken him to the Fatehgarh Hospital where after four-five days, he died."

26. From the above statement of this witness, it is clear that there was heated exchange of words between the deceased and the appellant. The deceased had thrown the appellant on the ground. They were separated by Amar Singh and Ram Saran. She also admits that her husband had told the appellant that he could shoot at him if he had the courage. It was upon this provocation that the appellant fired the shot which hit the deceased in his stomach and ultimately resulted in his death.

27. Another very important aspect is that it is not a case of previous animosity. There is nothing on record to show that the relation between the families of the deceased and the appellant was not cordial. On the contrary, there is evidence that the relations between them were cordial, as deposed by PW1. The dispute between the parties arose with a specific reference to the ladauri. It is clear that the appellant had not

committed the crime with any pre-meditation. There was no intention on his part to kill. The entire incident happened within a very short span of time. The deceased and the appellant had had an altercation and the appellant was thrown on the ground by the deceased, his own relation. It was in that state of anger that the appellant went to his house, took out the rifle and from a distance, i.e., from the roof of Muneshwar, he shot at the deceased. But before shooting, he expressed his intention to shoot by warning his brother to keep away. He actually fired in response to the challenge that was thrown at him by the deceased. It is true that there was knowledge on the part of the appellant that if he used the rifle and shot at the deceased, the possibility of the deceased being killed could not be ruled out. He was a person from the armed forces and was fully aware of consequences of use of fire arms. But this is not necessarily conclusive of the fact that there was intention on the part of the appellant to kill his brother, the deceased. The intention probably was to merely cause bodily injury. However, the Court cannot overlook the fact that the appellant had the knowledge that such injury could result in death of the deceased. He only fired one shot at the deceased and ran away. That shot was aimed at the lower part of the body, i.e. the stomach of the deceased. As per the statement of PW2, Dr. A.K. Rastogi, there was a stitched wound obliquely placed on the right iliac tossa which shows the part of the body the appellant aimed at.

28. This evidence, examined in its entirety, shows that without any pre-meditation, the appellant committed the offence. The same, however, was done with the intent to cause a bodily injury which could result in death of the deceased.

29. In the case of *Vineet Kumar Chauhan v. State of Uttar Pradesh* (supra), the Court noticed that concededly there was no enmity between the parties and there was no allegation of the prosecution that before the occurrence, the appellant had pre-meditated the crime of murder. Faced with the hostile attitude from the family of the deceased over the cable connection, a sudden quarrel took place between the appellant

and the son of the deceased. On account of heat of passion, the appellant went home, took out his father's revolver and started firing indiscriminately and unfortunately one of the bullets hit the deceased on the chin. Appreciating these circumstances, the Court concluded :

> "Thus, in our opinion, the offence committed by the appellant was only culpable homicide not amounting to murder. Under these circumstances, we are inclined to bring down the offence from first degree murder to culpable homicide not amounting to murder, punishable under the second part of Section 304 IPC."

30. The above case is quite close on facts and law to the case in hand, except to the extent that the appellant was a person from the armed forces and knew the consequences of using a rifle. He had not fired indiscriminately but took a clear aim at his brother. Thus, the present is not a case of knowledge simplicitor but that of intention ex facie. In the case of *Aradadi Ramudu @ Aggiramudu vs. State, through Inspector of Police* [(2012) 5 SCC 134], this Court also took the view that for modification of sentence from Section 302 of the Code to Part II of Section 304 of the Code, not only should there be an absence of the intention to cause death but also an absence of intention to cause such bodily injury that in the ordinary course of things is likely to cause death.

31. In view of the above discussion, we partially accept this appeal and alter the offence that the appellant has been held guilty of, from that under Section 302 of the Code to the one under Section 304 Part I of the Code. Having held that the accused is guilty of the offence under Section 304 Part I, we award a sentence of ten years rigorous imprisonment and a fine of Rs.10,000/-, in default to undergo simple imprisonment for one month. The judgment under appeal is modified in the above terms. The appeal is disposed of accordingly.

B.B.B. Appeal disposed of.

COLUMBIA SPORTSWEAR COMPANY
v.
DIRECTOR OF INCOME TAX, BANGALORE
(Special Leave Petition (C) No. 31543 of 2011)

JULY 30, 2012

[S.H. KAPADIA, CJI, A.K. PATNAIK AND SWATANTER KUMAR, JJ.]

Income Tax Act, 1961 - Chapter XIX-B; Sections 245N(a) and 245S - Authority for Advance Rulings (Income Tax) - Whether an advance ruling pronounced by the Authority can be challenged u/Article 226/227 of the Constitution before the High Court or u/Article 136 of the Constitution before the Supreme Court - Whether the Authority, if not a court, is a tribunal within the meaning of expression in Articles 136 and 227 of the Constitution and whether the Authority has a duty to act judicially and is amenable to writs of Certiorari and Prohibition u/Article 226 of the Constitution - Held: The Authority is a body exercising judicial power conferred on it by Chapter XIX-B of the Act and is a tribunal within the meaning of the expression in Articles 136 and 227 of the Constitution - Sub-section (1) of s.245S of the Act, insofar as, it makes the advance ruling of the Authority binding on the applicant, in respect of the transaction and on the Commissioner and income-tax authorities subordinate to him, does not bar the jurisdiction of Supreme Court u/Article 136 of the Constitution or the jurisdiction of the High Court u/Articles 226 and 227 of the Constitution to entertain a challenge to the advance ruling of the Authority - It cannot be held that an advance ruling of the Authority can only be challenged u/Article 136 of the Constitution before Supreme Court and not u/Articles 226 and/or 227 of the Constitution before the High Court - However, when an advance ruling of the Authority is challenged before the High Court u/Articles

226 and/or 227 of the Constitution, the same should be heard directly by a Division Bench of the High Court and decided expeditiously- Even if good grounds are made out in a SLP u/Article 136 for challenge to an advance ruling given by the Authority, the Supreme Court may still, in its discretion, refuse to grant special leave on the ground that the challenge to the advance ruling of the authority can also be made to the High Court u/Articles 226 and/or 227 of the Constitution on the self same grounds - Unless, a SLP raises substantial questions of general importance or a similar question is already pending before the Supreme Court for decision, the Supreme Court does not entertain a SLP directly against an order of the tribunal - The instant SLP neither raised any substantial question of general importance nor was it shown that a similar question was already pending before the Supreme Court for which the petitioner should be permitted to approach the Supreme Court directly against the advance ruling of the Authority - Instant SLP accordingly disposed of with liberty to the petitioner to move the appropriate High Court u/Article 226 and/or 227 of the Constitution - High Court concerned to ensure that the Writ Petition, if filed, is heard by the Division Bench hearing income-tax matters and is disposed of expeditiously - Constitution of India, 1950 - Articles 136, 226 and 227.

Kihoto Hollohan v. Zachillhu and Others **1992 Supp (2) SCC 651: 1992 (1) SCR 686;** *Jyotendrasinhji v. S.I. Tripathi and Others* **1993 Supp (3) SCC 389: 1993 (2) SCR 938;** *L. Chandra Kumar v. Union of India and Others* **(1997) 3 SCC 261: 1997 (2) SCR 1186 and** *Sirpur Paper Mills Ltd. v. Commissioner of Wealth Tax, Hyderabad* **AIR 1970 SC 1520: 1971 (1) SCR 304 - relied on.**

Durga Shankar Mehta v. Thakur Raghuraj Singh and Others **(1955) 1 SCR 267 and** *Union of India & Anr. v. Azadi Bachao Andolan & Anr.* **(2003) 263 ITR 706 - referred to.**

Cyril Eugene Pereira, In re. **(1999) 239 ITR 650 and** *Groupe Industrial Marcel Dassault, In re* **(2012) 340 ITR 353 (AAR) - referred to.**

"Constitutional Law of India" (Fourth Edition) by H.M. Seervai - referred to.

Words and Phrases - Expression "tribunal" - Meaning of - Held: The test for determining whether a body is a tribunal or not is to find out whether it is vested with the judicial power of the State by any law to pronounce upon rights or liabilities arising out of some special law.

Harinagar Sugar Mills v. Shyam Sunder **AIR 1961 S.C. 1669: 1962 SCR 339;** *Jaswant Sugar Mills Ltd. v. Lakshmi Chand & Ors.* **AIR 1963 SC 677: 1963 Suppl. SCR 242;** *Associated Cement Companies Ltd. v. P.N. Sharma & Anr.* **AIR 1965 SC 1595: 1965 SCR 366;** *Union of India v. R. Gandhi, President, Madras Bar Association* **(2010) 11 SCC 1: 2010 (6) SCR 857 - relied on.**

Case Law Reference:

(1955) 1 SCR 267	**referred to**	**Para 5**
1992 (1) SCR 686	**relied on**	**Para 5**
1993 (2) SCR 938	**relied on**	**Para 5**
1997 (2) SCR 1186	**relied on**	**Para 5**
1962 SCR 339	**relied on**	**Para 7**
1963 Suppl. SCR 242	**relied on**	**Para 7**
1965 SCR 366	**relied on**	**Para 7**
2010 (6) SCR 857	**relied on**	**Para 7**
(1999) 239 ITR 650	**referred to**	**Para 9**

(2003) 263 ITR 706	**referred to**	**Para 9**
(2012) 340 ITR 353	**referred to**	**Para 12**
1971 (1) SCR 304	**relied on**	**Para 13**

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 31543 of 2011 etc.

From the Judgment & Order dated 08.08.2011 of the Authority for Advanced Rulings (Income Tax), New Delhi in AAR No. 862 of 2009.

WITH

SLP (C) Nos. 3318 & 13760 of 2011, C.A. Nos. 2996, 5839 of 2008, 6987 of 2010 & 7035, 10064, 11327, 9768 & 9775 of 2011.

Mohan Parasaran, Gaurab Banerjee, ASG, Harish N. Salve, Ambhoj Kumar Sinha, Nageswar Rao, Shayari, Sumit Goel, Nishith Desai, Ashish Kabra, Shashank Kunwar, Ekansh Mishra, Dhruv Sanghvi, Pratibha Jain (for Parekh & Co.), Mukesh Butani, H. Raghavendra Rao, Arijit Prasad, Rahul Yadav, Mahesh Agarwal, Rishi Agrawala, E.C. Agrawala, Neha Nagpal, Nakul Mohta, Shikha Sarin, D.L. Chidananda, Gaurav Dhigra, A.K. Srivastava, Vikas Malhotra, Anil Katiyar (for B.V. Balaram Das), Vanita Bhargava, Ajay Bhargava, Sanjay Shanghvi, Nitin Mishra (for Khaitan & Co.), F.V. Irani, Rustom B. Hathikhanawala, Balbir Singh, Rupender Sinhmar, Abhishek Singh Baghel, Deepal, Rajesh Kumar, Kamal Mohan Gupta, Vivek B. Saharya, Vishnu B. Saharya, V.B. Saharya (for Saharya and Co.) for the appearing parties.

The order of the Court was delivered by

A.K. PATNAIK, J.

SPECIAL LEAVE PETITION (C) No. 31543 of 2011:

1. This is a petition under Article 136 of the Constitution

of India seeking special leave to appeal against the order dated 08.08.2011 of the Authority for Advance Rulings (Income Tax) constituted under Chapter XIX-B of the Income Tax Act, 1961 (for short 'the Act') in A.A.R. No.862 of 2009.

2. The petitioner is a company incorporated in the United States of America (for short 'the USA') and is engaged in the business of designing, developing, marketing and distributing outdoor apparel. For making purchases for its business, the petitioner established a liaison office in Chennai with the permission of the Reserve Bank of India (for short 'the RBI') in 1995. The RBI granted the permission in its letter dated 01.03.1995 subject to the conditions stipulated therein. The permission letter dated 01.03.1995 of the RBI stated that the liaison office of the petitioner was for the purpose of undertaking purely liaison activities viz. to inspect the quality, to ensure shipments and to act as a communication channel between head office and parties in India and except such liaison work, the liaison office will not undertake any other activity of a trading, commercial or industrial nature nor shall it enter into any business contracts in its own name without the prior permission of the RBI. The petitioner also obtained permission on 19.06.2000 from the RBI for opening an additional liaison office in Bangalore on the same terms and conditions as mentioned in the letter dated 01.03.1995 of the RBI.

3. On 10.12.2009, the petitioner filed an application before the Authority for Advance Rulings (for short 'the Authority') on the questions relating to its transactions in its liaison office in India set out in Annexure-II to the application. Questions No. 1 to 6 as set out in Annexure-II to the application of the petitioner before the Authority are extracted hereinbelow:

> "1. Whether based on the nature of activities carried on by the Liaison Office ['India LO'] of the Applicant in India, as listed in the Statement of relevant facts [Annexure III], any income accrues or arises in India as per Section 5(2)9B) of the Act?
>
> 2. Whether based on the nature of activities carried on by the India LO, as listed in the Statement of relevant facts [Annexure III], the Applicant can be said to have a business connection in India as per the provisions of Section 9(1)(i) of Act read with its Explanation 2?
>
> 3. If the answer to Query 2 is in the affirmative, whether various activities carried out by the India LO, as listed in the Statement of relevant facts [Annexure III], are covered under the phrase 'through or from operations which are confined to the purchase of goods in India for the purpose of export' as stated in part (b) of Explanation 1 to Section 9(1)(i) of the Act?
>
> 4. If the answer to Query 3 is in the negative, how would the profits attributable to the 'operations in India' be determined and what would be the broad principles to be borne in mind for attributing income to the India LO?
>
> 5. Whether the India LO creates a permanent establishment ['PE'] for the Applicant in India under Article 5(1) of the Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains entered into between the Government of the Republic of India and the Government of the United States of America ['Treaty'] read with the PE exclusion available for purchase function in terms of paragraph 3(d) of Article 5 of the Treaty?
>
> 6. If the answer to Query 5 is in the affirmative, how would the profits attributable to the PE in India be determined and what would be the broad principles to be borne in mind for attributing income to India LO under the Treaty?'

4. The respondent filed his reply dated 10.12.2010 to the

aforesaid application of the petitioner before the Authority. The petitioner also filed its response dated 08.02.2011 to the reply of the respondent. The Authority heard the petitioner and the respondent and passed the impugned order dated 08.08.2011. In para 34 of the impugned order, the Authority gave its ruling on the six questions as follows:

> "(1) A portion of the income of the business of designing, manufacturing and sale of the products imported by the applicant from India accrues to the applicant in India.
>
> (2) The applicant has a business connection in India being its liaison office located in India.
>
> (3) The activities of the Liaison Office in India are not confined to the purchase of goods in India for the purpose of export.
>
> (4) The income taxable in India will be only that part of the income that can be attributed to the operations carried out in India. This is a matter of computation.
>
> (5) The Indian Liaison Office involves a 'Permanent Establishment' for the applicant under Article 5.1 of the DTAA.
>
> (6) In terms of Article 7 of the DTAA only the income attributable to the Liaison Office of the applicant is taxable in India."

Aggrieved, the petitioner has challenged the impugned order on various grounds mentioned in this special leave petition.

5. On 10.02.2012, we passed orders calling upon the learned counsel for the parties to first address us on the question of maintainability of special leave petitions filed either by the assessee or by the Department against the advance rulings of the Authority. Learned counsel for the parties referred to the provisions of Chapter XIX-B of the Act to show that the

Authority is a quasi-judicial Tribunal. They submitted that the order of the Authority is an adjudicating order determining a question of law or fact specified in the application and sub-section (5) of Section 245R mandates compliance with the principles of natural justice. They further submitted that the Authority is also vested with the powers of a civil court in relation to the discovery and inspection, enforcing the attendance of persons and examining them on oath and compelling the production of books of account, etc. They argued that as the Authority is a quasi-judicial Tribunal, its orders can be challenged before the High Court by way of judicial review under Article 226/227 of the Constitution or before this Court by way of an appeal under Article 136 of the Constitution. They submitted that this Court may, however, decline to interfere with the order passed by the Authority in exercise of its powers under Article 136 of the Constitution where it feels that it would be more appropriate that the order of the Authority must first be examined by the High Court under Article 226/227 of the Constitution. They relied upon the decision of this Court in *Durga Shankar Mehta v. Thakur Raghuraj Singh and Others* [(1955) 1 SCR 267] in which it has been held that the expression "Tribunal" used in Article 136 of the Constitution includes, within its ambit all adjudicating bodies, provided they are created by the State and are invested with judicial as distinguished from purely administrative or executive functions. They cited the decisions of this Court in *Kihoto Hollohan v. Zachillhu and Others* [1992 Supp (2) SCC 651], *Jyotendrasinhji v. S.I. Tripathi and Others* [1993 Supp (3) SCC 389], *L. Chandra Kumar v. Union of India and Others* [(1997) 3 SCC 261] and *Union of India v. R. Gandhi, President, Madras Bar Association* [(2010) 11 SCC 1] in support of their submission that where a tribunal is constituted by an Act of the legislature for adjudicating any particular matter, the power of the constitutional courts under Article 226/227 or 136 is not ousted even if the Act makes the decision of the tribunal final.

6. The preliminary question that we have to decide is

whether an advance ruling pronounced by the Authority can be challenged by the applicant or by the Commissioner or any income-tax authority subordinate to him under Article 226/227 of the Constitution before the High Court or under Article 136 of the Constitution before this Court. Under Article 226 of the Constitution, the High Court can issue writs of Certiorari and Prohibition to control the proceedings of not only a subordinate court but also of any person, body or authority having the duty to act judicially, such as a tribunal. Under Article 227 of the Constitution, the High Court has superintendence over all courts and tribunals throughout the territory in relation to which it exercises jurisdiction. Under Article 136 of the Constitution, this Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India. Hence, we have to decide whether the Authority, if not a court, is a tribunal within the meaning of expression in Articles 136 and 227 of the Constitution and whether the Authority has a duty to act judicially and is amenable to writs of Certiorari and Prohibition under Article 226 of the Constitution.

7. The meaning of the expression "tribunal" in Article 136 and the expression "tribunals" in Article 227 of the Constitution has been explained by Hidayatullah, J., in *Harinagar Sugar Mills v. Shyam Sunder* [AIR 1961 S.C. 1669] in paragraph 32, relevant portion of which is quoted herein below:

> "With the growth of civilisation and the problems of modern life, a large number of administrative tribunals have come into existence. These tribunals have the authority of law to pronounce upon valuable rights; they act in a judicial manner and even on evidence on oath, but they are not part of the ordinary Courts of Civil Judicature. They share the exercise of the judicial power of the State, but they are brought into existence to implement some administrative policy or to determine controversies arising out of some administrative law. They are very similar to Courts, but are not Courts. When the Constitution speaks of 'Courts' in Art. 136, 227 or 228 or in Art. 233 to 237 or in the Lists, it contemplates Courts of Civil Judicature but not tribunals other than such Courts. This is the reason for using both the expressions in Arts. 136 and 227.
>
> By "Courts" is meant Courts of Civil Judicature and by "tribunals", those bodies of men who are appointed to decide controversies arising under certain special laws. Among the powers of the State is included the power to decide such controversies. This is undoubtedly one of the attributes of the State, and is aptly called the judicial power of the State. In the exercise of this power, a clear division is thus noticeable. Broadly speaking, certain special matters go before tribunals, and the residue goes before the ordinary Courts of Civil Judicature. Their procedures may differ, but the functions are not essentially different. What distinguishes them has never been successfully established….."

Thus, the test for determining whether a body is a tribunal or not is to find out whether it is vested with the judicial power of the State by any law to pronounce upon rights or liabilities arising out of some special law and this test has been reiterated by this Court in *Jaswant Sugar Mills Ltd. v. Lakshmi Chand & Ors.* [AIR 1963 SC 677], *Associated Cement Companies Ltd. v. P.N. Sharma & Anr.* [AIR 1965 SC 1595] and in the recent decision of the Constitution Bench in *Union of India v. R. Gandhi, President, Madras Bar Association* [(2010) 11 SCC 1].

8. We may now examine the provisions of Chapter XIX B of the Act on Advance Ruling to find out whether the Authority pronounces upon the rights or liabilities arising out of the Act. Section 245N(a) of Chapter XIX B which defines "advance rulings" is extracted hereinbelow:

"245N. In this Chapter, unless the context otherwise requires,-

(a) "advance ruling" means-

(i) a determination by the Authority in relation to a transaction which has been undertaken or is proposed to be undertaken by a non-resident applicant; or

(ii) a determination by the Authority in relation to the tax liability of a non-resident arising out of a transaction which has been undertaken or is proposed to be undertaken by a resident applicant with such non-resident, and such determination shall include the determination of any question of law or of fact specified in the application;

(iii) a determination or decision by the Authority in respect of an issue relating to computation of total income which is pending before any income-tax authority or the Appellate Tribunal and such determination or decision shall include the determination or decision of any question of law or of fact relating to such computation of total income specified in the application :

[Provided that where an advance ruling has been pronounced, before the date on which the Finance Act, 2003 receives the assent of the President, by the Authority in respect of an application by a resident applicant referred to in sub-clause (ii) of this clause as it stood immediately before such date, such ruling shall be binding on the persons specified in section 245S;]"

A plain reading of the very definition of advance ruling in Section 245N (a) would show that the Authority is called upon to make a determination in relation to a transaction which has

been undertaken or is proposed to be undertaken by a non-resident applicant or in relation to the tax liability of a non-resident arising out of such transaction which has been undertaken or proposed to be undertaken by a resident applicant with such non-resident and such determination may be on any question of law or fact specified in the application. Further, the Authority may make a determination or decision in respect of a issue relating to the computation of total income which is pending before any income-tax authority or the Appellate Tribunal and such determination or decision may include the determination or decision of any question of law or of fact relating to such computation of total income specified in the application. Thus, the Authority may determine not only a transaction but also the tax liability arising out of a transaction and such determination may include a determination of issue of fact or issue of law. Moreover, the Authority may determine the quantum of income and such determination may include a determination on a issue of fact or issue of law.

9. We also find that the determination of the Authority is not just advisory but binding. Section 245S in Chapter XIX-B is quoted hereunder:

"245S. (1) The advance ruling pronounced by the Authority under section 245R shall be binding only-

(a) on the applicant who had sought it;

(b) in respect of the transaction in relation to which the ruling had been sought; and

(c) on the Commissioner, and the income-tax authorities subordinate to him, in respect of the applicant and the said transaction.

(2) The advance ruling referred to in sub-section (1) shall be binding as aforesaid unless there is a change in law or facts on the basis of which the advance ruling has been pronounced."

The binding effect of advance ruling as provided in Section 245S has been dealt with by the Authority (Chairman and two Members) in *Cyril Eugene Pereira, In re.* [1999] 239 ITR 650] and at page 672 of the ITR, the Authority held:

> "Thus, sub-section (2) of section 245S has limited the binding nature of the ruling to the case of the applicant in respect of the transaction in relation to which the advance ruling is sought and to the Commissioner and authorities subordinate to him only in respect of the applicant and the transaction involved. This is not to say that a principle of law laid down in a case will not be followed in future. The Act has made the ruling binding in the case of one transaction only and the parties involved in that case in respect of that transaction. For other transactions and for other parties, the ruling will be of persuasive nature."

The Authority, thus, held that the advance ruling of the Authority is binding in the case of one transaction only and the parties involved in respect of that transaction and for other parties, the ruling will be of persuasive nature. The Authority, however, has clarified that this is not to say that a principle of law laid down in a case will not be followed in future. This decision of the Authority in Cyril Eugene Pereira, In re. (supra) has been taken note of by this Court in *Union of India & Anr. v. Azadi Bachao Andolan & Anr.* [2003] 263 ITR 706 at 742] to hold that the advance ruling of the Authority is binding on the applicant, in respect of the transaction in relation to which the ruling had been sought and on the Commissioner and the income-tax authorities subordinate to him and has persuasive value in respect of other parties. However, it has also been rightly held by the Authority itself that this does not mean that a principle of law laid down in a case will not be followed in future.

10. As Section 245S expressly makes the Advance Ruling binding on the applicant, in respect of the transaction and on the Commissioner and the income tax authorities subordinate to him, the Authority is a body acting in judicial capacity. H.M.

Seervai in his book "Constitutional Law of India" (Forth Edition) while discussing the tests for identifying judicial functions in paragraph 16.99 quotes the following passage from Prof. de Smiths Judicial Review on page 1502:

> "An authority acts in a judicial capacity when, after investigation and deliberation, it performs an act or makes a decision that is binding and collusive and imposes obligation upon or affects the rights of individuals."

We have, therefore, no doubt in our mind that the Authority is a body exercising judicial power conferred on it by Chapter XIX-B of the Act and is a tribunal within the meaning of the expression in Articles 136 and 227 of the Constitution.

11. The fact that sub-section (1) of Section 245S makes the advance ruling pronounced by the Authority binding on the applicant, in respect of the transaction and on the Commissioner and the income-tax authorities subordinate to him in respect of the applicant and the transaction would not affect the jurisdiction of either this Court under Article 136 of the Constitution or of the High Courts under Articles 226 and 227 of the Constitution to entertain a challenge to the advance ruling pronounced by the Authority. The reason for this view is that Articles 136, 226 and 227 of the Constitution are constitutional provisions vesting jurisdiction on this Court and the High Courts and a provision of an Act of legislature making the decision of the Authority final or binding could not come in the way of this Court or the High Courts to exercise jurisdiction vested under the Constitution. We may cite some authorities in support of this view. In *Kihoto Hollohan v. Zachillhu and Others* (supra), the question raised before this Court was whether Paragraph 6(1) of Schedule-X of the Constitution providing that the decision of the Speaker or the Chairman on the question of disqualification of a member of the Legislature will be final would exclude judicial review under Articles 136, 226 and 227 of the Constitution and this Court held that the

finality clause in Paragraph 6 of the Schedule-X of the Constitution does not completely exclude the jurisdiction of the Courts under Articles 136, 226 and 227 of the Constitution, though it may limit the scope of this jurisdiction. In *Jyotendrasinhji v. S.I. Tripathi and Others* (supra), this Court held that the provision in Section 245-I of the Income Tax Act, 1961, declaring that every order of settlement passed under sub-section (4) of Section 245D shall be conclusive as to the matters stated therein would not bar the jurisdiction of the High Court under Article 226 of the Constitution or of this Court under Article 136 of the Constitution. Considering the settled position of law that the powers of this Court under Article 136 of the Constitution and the powers of the High Court under Articles 226 and 227 of the Constitution could not be affected by the provisions made in a statute by the Legislature making the decision of the tribunal final or conclusive, we hold that sub-section (1) of Section 245S of the Act, insofar as, it makes the advance ruling of the Authority binding on the applicant, in respect of the transaction and on the Commissioner and income-tax authorities subordinate to him, does not bar the jurisdiction of this Court under Article 136 of the Constitution or the jurisdiction of the High Court under Articles 226 and 227 of the Constitution to entertain a challenge to the advance ruling of the Authority.

12. In a recent advance ruling in *Groupe Industrial Marcel Dassault, In re* [2012] 340 ITR 353 (AAR)], the Authority has, however, observed:

> "….. But permitting a challenge in the High Court would become counter productive since writ petitions are likely to be pending in High Courts for years and in the case of some High Courts, even in Letters Patent Appeals and then again in the Supreme Court. It appears to be appropriate to point out that considering the object of giving an advance ruling expeditiously, it would be consistent with the object sought to be achieved, if the Supreme Court were to entertain an application for Special Leave to appeal directly from a ruling of this Authority, preliminary or final, and render a decision thereon rather than leaving the parties to approach the High Courts for such a challenge. …"

We have considered the aforesaid observations of the Authority but we do not think that we can hold that an advance ruling of the Authority can only be challenged under Article 136 of the Constitution before this Court and not under Articles 226 and/or 227 of the Constitution before the High Court. In *L. Chandra Kumar v. Union of India and Others* (supra), a Constitution Bench of this Court has held that the power vested in the High Courts to exercise judicial superintendence over the decisions of all courts and tribunals within their respective jurisdictions is part of the basic structure of the Constitution. Therefore, to hold that an advance ruling of the authority should not be permitted to be challenged before the High Court under Articles 226 and/or 227 of the Constitution would be to negate a part of the basic structure of the Constitution. Nonetheless, we do understand the apprehension of the Authority that a writ petition may remain pending in the High Court for years, first before a learned Single Judge and thereafter in Letters Patent Appeal before the Division Bench and as a result the object of Chapter XIX-B of the Act which is to enable an applicant to get an advance ruling in respect of a transaction expeditiously would be defeated. We are, thus, of the opinion that when an advance ruling of the Authority is challenged before the High Court under Articles 226 and/or 227 of the Constitution, the same should be heard directly by a Division Bench of the High Court and decided as expeditiously as possible.

13. The only other question which we have to consider is whether we should entertain this petition under Article 136 of the Constitution or ask the petitioner to approach the High Court under Articles 226 and/or 227 of the Constitution. Article 136 of the Constitution itself states that this Court may, "in its

discretion", grant special leave to appeal from any order passed or made by any court or tribunal in the territory of India. The words "in its discretion" in Article 136 of the Constitution makes the exercise of the power of this Court in Article 136 discretionary. Hence, even if good grounds are made out in a Special Leave Petition under Article 136 for challenge to an advance ruling given by the Authority, this Court may still, in its discretion, refuse to grant special leave on the ground that the challenge to the advance ruling of the authority can also be made to the High Court under Articles 226 and/or 227 of the Constitution on the self same grounds. In fact, in *Sirpur Paper Mills Ltd. v. Commissioner of Wealth Tax, Hyderabad* [AIR 1970 SC 1520] it has been observed that this Court does not encourage an aggrieved party to appeal directly to this Court against the order of a Tribunal exercising judicial functions unless it appears to the Court that a question of principle of great importance arises. Unless, therefore, a Special Leave Petition raises substantial questions of general importance or a similar question is already pending before this Court for decision, this Court does not entertain a Special Leave Petition directly against an order of the tribunal.

14. In this Special Leave Petition, we do not find that a substantial question of general importance arises nor is it shown that a similar question is already pending before this Court for which the petitioner should be permitted to approach this Court directly against the advance ruling of the Authority. We accordingly dispose of this Special Leave Petition granting liberty to the petitioner to move the appropriate High Court under Article 226 and/or 227 of the Constitution. We request the concerned High Court to ensure that the Writ Petition, if filed, is heard by the Division Bench hearing income-tax matters and we request the Division Bench to hear and dispose of the matter as expeditiously as possible.

SPECIAL LEAVE PETITION (C) No. 3318 of 2011, SPECIAL LEAVE PETITION (C) No. 13760 of 2011, CIVIL APPEAL No. 2996 of 20O8, CIVIL APPEAL No. 5839 of 2008, CIVIL APPEAL No. 7035 of 2011, CIVIL APPEAL No. 6987 of 2010, CIVIL APPEAL No. 10064 of 2011, AND CIVIL APPEAL No. 11327 of 2011,

Delay condoned in Special Leave Petitions.

These Special Leave Petitions and Civil Appeals are disposed of in terms of our order passed in Special Leave Petition (C) No.31543 of 2011.

B.B.B. Matters disposed of.

R.C. CHANDEL
v.
HIGH COURT OF M.P. & ANR.
(Civil Appeal No. 5790 of 2012)

AUGUST 8, 2012

[R.M. LODHA AND ANIL R. DAVE, JJ.]

Service Law - Judicial Service - Compulsory retirement - Of appellant-judicial officer after 25 years in judicial service - Challenge to - Scope of judicial review - Held: On facts, it cannot be said that the recommendation made by the Full Court (of the High Court) to the Government for compulsory retirement of the appellant was arbitrary or based on material not germane for such recommendation - Recommendation made by High Court to the Government for compulsory retirement of the appellant and the order of compulsory retirement issued by the Government did not suffer from any legal flaw - In assessing potential for continued useful service of a judicial officer, the High Court is required to take into account the entire service record - Those of doubtful integrity, questionable reputation and wanting in utility are not entitled to benefit of service after attaining the requisite length of service or age - Appellant did not have unblemished service record all along - His quality of judgments and orders was not found satisfactory on more than one occasion - His reputation was observed to be tainted on few occasions and his integrity was not always found to be above board - Confirmation of appellant as District Judge and grant of selection grade and super time scale did not wipe out his earlier adverse entries - Conduct of appellant in involving an M.P. and the Ministry of Law, Justice and Company Affairs, in a matter of the High Court concerning an administrative review petition filed by him for expunging adverse remarks in his ACRs was most reprehensible and highly unbecoming of a judicial officer -

Still worst, appellant had the audacity to plead that he never made any representation to such M.P.- The Single Judge of the High Court examined the administrative decision of the Full Court (to recommend to the Government to compulsory retire the appellant) as if he was sitting as an appellate authority to consider the correctness of such recommendation by going into sufficiency and adequacy of the materials which led the Full Court in reaching its satisfaction - The whole approach of the Single Judge was flawed and not legally proper - It did not keep the scope of judicial review - The Division Bench of the High Court was, thus, fully justified in setting aside the order of Single Judge - Fundamental Rules, as applicable in the State of Madhya Pradesh - Rule 56(2)(a) as amended - Madhya Pradesh Higher Judicial Service (Recruitment and Service Conditions) Rules, 1994 - Rule 14 - Madhya Pradesh Civil Services (Pension) Rules, 1976 - Rule 42(1)(b) - Madhya Pradesh District and Sessions Judges (Death-cum-Retirement Benefits) Rules, 1964 - Rule 1-A -Constitution of India, 1950 - Article 235.

Judiciary - Judicial Officer - Conduct of - What should be - Held: Judicial service is not an ordinary government service and the Judges are not employees as such - Judges hold the public office - In discharge of their functions and duties, the Judges represent the State - A Judge must be a person of impeccable integrity and unimpeachable independence - The standard of conduct expected of a Judge is much higher than an ordinary man - A Judge, like Caesar's wife, must be above suspicion - A Judge is expected not to be influenced by any external pressure and he is also supposed not to exert any influence on others in any administrative or judicial matter.

On 13.09.2004, the appellant, who was working on the post of District and Sessions Judge, was compulsorily retired from service in public interest, by the Government of Madhya Pradesh on the request of the Madhya Pradesh High Court. The Full Court, on the basis

of the service record of the appellant, had formed a unanimous opinion that he must be compulsorily retired and had recommended to the Government, accordingly. The order of compulsory retirement was issued by the Government in exercise of its power under amended Rule 56(2)(a) of the Fundamental Rules, as made applicable in the State of Madhya Pradesh, Rule 14 of the Madhya Pradesh Higher Judicial Service (Recruitment and Service Conditions) Rules, 1994, Rule 42(1)(b) of the Madhya Pradesh Civil Services (Pension) Rules, 1976 and Rule 1-A of Madhya Pradesh District and Sessions Judges (Death-cum-Retirement Benefits) Rules, 1964. In lieu of notice of three months, it was directed in the order that the appellant shall be entitled to three months' salary and allowances which he was receiving prior to his retirement. At the time of issuance of the order of compulsory retirement on 13.09.2004, the appellant had completed 25 years or so in judicial service.

The appellant challenged the order of compulsory retirement by filing a writ petition before the High Court. A Single Judge of that Court allowed the writ petition; quashed the order of compulsory retirement dated 13.09.2004 and directed that he be reinstated with all consequential benefits. The High Court on the administrative side challenged the order of Single Judge in writ appeal. The Division Bench of that Court held that the challenge to the order of compulsory retirement was ill-founded and, accordingly, set aside the order of the Single Judge.

In the instant appeal, the counsel for the appellant submitted that compulsory retirement of the appellant on the basis of adverse entry recorded in 1989 and two subsequent adverse entries for 1993 and 1994 was wholly unjustified. As regards 1989 adverse entry, the counsel submitted that the appellant was awarded lower selection

grade in 1990 and, therefore, the said entry had lost its efficacy. In respect of entries recorded in 1993 and 1994, the counsel submitted that the said entries also lost their significance since the appellant was awarded super time scale in 1999 and above super time scale in 2002 and in between in 2001, he was allowed to continue in service. Moreover, the counsel submitted that the adverse remarks recorded in 1993 and 1994 were challenged by the appellant on the judicial side of the High Court and a Single Judge of that Court, in writ petition, had accepted the appellant's challenge and expunged these remarks; and that in writ appeal, though the Division Bench of the High Court had set aside the order of the Single Judge, but it had observed that the 1993 and 1994 entries should not be read adverse to the appellant for all times to come.

The questions which therefore arose for consideration were: whether the recommendation made by the High Court on the basis of unanimous opinion to the Government for compulsory retirement of the appellant and the order of compulsory retirement issued by the Government suffered from any legal flaw; whether the order of compulsory retirement was so arbitrary or irrational that justified interference in judicial review; and whether the view of the Division Bench upholding the order of appellant's compulsory retirement so erroneous warranting interference under Article 136 of the Constitution of India.

Dismissing the appeal, the Court

HELD: 1.1. Rule 56(2) of the Fundamental Rules provides that a government servant (read judicial officer) may, in the public interest, be retired at any time after he has completed 20 years' qualifying service, or on his attaining the age of 50 years, whichever is earlier without assigning any reason by giving him a notice in writing. The notice period is three months. However, he may be

retired forthwith and on such retirement he is entitled to claim a sum equivalent to the amount of his pay plus allowances for the period of notice at the same rates at which he was drawing them immediately before retirement or, as the case may be, for the period by which such notice falls short of three months. Sub-rule 1-A added to Madhya Pradesh District and Sessions Judge (Death cum Retirement Benefits) Rules, 1964 provides that with regard to age of compulsory retirement, the permanent District and Sessions Judge shall be governed by the provisions of Fundamental Rule 56. Rule 42(1)(b) of the Madhya Pradesh Civil Services (Pension) Rules, 1976 provides that the appointing authority may in the public interest require a government servant (read judicial officer) to retire from service at any time after he has completed 20 years' qualifying service or on his attaining the age of 50 years whichever is earlier by giving three months' notice in Form 29 provided that he may be retired forthwith and on such retirement he shall be entitled to claim a sum equivalent to the amount of his pay plus allowances for the period of the notice at the same rate at which he was drawing immediately before his retirement or, for the period by which such notice falls short of three months, as the case may be. Rule 14(1) of the MadhyaPradesh Higher Judicial Service (Recruitment and Service Conditions) Rules, 1994 provides that the age of superannuation of a member of the Madhya Pradesh Higher Judicial Service shall ordinarily be 60 years, provided he is found fit and suitable to continue after 58 years in service of the High Court. Sub-rule (2) makes a provision that without prejudice to the provisions contained in Rule 56(3) of the Fundamental Rules and Rule 42(1)(b) of the 1976 Rules, a member of the service not found fit and suitable shall be compulsorily retired on his attaining the age of 58 years. [Para 12] [219-F-H; 220-A-E]

1.2. Article 235 of the Constitution vests in the High

Court the control over the subordinate judiciary within the State. The power of the High Court to recommend to the Government to compulsorily retire a judicial officer on attaining the required length of service or requisite age and consequent action by the Government on such recommendation is beyond any doubt. [Para 19] [220-F; 222-D-E]

1.3. It is clear that the appellant did not have unblemished service record all along. He was graded "Average" on quite a few occasions. He was assessed "Poor" in 1993 and 1994. His quality of judgments and orders was not found satisfactory on more than one occasion. His reputation was observed to be tainted on few occasions and his integrity was not always found to be above board. In 1988-89, the remark reads, "never enjoyed clean reputation". In 1993, the remark "his reputation was not good" and in 1994 the remark "officer does not enjoy good reputation", were recorded. His representations for expunction of these remarks failed. The challenge to these remarks on judicial side was unsuccessful right upto this Court. In 1993, it was also recorded that quality of performance of the appellant was poor and his disposals were below average. In 1994, the remark in the service record stated that the performance of the appellant qualitatively and quantitatively has been poor. With this service record, it cannot be said that there existed no material for an order of compulsory retirement of the appellant from service. Material germane for taking decision by the Full Court whether the appellant could be continued in judicial service or deserved to be retired compulsorily did exist. It is not the scope of judicial review to go into adequacy or sufficiency of such materials. [Para 33] [227-C-H]

1.4. Though it is true that the appellant was confirmed as District Judge in 1985; he got lower selection grade with effect from 24.03.1989; he was

awarded super time scale in May, 1999 and he was also given above super time scale in 2002 but the confirmation as District Judge and grant of selection grade and super time scale did not wipe out the earlier adverse entries which remained on record and continued to hold the field. The criterion for promotion or grant of increment or higher scale is different from an exercise which is undertaken by the High Court to assess a judicial officer's continued utility to the judicial system. In assessing potential for continued useful service of a judicial officer in the system, the High Court is required to take into account the entire service record. Overall profile of a judicial officer is the guiding factor. Those of doubtful integrity, questionable reputation and wanting in utility are not entitled to benefit of service after attaining the requisite length of service or age. [Para 34] [228-A-D]

1.5. The appellant's challenge to 1993 and 1994 entries was unsuccessful right upto this Court. Though the appellant placed heavy reliance upon the observations made by the Division Bench (of the High Court) in its judgment that adverse remarks on his reputation in the relevant years should not haunt him all through his judicial career and hamper his prospects for all times, the above observations by the Division Bench while upholding the remarks in no manner restricted the power of the Full Court in taking into consideration these adverse remarks in its exercise to find out whether or not the appellant should be retained in service after he has attained the required length of service. The consideration of the appellant's case for grant of selection grade and super time scale stood on different footing. The entire service record and overall profile of a judicial officer guide the High Court in reaching its satisfaction about the continuance or otherwise after the judicial officer has attained the required length of service or age. When the entire service record of a judicial officer is under

consideration, obviously the High Court is alive to such judicial officer's having got promotion/s, increments, etc. during the service. [Paras 35] [229-E-H, 230-A]

1.6. Though it was argued by the counsel for the appellant that the administrative committee-1 had recommended the appellant's continuation in service and there was no justification for the Full Court to take a contrary view, but the view of the administrative committee is not final. It is recommendatory in nature. It is open to the Full Court to accept the committee's report or take a different view. In the present case, the Full Court on the basis of the entire service record of the appellant formed a unanimous opinion that the appellant must be compulsorily retired and recommended to the Government, accordingly. On the basis of the existent material, it can hardly be said that the recommendation by the Full Court to the Government for compulsory retirement of the appellant was arbitrary or based on material not germane for such recommendation. [Para 36] [229-B-D]

1.7. Judicial service is not an ordinary government service and the Judges are not employees as such. Judges hold the public office; their function is one of the essential functions of the State. In discharge of their functions and duties, the Judges represent the State. The office that a Judge holds is an office of public trust. A Judge must be a person of impeccable integrity and unimpeachable independence. He must be honest to the core with high moral values. When a litigant enters the courtroom, he must feel secured that the Judge before whom his matter has come, would deliver justice impartially and uninfluenced by any consideration. The standard of conduct expected of a Judge is much higher than an ordinary man. This is no excuse that since the standards in the society have fallen, the Judges who are drawn from the society cannot be expected to have high

standards and ethical firmness required of a Judge. A Judge, like Caesar's wife, must be above suspicion. The credibility of the judicial system is dependent upon the Judges who man it. For a democracy to thrive and rule of law to survive, justice system and the judicial process have to be strong and every Judge must discharge his judicial functions with integrity, impartiality and intellectual honesty. [Para 37] [229-E-H; 230-A-B]

1.8. The most shocking and unbecoming conduct of the appellant highlighted by the respondent no. 1 before the High Court in opposition to the writ petition and in response to the present appeal is his act to overreach the administrative decision on the review petition filed by him before the Chief Justice after his representations for expunction of adverse remarks for the period ending on 31.03.1993 and 31.03.1994 had been thrice earlier rejected. The appellant approached 'RKM', Member of Parliament and Chairman, House Committee (Rajya Sabha) for his grievance concerning rejection of his representations for expunction of remarks for 1993 and 1994. The conduct of the appellant in involving an M.P. and the Ministry of Law, Justice and Company Affairs, in a matter of the High Court concerning an administrative review petition filed by him for expunging adverse remarks in ACRs is most reprehensible and highly unbecoming of a judicial officer. His conduct has tarnished the image of the judiciary and he disentitled himself from continuation in judicial service on that count alone. A Judge is expected not to be influenced by any external pressure and he is also supposed not to exert any influence on others in any administrative or judicial matter. Secondly and still worst, the appellant had an audacity to set up a plea in the rejoinder that he never made any representation to 'RKM', M.P. for any purpose whatsoever. But for the appellant's approaching 'RKM' and his request for help, 'RKM' would have never written

the letter to the Minister of State for Law, Justice and Company Affairs. On this ground also his writ petition was liable to be dismissed. [Paras 38, 40] [230-B-D; 232-F-H; 233-A-B]

1.9. The Single Judge examined the administrative decision of the Full Court to recommend to the Government to compulsory retire the appellant as if he was sitting as an appellate authority to consider the correctness of such recommendation by going into sufficiency and adequacy of the materials which led the Full Court in reaching its satisfaction. The whole approach of the Single Judge in consideration of the matter was flawed and not legally proper. The Single Judge did not keep the scope of judicial review in view while examining the validity of the order of compulsory retirement. The Division Bench of the High Court in the intra-court appeal was, thus, fully justified in setting aside the impugned order of the Single Judge. In view of that, the recommendation made by the High Court to the Government for compulsory retirement of the appellant and the order of compulsory retirement issued by the Government did not suffer from any legal flaw. The order of compulsory retirement is neither arbitrary nor irrational justifying any interference in judicial review. The impugned judgment of the Division Bench is not legally unsustainable warranting any interference by this Court in an appeal under Article 136 of the Constitution of India. [Paras 41, 43] [233-B-E; 234-C-D]

Nand Kumar Verma v. State of Jharkhand and others **(2012) 3 SCC 580: 1992 (3) SCR 213 - held inapplicable.**

Rajendra Singh Verma (Dead) Through LRs. and others v. Lieutenant Governor (NCT of Delhi) and others **(2011) 10 SCC 1: 2011 (12) SCR 496;** *Samsher Singh v. State of Punjab and another* **(1974) 2 SCC 831: 1975 (1) SCR 814;** *Chandra Singh and others v. State of Rajasthan and another*

(2003) 6 SCC 545: 2003 (1) Suppl. SCR 674; *High Court of Judicature at Bombay Through Its Registrar v. Shirishkumar Rangrao Patil and another* **(1997) 6 SCC 339: 1997 (3) SCR 1131;** *All India Judges' Association (2) and others v. Union of India and others* **(1993) 4 SCC 288: 1993 (1) Suppl. SCR 749;** *State of U.P. and another v. Bihari Lal* **1994 (Suppl) 3 SCC 593: 1994 (3) Suppl. SCR 108;** *Union of India v. V.P. Seth and another* **(1994) SCC (L&S) 1052;** *Baikuntha Nath Das and another v. Chief District Medical Officer, Baripada and another* **(1992) 2 SCC 299: 1992 (1) SCR 836;** *Baidyanath Mahapatra v. State of Orissa and another* **(1989) 4 SCC 664: 1989 (3) SCR 803;** *Union of India v. Col. J.N. Sinha and another* **(1970) 2 SCC 458: 1971 (1) SCR 791 and** *All India Judges' Association (1) v. Union of India and others* **(1992) 1 SCC 119: 1991 (2) Suppl. SCR 206 - referred to.**

Case Law Reference:

1992 (3) SCR 213	**held inapplicable**	**Para 9**
2011 (12) SCR 496	**referred to**	**Para 11**
1975 (1) SCR 814	**referred to**	**Para 14**
2003 (1) Suppl. SCR 674	**referred to**	**Para 15**
1997 (3) SCR 1131	**referred to**	**Para 17**
1993 (1) Suppl. SCR 749	**referred to**	**Para 18**
1994 (3) Suppl. SCR 108	**referred to**	**Para 27**
(1994) SCC (L&S) 1052	**referred to**	**Para 27**
1992 (1) SCR 836	**referred to**	**Para 27**
1989 (3) SCR 803	**referred to**	**Para 27**
1971 (1) SCR 791	**referred to**	**Para 27**
1991 (2) Suppl. SCR 206	**referred to**	**Para 27**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5790 of 2012.

From the Judgment & Order dated 23.11.2006 of the High Court of Madhya Pradesh at Jabalpur in Writ Appeal No. 72 of 2006.

Rohit Arya, Nitin Gaur, Hitendra Nath Rath, Y. Raja Gopala Rao, Sunil Singh Parihar for the Appellant.

Ravindra Shrivastava, Arvind Verma, C.D. Singh, Sunny Choudhary, Anup Jain, Anubhav Shrivastav, Aditi Mohan, Vikas Upadhyay for B.S. Banthia for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Leave granted.

2. On 13.09.2004, the appellant, who was working on the post of District and Sessions Judge, Punna was compulsorily retired from the service in the public interest by the Government of Madhya Pradesh (for short, 'the Government') on the request of the Madhya Pradesh High Court (for short, 'High Court'). The order of compulsory retirement was issued by the Government in exercise of its power under amended Rule 56(2)(a) of the Fundamental Rules, as made applicable in the State of Madhya Pradesh, Rule 14 of the Madhya Pradesh Higher Judicial Service (Recruitment and Service Conditions) Rules, 1994 (for short, '1994 Rules'), Rule 42(1)(b) of the Madhya Pradesh Civil Services (Pension) Rules, 1976 (for short, '1976 Rules') and Rule 1-A of Madhya Pradesh District and Sessions Judges (Death-cum-Retirement Benefits) Rules, 1964 (for short, '1964 Rules'). In lieu of notice of three months, it was directed in the order that the appellant shall be entitled to three months' salary and allowances which he was receiving prior to his retirement.

3. The appellant challenged the above order of compulsory retirement by filing a writ petition before the High Court. The Single Judge of that Court by his order dated 20.04.2006,

allowed the writ petition; quashed the order of compulsory retirement dated 13.09.2004 and directed that he be reinstated with all consequential benefits.

4. The High Court on the administrative side challenged the order of Single Judge in writ appeal. The Division Bench of that Court on consideration of the entire matter held that the challenge to the order of compulsory retirement was ill-founded and, accordingly, set aside the order of the Single Judge vide its judgment dated 23.11.2006. It is from this order that the appellant has preferred this appeal by special leave.

5. The appellant was selected in the higher judicial service of Madhya Pradesh by direct recruitment. He joined the judicial service as an Additional District Judge on 17.10.1979. On 26.06.1985, he was confirmed as a District Judge. The appellant was awarded lower selection grade on 07.09.1990 with effect from 24.03.1989. He was awarded super time scale in May, 1999 and above super time scale in 2002. As noted above, by the order dated 13.09.2004, the appellant was compulsorily retired in public interest.

6. We have heard Mr. Rohit Arya, learned senior counsel for the appellant and Mr. Ravindra Shrivastava, learned senior counsel for the High Court on the administrative side.

7. Mr. Rohit Arya, learned senior counsel for the appellant vehemently contended that the Division Bench was not at all justified in setting aside the judgment and order of the Single Judge. The observations made by the Division Bench in the impugned order and the findings recorded therein are founded on incorrect and misleading facts. The service record of the appellant speaks otherwise.The appellant has been largely assessed in his ACRs 'Good' or 'Very Good'. He highlighted that the appellant was confirmed as District Judge in 1985, he was awarded lower selection grade in 1990, he was given super time scale in 1999 and above super time scale in 2002 on merits and, on the basis of his judicial work he was also

recommended for elevation as a High Court Judge by the High Court collegium in March, 2004.

8. Learned senior counsel for the appellant submitted that compulsory retirement of the appellant on the basis of an adverse entry recorded in 1989 and two subsequent adverse entries for 1993 and 1994 was wholly unjustified. As regards 1989 adverse entry, learned senior counsel submitted that the appellant was awarded lower selection grade in 1990 and, therefore, the said entry had lost its efficacy. In respect of entries recorded in 1993 and 1994, learned senior counsel submitted that the said entries also lost their significance since the appellant was awarded super time scale in 1999 and above super time scale in 2002. In between in 2001, he was allowed to continue in service. Moreover, learned senior counsel would submit that the adverse remarks recorded in 1993 and 1994 were challenged by the appellant on the judicial side of the High Court. The Single Judge of that Court accepted the appellant's challenge and expunged these remarks. The High Court on administrative side challenged the order of the Single Judge in writ appeal. The Division Bench of the High Court although set aside the order of the Single Judge but observed that 1993 and 1994 entries shall not be read adverse to the appellant for all times to come.

9. Learned senior counsel referred to the guidelines dated 22.08.2000 issued by the Government and submitted that in view thereof no order of compulsory retirement could be passed on the basis of incapacity if the officer was promoted within the last five years and during that period his performance remained satisfactory. He submitted that throughout his work, the appellant achieved the norms for disposal of cases fixed by the High Court and his reputation and integrity as well as the judicial performance was found to be good and it is because of that that he got lower selection grade and super time scale from time to time. Learned senior counsel, thus, submitted that the Single Judge of the High Court was fully

justified in interfering with the order of compulsory retirement after dealing with each and every complaint made against the appellant and none of these complaints was found meritorious justifying compulsory retirement of the appellant. Learned senior counsel for the appellant, in support of his arguments, heavily relied upon a recent decision of this Court in *Nand Kumar Verma v. State of Jharkhand and others*[1].

10. On the other hand, Mr. Ravindra Shrivastava, learned senior counsel for the High Court on administrative side (respondent no.1) stoutly defended the impugned judgment. He submitted that the High Court recommended the compulsory retirement of the appellant to the Government as he was not found fit for continuation in judicial service in public interest. While making such recommendation the Full Court considered the entire service record of the appellant. Mr. Ravindra Shrivastava, learned senior counsel referred to ACRs of the appellant recorded for the years 1982, 1989, 1993, 1994, 1997 and 1998 and submitted that the decision of the Full Court to compulsorily retire the appellant cannot be said to be unjustified.

11. Learned senior counsel for the respondent no. 1 placed reliance upon a decision of this Court in *Rajendra Singh Verma (Dead) Through LRs. and others v. Lieutenant Governor (NCT of Delhi) and others*[2].

12. Rule 56(2) of the Fundamental Rules provides that a government servant (read judicial officer) may, in the public interest, be retired at any time after he has completed 20 years' qualifying service, or on his attaining the age of 50 years, whichever is earlier without assigning any reason by giving him a notice in writing. The notice period is three months. However, he may be retired forthwith and on such retirement he is entitled to claim a sum equivalent to the amount of his pay plus allowances for the period of notice at the same rates at which

1. (2012) 3 SCC 580.
2. (2011) 10 SCC 1.

he was drawing them immediately before retirement or, as the case may be, for the period by which such notice falls short of three months. Sub-rule 1-A added to 1964 Rules provides that with regard to age of compulsory retirement, the permanent District and Sessions Judge shall be governed by the provisions of Fundamental Rule 56. Rule 42(1)(b) of the 1976 Rules provides that the appointing authority may in the public interest require a government servant (read judicial officer) to retire from service at any time after he has completed 20 years' qualifying service or on his attaining the age of 50 years whichever is earlier by giving three months' notice in Form 29 provided that he may be retired forthwith and on such retirement he shall be entitled to claim a sum equivalent to the amount of his pay plus allowances for the period of the notice at the same rate at which he was drawing immediately before his retirement or, for the period by which such notice falls short of three months, as the case may be. Rule 14(1) of the 1994 Rules provides that the age of superannuation of a member of the Madhya Pradesh Higher Judicial Service shall ordinarily be 60 years, provided he is found fit and suitable to continue after 58 years in service of the High Court. Sub-rule (2) makes a provision that without prejudice to the provisions contained in Rule 56(3) of the Fundamental Rules and Rule 42(1)(b) of the 1976 Rules, a member of the service not found fit and suitable shall be compulsorily retired on his attaining the age of 58 years.

13. Article 235 of the Constitution vests in the High Court the control over the subordinate judiciary within the State. It reads as follows :

> **"Control over subordinate courts.**-The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this article shall

be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorizing the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law."

14. In *Samsher Singh v. State of Punjab and another*[3], a seven-Judge Bench of this Court considered the ambit and scope of the word "control" and while elaborating the powers included in the High Courts with regard to control over subordinate judiciary within its respective state, inter alia, exposited the position that such power included pre-mature or compulsory retirement of Judges of the district courts and of subordinate courts.

15. In *Chandra Singh and others v. State of Rajasthan and another*[4], the above position laid down by this Court in *Samsher Singh*[3] has been reiterated.

16. The above position laid down by this Court in the cases of *Samsher Singh*[3] and *Chandra Singh*[4] has been reiterated in a recent decision of this Court in *Rajendra Singh Verma*[2] . In paragraph 82 (Pg. 43) of the Report, this Court in *Rajendra Singh Verma*[2] stated as follows :

"82. As explained by this Court in *Chandra Singh v. State of Rajasthan* [(2003) 6 SCC 545], the power of compulsory retirement can be exercised at any time and that the power under Article 235 in this regard is not in any manner circumscribed by any rule or order. What is explained in the said decision by this Court is that Article 235 of the Constitution of India enables the High Court to assess the performance of any judicial officer at any time with a view to discipline the black sheep or weed out the dead wood, and this constitutional power of the High Court cannot be circumscribed by any rule or order."

3. (1974) 2 SCC 831.
4. (2003) 6 SCC 545.

17. Following a decision of this Court in *High Court of Judicature at Bombay Through Its Registrar v. Shirishkumar Rangrao Patil and another*[5], this Court in *Rajendra Singh Verma*[2] reiterated that the High Court had to maintain constant vigil on its subordinate judiciary.

18. A three-Judge Bench of this Court in *All India Judges' Association (2) and others v. Union of India and others*[6] has emphasized that the benefit of increase of retirement age to 60 years shall not be available automatically to all judicial officers irrespective of their past record of service and evidence of their continued utility to the judicial system. The benefit is available to only those who, in the opinion of the respective High Courts, have a potential for continued useful service. The Bench said, "It is not intended as a windfall for the indolent, the infirm and those of doubtful integrity, reputation and utility".

19. That power of the High Court to recommend to the Government to compulsorily retire a judicial officer on attaining the required length of service or requisite age and consequent action by the Government on such recommendation are beyond any doubt.

20. The appellant, as noted above, was selected in Madhya Pradesh Higher Judicial Service in 1979 by way of direct recruitment. At the time of issuance of the order of compulsory retirement on 13.09.2004 he had completed 25 years or so in judicial service. The available materials show that for the period from 01.04.1981 to 31.03.1982, the appellant was given grade 'D' (Average).

21. In 1988-89, the appellant was assessed "D". ACR for that year also records that he never enjoyed clean reputation although no such complaint was received in writing. It also records that his quality of judgments and orders was not satisfactory.

5. (1997) 6 SCC 339.
6. (1993) 4 SCC 288.

22. For the period ending 31.03.1991, the appellant was graded "C" (Good) but it records, "the descriptive report of the then Chief Justice dated 28.06.1991 is that no inspection of Betul District Judge was made, however, the appellant was reported to be an average judicial officer".

23. For the period ending 31.03.1992, the appellant has been given grade "D" (Average).

24. For the period ending 31.03.1993, the appellant has been graded "E" (Poor). Inter alia, the remarks read, "Inspection note shows that the quality of his performance is poor. His disposals were below average, his reputation was not good".

25. For the period ending 31.03.1994, the appellant has been graded "E" (Poor). The entry reads, "His performance qualitatively and quantitatively has been poor. The officer does not enjoy good reputation".

26. The questions that fall for consideration are: whether the recommendation made by the High Court on the basis of unanimous opinion to the Government for compulsory retirement of the appellant and the order of compulsory retirement issued by the Government suffer from any legal flaw? Is the order of compulsory retirement so arbitrary or irrational that justifies interference in judicial review? Is the view of the Division Bench upholding the order of appellant's compulsory retirement so erroneous warranting interference by this Court in an appeal under Article 136 of the Constitution of India?

27. In *Rajendra Singh Verma*[2] , this Court restated what has been stated in earlier decisions that compulsory retirement from service is neither dismissal nor removal; it differs from both of them, in that it is not a form of punishment prescribed by the rules and involves no penal consequences inasmuch as the person retired is entitled to pension and other retiral benefits proportionate to the period of service standing to his credit. An order of compulsory retirement being not an order of adverse

consequence, principles of natural justice have no application. This Court took into consideration a long line of cases including *State of U.P. and another v. Bihari Lal*[7], *Union of India v. V.P. Seth and another*[8], *Baikuntha Nath Das and another v. Chief District Medical Officer*[9], *Baripada and another , Baidyanath Mahapatra v. State of Orissa and another*[10], *Union of India v. Col. J.N. Sinha and another*[11], *All India Judges' Association (1) v. Union of India and others*[12] and *All India Judges' Association (2)*[6] and culled out the legal position in paragraph 183 (Pg. no. 75) of the Report as follows :

> "183. It is well settled by a catena of decisions of this Court that while considering the case of an officer as to whether he should be continued in service or compulsorily retired, his entire service record up to that date on which consideration is made has to be taken into account. What weight should be attached to earlier entries as compared to recent entries is a matter of evaluation, but there is no manner of doubt that consideration has to be of the entire service record. The fact that an officer, after an earlier adverse entry, was promoted does not wipe out earlier adverse entry at all. It would be wrong to contend that merely for the reason that after an earlier adverse entry an officer was promoted that by itself would preclude the authority from considering the earlier adverse entry. When the law says that the entire service record has to be taken into consideration, the earlier adverse entry, which forms a part of the service record, would also be relevant irrespective of the fact whether the officer concerned was promoted to higher position or whether he was granted certain benefits like increments, etc."

7. 1994 (Suppl) 3 SCC 593.
8. (1994) SCC (L&S) 1052.
9. (1992) 2 SCC 299.
10. (1989) 4 SCC 664.
11. (1970) 2 SCC 458.
12. (1992) 1 SCC 119.

28. Few other features based on service record of the appellant highlighted in the counter filed by the respondent no. 1 in opposition to the writ petition as well as in response to the special leave petition before this Court may be noticed. The appellant was informed of his having been assessed in grade "D" for the period 01.04.1981 to 31.03.1982 by communication dated 15.09.1982. The said adverse grading was not assailed by the appellant and it remained on the record as it is. The appellant was also intimated on 06.11.1989 about the adverse remarks recorded in his ACR for the period 1988-89 that he never enjoyed clean reputation and that his quality of judgments and orders was not satisfactory. The appellant made representation against the above remarks but the same was rejected and they hold the field as it is. For the period ending 31.03.1992, the appellant was graded "D" and that grading remains as it is.

29. The adverse remarks recorded in the ACR for the period ending on 31.03.1993 and 31.03.1994, were communicated to the appellant. He made two separate representations for expunging the adverse remarks recorded for these years. His representations were rejected by the then Chief Justice on 27.08.1994 and the appellant was informed of the said rejection on 30.08.1994. Despite rejection of the two representations made by the appellant, he again made two representations to the Chief Justice for expunction of these adverse remarks. These representations were also rejected and the appellant was communicated of the same on 05.01.1995. The representations made by the appellant having been rejected twice by the Chief Justice, the appellant yet again made representation on 02.08.1995 for expunction of these remarks. This representation also came to be rejected by the Chief Justice on 21.08.1995 by observing that the remarks in the ACR for the above period do not call for any modification. The appellant sought administrative review of the decision taken by the Chief Justice and the administrative review was also rejected by the Chief Justice on 06.01.1996. The appellant then

filed a writ petition (No. 413 of 1996) on the judicial side of the High Court. The Single Judge of that Court allowed the appellant's writ petition vide his judgment and order dated 18.10.1996 and quashed the adverse remarks in the appellant's ACR for the years ending on 31.03.1993 and 31.03.1994. The High Court on administrative side filed LPA against the judgment and order dated 18.10.1996. The Division Bench of that Court allowed the LPA and set aside the judgment and order of the Single Judge dated 18.10.1996. While doing so the Division Bench in its judgment and order dated 25.02.1997 observed in para 69 as follows :

> "69. Before parting with this case in all fairness, we consider it necessary to observe that the adverse remarks on the reputation of respondent conveyed to him in the relevant years should not haunt him all through his judicial career and hamper his prospects for all times. The above remarks cannot be read to his prejudice in future if he shows improvement in his work and performance and is able to achieve the requisite grade for being admitted to higher Selection Grade. The very purpose of communicating adverse remarks is not to condemn an officer but to caution him at the right time so as to give chance of improvement."

30. Against the judgment and order dated 25.02.1997 passed by the Division Bench, the appellant filed a special leave petition before this Court but that was dismissed on 28.04.1997. Thus, advance remarks for the period ending 31.03.1993 and 31.03.1994 remain as it is.

31. From the counter affidavit filed by the respondent no. 1 it also transpires that the benefit of super time scale was not given to the appellant as soon as it became due. Rather, the administrative committee in its meeting held on 25.03.1995, on consideration of the case of the appellant for grant of benefit of super time scale, deferred his case with remarks, "his work performance and conduct will be kept under watch". The view

of the administrative committee was accepted by the Full Court in its meeting held on 29.04.1995. The appellant's case for grant of super time scale was again considered by the Full Court in the subsequent year 1996 and the Full Court in its meeting held on 20/21.04.1996 found that the appellant was not suitable for grant of super time scale. It was only in 1999 that the appellant was given super time scale and 2002 that he was granted above super time scale.

32. In 2002, the appellant was warned for claiming false units. His explanation that there was typing mistake was not found to be credible.

33. From the above, it is clear that the appellant did not have unblemished service record all along. He has been graded "Average" on quite a few occasions. He was assessed "Poor" in 1993 and 1994. His quality of judgments and orders was not found satisfactory on more than one occasion. His reputation was observed to be tainted on few occasions and his integrity was not always found to be above board. In 1988-89, the remark reads, "never enjoyed clean reputation". In 1993, the remark "his reputation was not good" and in 1994 the remark "officer does not enjoy good reputation", were recorded. His representations for expunction of these remarks failed. The challenge to these remarks on judicial side was unsuccessful right upto this Court. In 1993, it was also recorded that quality of performance of the appellant was poor and his disposals were below average. In 1994, the remark in the service record states that the performance of the appellant qualitatively and quantitatively has been poor. With this service record, can it be said that there existed no material for an order of compulsory retirement of the appellant from service? We think not. The above material amply shows that the material germane for taking decision by the Full Court whether the appellant could be continued in judicial service or deserved to be retired compulsorily did exist. It is not the scope of judicial review to go into adequacy or sufficiency of such materials.

34. It is true that the appellant was confirmed as District Judge in 1985; he got lower selection grade with effect from 24.03.1989; he was awarded super time scale in May, 1999 and he was also given above super time scale in 2002 but the confirmation as District Judge and grant of selection grade and super time scale do not wipe out the earlier adverse entries which have remained on record and continued to hold the field. The criterion for promotion or grant of increment or higher scale is different from an exercise which is undertaken by the High Court to assess a judicial officer's continued utility to the judicial system. In assessing potential for continued useful service of a judicial officer in the system, the High Court is required to take into account the entire service record. Overall profile of a judicial officer is the guiding factor. Those of doubtful integrity, questionable reputation and wanting in utility are not entitled to benefit of service after attaining the requisite length of service or age.

35. That the appellant's challenge to 1993 and 1994 entries was unsuccessful right upto this Court is not in dispute. However, learned senior counsel for the appellant has placed heavy reliance upon the observations made by the Division Bench in its judgment and order dated 25.02.1997, particularly, paragraph 69 thereof wherein the Division Bench held that adverse remarks on the reputation in the relevant years should not haunt him all through his judicial career and hamper his prospects for all times. We are afraid the above observations by the Division Bench while upholding the remarks in no manner restricted the power of the Full Court in taking into consideration these adverse remarks in its exercise to find out whether or not the appellant should be retained in service after he has attained the required length of service. The consideration of the appellant's case for grant of selection grade and super time scale stood on different footing. The entire service record and overall profile of a judicial officer guide the High Court in reaching its satisfaction about the continuance or otherwise after the judicial officer has attained the required

length of service or age. When the entire service record of a judicial officer is under consideration, obviously the High Court is alive to such judicial officer's having got promotion/s, increments, etc. during the service.

36. It was argued by the learned senior counsel for the appellant that the administrative committee-1 had recommended the appellant's continuation in service and there was no justification for the Full Court to take a contrary view. The view of the administrative committee is not final. It is recommendatory in nature. It is open to the Full Court to accept the committee's report or take a different view. In the present case, the Full Court on the basis of the entire service record of the appellant formed a unanimous opinion that the appellant must be compulsorily retired and recommended to the Government, accordingly. On the basis of the material which existed and which we have referred to above, it can hardly be said that the recommendation by the Full Court to the Government for compulsory retirement of the appellant was arbitrary or based on material not germane for such recommendation.

37. Judicial service is not an ordinary government service and the Judges are not employees as such. Judges hold the public office; their function is one of the essential functions of the State. In discharge of their functions and duties, the Judges represent the State. The office that a Judge holds is an office of public trust. A Judge must be a person of impeccable integrity and unimpeachable independence. He must be honest to the core with high moral values. When a litigant enters the courtroom, he must feel secured that the Judge before whom his matter has come, would deliver justice impartially and uninfluenced by any consideration. The standard of conduct expected of a Judge is much higher than an ordinary man. This is no excuse that since the standards in the society have fallen, the Judges who are drawn from the society cannot be expected to have high standards and ethical firmness required of a

Judge. A Judge, like Caesar's wife, must be above suspicion. The credibility of the judicial system is dependent upon the Judges who man it. For a democracy to thrive and rule of law to survive, justice system and the judicial process have to be strong and every Judge must discharge his judicial functions with integrity, impartiality and intellectual honesty.

38. The most shocking and unbecoming conduct of the appellant highlighted by the respondent no. 1 before the High Court in opposition to the writ petition and in response to the present appeal is his act to overreach the administrative decision on the review petition filed by him before the Chief Justice after his representations for expunction of adverse remarks for the period ending on 31.03.1993 and 31.03.1994 had been thrice earlier rejected. The appellant approached Shri R. K. Malaviya, Member of Parliament and Chairman, House Committee (Rajya Sabha) for his grievance concerning rejection of his representations for expunction of remarks for 1993 and 1994. Though the appellant has denied that he ever approached Shri R.K. Malaviya but to falsify his claim, the learned senior counsel for the respondent no. 1 placed before us xerox copy of the letter dated 14.02.1996 written by Shri R.K. Malaviya to Shri H.R. Bhardwaj, Minister of State for Law, Justice and Company Affairs, Government of India, New Delhi and the copy of the letter dated 08.03.1996 sent by the Ministry of Law, Justice and Company Affairs (Department of Justice), Government of India addressed to the Chief Secretary to the Government of Madhya Pradesh, Bhopal and the Registrar, High Court. The letter dated 14.02.1996 addressed by Shri R.K. Malaviya to Shri H.R. Bhardwaj, the then Minister of State for Law, Justice and Company Affairs reads as follows :

"R.K. Malaviya Off. : 66, PARLIAMENT HOUSE
MEMBER OF PARLIAMENT NEW DELHI - 110001.
CHAIRMAN TEL.: 3017048, 3034699
HOUSE COMMITTEE

(RAJYA SABHA)

RES.: 30, CANNING LANE
KASTURBA GANDHI MARG
NEW DELHI -110001
TEL. : 3782895
RES. : 19, TILAK NAGAR, MAIN
ROAD INDORE (M.P.)
TEL. : 492412, 492588, 495054
14 February 1996

Dear Shri Bhardwaj Ji

Enclosed is a representation of Shri R.C. Chandel, District & Sessions Judge, Rewa [MP], which is self-explanatory.

I shall be grateful if you kindly get it examined and do the needful.

Yours sincerely,

[R.K. MALVIYA]

Shri H.R. Bhardwaj,
Minister of State for Law, Justice &
Company Affairs, Government of India,
NEW DELHI."

39. The forwarding letter sent by the Government of India, Ministry of Law, Justice and Company Affairs (Department of Justice) dated 8.3.1996 reads as follows :

"No. L-19015/3/96-Jus
Government of India
Ministry of Law, Justice and C.A.
(Department of Justice)

Jaisalmer House, Mansingh Road
New Delhi, the 8/3/96.

1) The Chief Secretary
to the Government of

Madhya Pradesh,
BHOPAL.

2) The Registrar,
Madhya Pradesh High Court,
JABALPUR.

Subject : Reference from Sh. R.K. Malaviya, Member of Parliament and Chairman, House Committee, Rajya Sabha on representation of Sh. R.C. Chandel District and Sessions Judge, Rewa (M.P.)

Sir,

I am directed to forward herewith a copy of letter dated 14.2.1996 alongwith its enclosure, received from Shri R.K. Malaviya, Member of Parliament and Chairman House Committee, Rajya Saba on the above subject for taking such action as may be considered appropriate.

Yours faithfully,

(P.N. SINGH)

Under Secretary to the Government of India"

40. The conduct of the appellant in involving an M.P. and the Ministry of Law, Justice and Company Affairs, in a matter of the High Court concerning an administrative review petition filed by him for expunging adverse remarks in ACRs of 1993 and 1994 is most reprehensible and highly unbecoming of a judicial officer. His conduct has tarnished the image of the judiciary and he disentitled himself from continuation in judicial service on that count alone. A Judge is expected not to be influenced by any external pressure and he is also supposed not to exert any influence on others in any administrative or judicial matter. Secondly and still worst, the appellant had an audacity to set up a plea in the rejoinder that he never made

any representation to Shri R.K. Malaviya, M.P. for any purpose whatsoever. But for the appellant's approaching Shri R.K. Malaviya and his request for help, Shri R.K. Malaviya would have never written the letter quoted above to the then Minister of State for Law, Justice and Company Affairs. On this ground also his writ petition was liable to be dismissed.

41. The learned Single Judge examined the administrative decision of the Full Court to recommend to the Government to compulsory retire the appellant as if he was sitting as an appellate authority to consider the correctness of such recommendation by going into sufficiency and adequacy of the materials which led the Full Court in reaching its satisfaction. The whole approach of the Single Judge in consideration of the matter was flawed and not legally proper. The learned Single Judge proceeded to examine the materials by observing, "The entire record pertaining to complaints against the petitioner has also been produced before me during the course of argument by learned senior counsel for respondent no. 1. Thus, I am dealing each and every complaint one by one". We are afraid, the learned Single Judge did not keep the scope of judicial review in view while examining the validity of the order of compulsory retirement. The Division Bench of the High Court in the intra-court appeal was, thus, fully justified in setting aside the impugned order.

42. Learned senior counsel for the appellant placed heavy reliance on a decision of this Court in Nand Kumar Verma1. Having carefully considered Nand Kumar Verma1, we find that the decision of this Court in Nand Kumar Verma1 has no application on the facts of the present case. This is clear from para 36 (Pg. 591) of the Report which reads as follows:

> "36. The material on which the decision of the compulsory retirement was based, as extracted by the High Court in the impugned judgment, and material furnished by the appellant would reflect that totality of relevant materials

> were not considered or completely ignored by the High Court. This leads to only one conclusion that the subjective satisfaction of the High Court was not based on the sufficient or relevant material. In this view of the matter, we cannot say that the service record of the appellant was unsatisfactory which would warrant premature retirement from service. Therefore, there was no justification to retire the appellant compulsorily from service."

Nand Kumar Verma[1], thus, turned on its own facts.

43. In view of the above, we are satisfied that the recommendation made by the High Court to the Government for compulsory retirement of the appellant and the order of compulsory retirement issued by the Government do not suffer from any legal flaw. The order of compulsory retirement is neither arbitrary nor irrational justifying any interference in judicial review. The impugned judgment of the Division Bench is not legally unsustainable warranting any interference by this Court in an appeal under Article 136 of the Constitution of India.

44. Civil Appeal is, accordingly, dismissed with no order as to costs.

B.B.B. Appeal dismissed.

SAEED ZAKIR HUSSAIN MALIK
v.
STATE OF MAHARASHTRA & ORS.
(Criminal Appeal No.1187 of 2012)

AUGUST 9, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

CONSTITUTION OF INDIA, 1950

Art.22(5)-Preventive detention-Delay of 14½ months in executing the order of detention and also a delay of 15 months in making the order of detention-Held: Delay at both stages has to be explained and the court is required to consider the question having regard to the overall picture-The explanation offered that the detenu after being released on bail remained absconding and therefore the order of detention could not be executed, cannot be accepted, as no efforts were taken for cancellation of the bail bonds and forfeiture of the amount deposited by the detenu - Further, no serious efforts were made by police to apprehend him - Besides, there is no proper explanation for the delay of 15 months in issuing the order -The detention order thus stands vitiated and is set aside - Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 - s.3(1) - Preventive detention.

Art. 136 - Appeal by way of special leave - Plea of delay in passing detention order not raised before High Court, permitted to be raised and discussed.

The appellants' brother was arrested on 21.10.2005, as he was alleged to be one of the racketeers involved in using fictitious Import Export Codes and forged documents under the Drawback Scheme of the Customs Act, 1962. He was released on bail on 11.11.2005. On 14.11.2006, a detention order u/s. 3(1) of the Conservation

of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 was passed against him by the State Government and on the same day the said order was received by the executing authority. However the detention order was served on him on 1.2.2008. The writ petition filed by the appellant before the High Court was dismissed.

In the instant appeal it was contended that there was inordinate delay of 14½ months in executing the detention order as also unreasonable and inordinate delay of 15 months in issuing the detention order and, as such, the detention was vitiated.

Allowing the appeal the Court

HELD: 1.1. In view of clause (5) of Art.22 of the Constitution of India, it is incumbent on the detaining authority as well as the executing authority to serve the detention order at the earliest point of time. If there is any delay, it is the duty of the said authorities to afford proper explanation. [para 12] [243-G]

1.2. In the case on hand, though the detention order was passed on 14.11.2006, the same was served only on 01.02.2008. It has been pointed out that the detenu absconded after release from the prison on 11.11.2005 and actions were also taken u/s. 7(1)(b) and 7 (1)(a) of COFEPOSA and that the detenu did not comply with the same. However, it is not disputed that when the detenu was released on bail on 11.11.2005, no proper steps were taken for cancellation of the bail and forfeiture of the amount which was deposited by the detenu. Further, the representation dated 7.8.2007 acknowledged by the authorities concerned contained the addresses of the detenu but there was no explanation about any attempt made to verify the said address. Besides, no serious efforts were made by the Police Authorities to apprehend

the detenu. In such circumstances, the reasons stated in the affidavit filed by the detaining and executing authorities that, on several occasions, their officers visited the residential address of the detenu and he could not be traced, are all unacceptable. The unusual delay in serving the order of detention has not been properly and satisfactorily explained. [Para 13, 23, 25] [243-H; 244-A-F; 249-A-B, E]

P.M. Hari Kumar vs. Union of India and Others, **1995 (3) Suppl. SCR 301 = (1995) 5 SCC 691** *SMF Sultan Abdul Kader vs. Jt. Secy., to Govt. of India and Others* **1998 (3) SCR 508 =(1998) 8 SCC 343;** *A. Mohammed Farook vs. Jt. Secy. to G.O.I and Others,* **(2000) 2 SCC 360** *Lakshman Khatik vs. The State of West Bengal,* **(1974) 4 SCC 1** *T.V. Abdul Rahman vs. State of Kerala and Others* **1989 (3) SCR 945 = (1989) 4 SCC 741** *Pradeep Nilkanth Paturkar vs. S. Ramamurthi and Others,* **1993 Supp (2) SCC 61** *Manju Ramesh Nahar vs. Union of India and Others,* **(1999) 4 SCC 116** *Adishwar Jain vs. Union of India and Another,* **2006 (7) Suppl. SCR 801 = (2006) 11 SCC 339** *Rajinder Arora vs. Union of India and Others,* **2006 (3) SCR 9 = (2006) 4 SCC 796 - relied on**

2.1 When there is undue and long delay between the prejudicial activities and the passing of detention order, it is incumbent on the part of the court to scrutinize whether the detaining authority has satisfactorily examined such a delay and afforded a reasonable and acceptable explanation as to why such a delay has occasioned. It is also the duty of the court to investigate whether casual connection has been broken in the circumstance of each case. The delay in passing the detention order, namely, after 15 months vitiates the detention itself. The unreasonable delay in executing the order creates a serious doubt regarding the genuineness of the detaining authority as regards the immediate necessity of detaining the detenu in order to prevent him

from carrying on the prejudicial activity referred to in the grounds of detention. This Court holds that the order of detention passed by the detaining authority was not in lawful exercise of power vested in it. [Para 25-27] [249-E-F; 250-A-C]

2.2 Though the contention regarding delay in passing the order has not been raised before the High Court, since it goes against the constitutional mandate as provided in Art. 22(5), this Court permitted and also discussed the same. [para 28] [250-E]

3. If the delay is sufficiently explained, the same would not be a ground for quashing an order of detention under COFEPOSA. However, delay at both stages has to be explained and the Court is required to consider the question having regard to the overall picture. This Court holds that the authorities have not executed the detention order promptly as required under Art. 22(5) of the Constitution. Further, there is no proper explanation for the delay of a period of 15 months in issuing the order of detention. Thus, it is evident that there has been unusual delay in passing the detention order and serving the same on the detenu. The impugned judgment is set aside and the detention order dated 14.11.2006 quashed. [para 13, 20, 27 and 29] [244-F-G; 248-B; 250-C-D, F]

Case Law Reference:

1995 (3) Suppl. SCR 301	**relied on**	**Para 9**
1998 (3) SCR 508	**relied on**	**Para 10**
2000 (2) SCC 360	**relied on**	**Para 11.**
1974 (4) SCC 1	**relied on**	**Para 15**
1989 (3) SCR 945	**relied on**	**Para 16**
1993 Supp. (2) SCC 61	**relied on**	**Para 17**
1999 (4) SCC 116	**relied on**	**Para 18**

2006 (7) Suppl. SCR 801 relied on Para 19

2006 (3) SCR 9 relied on Para 21

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1187 of 2012.

From the Judgment and Order dated 28.08.2008 of the High Court of Judicature at Bombay in Criminal Writ Petition No. 456 of 2008.

K.K. Mani, Abhishek Krishna, A. Lakshminarayan for the Appellant.

Asha Gopalan Nair for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the final judgment and order dated 14.08.2008 passed by the High Court of Bombay in Criminal Writ Petition No. 455 of 2008 whereby the High Court dismissed the petition filed by the appellant herein.

3. Brief facts:

(a) The appellant herein is the brother of the detenu-Shahroz Zakir Hussain Malik. According to the appellant, the Directorate of Revenue Intelligence (DRI), Mumbai Zonal Unit, on the basis of information, initiated investigation into the claim of fraudulent exports allegedly made from Nhava Sheva Port under the Drawback Scheme of the Customs Act, 1962 by a syndicate of persons in the name of fictitious firms.

(b) During the course of investigation, several fictitious firms were identified which had availed the drawback allegedly running into several crores. The DRI, Mumbai arrested about 10 persons and several records/incriminating documents including copies of Shipping bills, Import Export Codes (IEC) etc., were seized.

(c) The role of the appellant's brother-the detenu also came to light as one of the racketeers who was involved in using fictitious IECs and forged documents for fraudulent exports under the said Scheme and he was arrested on 21.10.2005. All the abovesaid persons were subsequently released on bail and the detenu was also released on bail on 11.11.2005.

(d) While the detenu was on bail, on 14.11.2006, a Detention Order was issued against him by the Principal Secretary (Appeals and Security) to the Government of Maharashtra, Home Department and Detaining Authority exercising powers under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (in short 'COFEPOSA') and on the same day, the detention order was received by the executing authority.

(e) On 01.02.2008, i.e., after a delay of 14 ½ (fourteen and a half) months, the said Order was served upon the detenu. Challenging the detention order, the appellant herein-brother of the detenu filed Criminal Writ Petition being No. 455 of 2008 before the High Court. The High Court, by impugned judgment dated 14.08.2008, dismissed the said petition.

(f) Aggrieved by the said judgment, the appellant has filed this appeal by way of special leave before this Court.

4. Heard Mr. K.K. Mani, learned counsel for the appellant and Ms. Asha Gopalan Nair, learned counsel for the respondent-State.

Contentions of the appellant:

5. a) Though the detention order was passed on 14.11.2006 and the detenu was available on the address known to the authorities, the authorities have chosen to execute the order only on 01.02.2008. Pursuant to the same, there was an inordinate and unreasonable delay of 14 ½ months in executing the detention order which vitiates the detention itself;

b) Though the DRI came to know of the incident by

recording the statement of one Vijay Mehta on 03.08.2005 and the detenu was also arrested on 21.10.2005, the detention order was issued only on 14.11.2006 after an inordinate and unreasonable delay of 15 months which vitiates the detention itself.

Contentions of the respondent-State:

6. a) Since the detenu was absconding, in spite of repeated attempts by the Executing Authority for executing the detention order, all the efforts were in vain as the detenu had rendered himself non-traceable.

b) The delay has been properly explained by filing an affidavit not only by the Detaining Authority but also by the Executing Authority.

c) After realizing that the detenu has absconded an action was also taken under Section 7(1)(b) and additionally under Section 7(1)(a) of COFEPOSA that the detenu did not comply with the same. It is pointed out that once appropriate action has been taken under Section 7(1)(a)(b) of COFEPOSA, the burden shifts on the detenu.

7. We have considered the rival contentions, perused the grounds of detention and all other connected materials.

Discussion:

8. In order to consider the first contention raised by learned counsel for the appellant, it is useful to refer Article 22(5) of the Constitution of India which reads as under:-

> "(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

The above provision mandates that in the case of preventive

detention, it is incumbent on the authority making such order to communicate to the person concerned/detenu the grounds on which the order has been made. It is also clear that after proper communication without delay, the detenu shall be afforded the earliest opportunity for making a representation against the said order. In the light of the above mandate, let us consider the first submission with reference to the various earlier decisions of this Court.

9. In *P.M. Hari Kumar vs. Union of India and Others,* (1995) 5 SCC 691, which is almost similar to the case on hand, the only reason for delay in execution of the detention order was that the detenu was absconding and they could not serve the detention order on him because of his own fault. Rejecting the said contention, this Court held:

> "13. If the respondents were really sincere and anxious to serve the order of detention without any delay it was expected of them, in the fitness of things, to approach the High Court or, at least, the Court which initially granted the bail for its cancellation as, according to their own showing, the petitioner had violated the conditions imposed, and thereby enforce his appearance or production as the case might be. Surprisingly, however, no such steps were taken and instead thereof it is now claimed that a communication was sent to his residence which was returned undelivered. Apart from the fact that no such communication has been produced before us in support of such claim, it has not been stated that any follow-up action was taken till 3-8-1990, when Section 7 of the Act was invoked. Similarly inexplicable is the respondents' failure to insist upon the personal presence of the petitioner in the criminal case (CC No. 2 of 1993) filed at the instance of the Customs Authorities, more so when the carriage of its proceeding was with them and the order of detention was passed at their instance. On the contrary, he was allowed to remain absent, which necessarily raises the inference that the Customs Authorities did not oppose his prayer, much less

bring to the notice of the Court about the order of detention passed against the detenu."

After finding that the respondent-authorities did not make sincere and earnest efforts and take urgent and effective steps which were available to them to serve the order of detention on the petitioner therein, this Court quashed the order of detention holding that the unusual delay in serving the order of detention has not been properly and satisfactorily explained.

10. In *SMF Sultan Abdul Kader vs. Jt. Secy., to Govt. of India and Others,* (1998) 8 SCC 343, the order of detention was passed on 14.03.1996 but the detenu was detained only on 07.08.1997. After finding that no serious efforts were made by the police authorities to apprehend the detenu and the Joint Secretary himself had not made any efforts to find out from the police authorities as to why they were not able to apprehend the detenu, quashed the order of detention.

11. In *A. Mohammed Farook vs. Jt. Secy. to G.O.I and Others,* (2000) 2 SCC 360, the only contention before the Court was that of delay in executing the order of detention. In that case, the detention order was passed on 25.02.1999 but the authorities have chosen to execute the detention order only on 06.04.1999 after an inordinate and unreasonable delay of nearly 40 days. In the absence of proper and acceptable reasons for the delay of 40 days in executing the detention order, this Court concluded that the subjective satisfaction of the Detaining Authority in issuing the detention order dated 25.02.1999 gets vitiated and on this ground quashed the same.

12. It is clear that in the light of sub-section (5) of Article 22, it is incumbent on the Detaining Authority as well as the Executing Authority to serve the detention order at the earliest point of time. If there is any delay, it is the duty of the said authorities to afford proper explanation.

13. Now, let us consider the delay in the case on hand in serving the order of detention. Though the detention order was

passed on 14.11.2006, the same was served only on 01.02.2008. Ms. Asha Gopalan Nair, learned counsel appearing for the State contended that since the detenu himself was absconding, in spite of repeated attempts made by the Executing Authority, the same were not materialized. She also brought to our notice the affidavits filed by the concerned authorities explaining the efforts made in serving the order of detention. By giving details about their efforts, she pointed out that the detenu absconded after release from the prison on 11.11.2005 and actions were also taken under Sections 7(1)(b) and 7 (1)(a) of COFEPOSA and that the detenu did not comply with the same. It is pointed out from the other side that during this period, the bail order dated 11.11.2005 was not cancelled nor an attempt was made to forfeit the amount which was deposited by the detenu. When this Court posed a specific question to the learned counsel for the State about the delay, particularly, when the detenu was released on bail on 11.11.2005 and no proper steps have been taken for cancellation of the bail and forfeiture of the amount which was deposited by the detenu, it is not disputed that such recourse has not been taken. In such circumstances, the reasons stated in the affidavit filed by the Detaining and Executing Authorities that, on several occasions, their officers visited the residential address of the detenu and he could not be traced, are all unacceptable. We hold that the respondent-authorities did not make any sincere and earnest efforts in taking urgent effective steps which were available to them, particularly, when the detenu was on bail by orders of the court. We are satisfied that the unusual delay in serving the order of detention has not been properly and satisfactorily explained. In view of the same, we hold that the authorities have not executed the detention order promptly as required under Article 22(5) of the Constitution.

14. Now, coming to the second contention, namely, delay in passing the Detention Order, it is the claim of the appellant that there was a delay of 15 months in passing the order of detention. It is pointed out that though the DRI came to know

of the incident by recording the statement of one Vijay Mehta on 03.08.2005 and the detenu was also arrested on 21.10.2005 and all the documents had also come into existence including the documents annexed with the grounds of detention, but still the authorities passed the order of detention only on 14.11.2006 after an unreasonable and inordinate delay of 15 months. It is also highlighted that during this period the detenu had not come into any adverse notice of the authorities and was also not alleged to have indulged in any similar illegal activities. Considering this, it is contended that the alleged incident has become stale and it is too remote in point of time. It is further submitted that there is no nexus or proximity between the alleged incident and the detention order. Finally, it is pointed out that the alleged incident has become irrelevant due to long lapse of time. Hence, the inordinate and unreasonable delay in passing the detention order against the detenu vitiates the detention itself. These aspects have been highlighted by this Court in several decisions.

15. In *Lakshman Khatik vs. The State of West Bengal,* (1974) 4 SCC 1, a three-Judge Bench of this Court, while considering the detention order under the Maintenance of Internal Security Act, 1971 has concluded that prompt action in such matters should be taken as soon as the incident like those which are referred to in the grounds have taken place. In the said decision, it was pointed out that all the three grounds on which the District Magistrate purports to have reached the required satisfaction are based on incidents which took place in rapid succession in the month of August, 1971. The first incident of unloading five bags of rice took place in the afternoon of August 3, 1971. The second incident took place on August 5, 1971 also in the afternoon practically at the same place as the first incident. This time also some rice was removed from the trucks carrying rice. The third incident took place in the afternoon of August 20, 1971 also at the same place. That also related to the removal of some rice from loaded trucks. In this factual scenario, this Court concluded that the District

Magistrate could not have been possibly satisfied about the need for detention on March 22, 1972 having regard to the detenu's conduct some seven months earlier. The following conclusion is very relevant.

> "5…..Indeed mere delay in passing a detention order is not conclusive, but we have to see the type of grounds given and consider whether such grounds could really weigh with an officer some 7 months later in coming to the conclusion that it was necessary to detain the petitioner to prevent him from acting in a manner preiudicial to the maintenance of essential supplies of foodgrains. It is not explained why there was such a long delay in passing the order. The District Magistrate appears almost to have passed an order of conviction and sentence for offences committed about 7 months earlier. The authorities concerned must have due regard to the object with which the order is passed, and if the object was to prevent disruption of supplies of foodgrains one should think that prompt action in such matters should be taken as soon as incidents like those which are referred to in the grounds have taken place. In our opinion, the order of detention is invalid."

16. In *T.V. Abdul Rahman vs. State of Kerala and Others,* (1989) 4 SCC 741, in similar circumstance, this Court held:

> "10…...The question whether the prejudicial activities of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live-link between the prejudicial activities and the purpose of detention is snapped depends on the facts and circumstances of each case. No hard and fast rule can be precisely formulated that would be applicable under all circumstances and no exhaustive guidelines can be laid down in that behalf. It follows that the test of proximity is not a rigid or mechanical test by merely counting number of months between the offending acts and the order of

detention. However, when there is undue and long delay between the prejudicial activities and the passing of detention order, the court has to scrutinise whether the detaining authority has satisfactorily examined such a delay and afforded a tenable and reasonable explanation as to why such a delay has occasioned, when called upon to answer and further the court has to investigate whether the causal connection has been broken in the circumstances of each case.

11. Similarly when there is unsatisfactory and unexplained delay between the date of order of detention and the date of securing the arrest of the detenu, such a delay would throw considerable doubt on the genuineness of the subjective satisfaction of the detaining authority leading to a legitimate inference that the detaining authority was not really and genuinely satisfied as regards the necessity for detaining the detenu with a view to preventing him from acting in a prejudicial manner."

After holding so, this Court quashed the order of detention.

17. In *Pradeep Nilkanth Paturkar vs. S. Ramamurthi and Others,* 1993 Supp (2) SCC 61, the effect of delay in passing the detention order has been considered in detail. After analyzing various earlier decisions, this Court held that delay ipso facto in passing an order of detention after an incident is not fatal to the detention of a person, in certain cases delay may be unavoidable and reasonable. However, what is required by law is that the delay must be satisfactorily explained by the Detaining Authority.

18. In *Manju Ramesh Nahar vs. Union of India and Others,* (1999) 4 SCC 116, there was a delay of more than one year in arresting the detenu. This Court, while rejecting the vague explanation that the detenu was absconding, found that the detention order is vitiated.

19. In *Adishwar Jain vs. Union of India and Another,*

(2006) 11 SCC 339, this Court held that delay must be sufficiently explained. In that case, lapse of four months between proposal for detention and order of detention was not explained properly, hence, this Court quashed the detention order.

20. It is clear that if the delay is sufficiently explained, the same would not be a ground for quashing an order of detention under COFEPOSA. However, delay at both stages has to be explained and the Court is required to consider the question having regard to the overall picture. In *Adishwar Jain's* case (supra), since a major part of delay remains unexplained, this Court quashed the detention order.

21. In *Rajinder Arora vs. Union of India and Others,* (2006) 4 SCC 796, this Court considered the effect of passing the detention order after about ten months of the alleged illegal act. Basing reliance on the decision in *T.A. Abdul Rahman* (supra), the detention order was quashed on the ground of delay in passing the same.

Summary:

22. It is clear that if there is unreasonable delay in execution of the detention order, the same vitiates the order of detention. In the case on hand, though the detenu was released on bail on 11.11.2005, the detention order was passed only on 14.11.2006, actually, if the detenu was absconding and was not available for the service of the detention order, the authorities could have taken steps for cancellation of the bail and for forfeiture of the amount deposited. Admittedly, no such recourse has been taken. If the respondents were really sincere and anxious to serve the order of detention without any delay, it was expected of them to approach the court concerned which granted bail for its cancellation, by pointing out that the detenu had violated the conditions imposed and thereby enforce his appearance or production as the case may be. Admittedly, no such steps were taken instead it was explained that several attempts were made to serve copy by visiting his house on many occasions.

23. Mr. K.K. Mani, learned counsel for the appellant has brought to our notice a detailed representation in the form of a petition sent to the Government of Maharashtra, Home Department, Detaining Authority, Fifth Floor, Mantralaya, Mumbai on 07.08.2007. It is also seen that the same has been acknowledged by them which is clear from the endorsement therein. The said representation contains the address of the detenu and his whereabouts. There is no explanation about any attempt made to verify the said address at least after 07.08.2007. We are satisfied that the reasons stated in the affidavit of the respondents explaining the delay are unacceptable and unsatisfactory.

24. In this regard, we reiterate that the Detaining Authority must explain satisfactorily the inordinate delay in executing the detention order, otherwise the subjective satisfaction gets vitiated. In the case on hand, in the absence of any satisfactory explanation explaining the delay of 14 ½ months, we are of the opinion that the detention order must stand vitiated by reason of non-execution thereof within a reasonable time.

25. We are also satisfied that no serious efforts were made by the Police Authorities to apprehend the detenu. Hence the unreasonable delay in executing the order creates a serious doubt regarding the genuineness of the Detention Authority as regards the immediate necessity of detaining the detenu in order to prevent him from carrying on the prejudicial activity referred to in the grounds of detention. We hold that the order of detention passed by the Detaining Authority was not in lawful exercise of power vested in it.

26. As regards the second contention, as rightly pointed out by learned counsel for the appellant, the delay in passing the detention order, namely, after 15 months vitiates the detention itself. The question whether the prejudicial activities of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live-link between the prejudicial activities and the purpose of detention

is snapped depends on the facts and circumstances of each case. Though there is no hard and fast rule and no exhaustive guidelines can be laid down in that behalf, however, when there is undue and long delay between the prejudicial activities and the passing of detention order, it is incumbent on the part of the court to scrutinize whether the Detaining Authority has satisfactorily examined such a delay and afforded a reasonable and acceptable explanation as to why such a delay has occasioned.

27. It is also the duty of the court to investigate whether casual connection has been broken in the circumstance of each case. We are satisfied that in the absence of proper explanation for a period of 15 months in issuing the order of detention, the same has to be set aside. Since, we are in agreement with the contentions relating to delay in passing the Detention Order and serving the same on detenu, there is no need to go into the factual details.

28. Though Ms. Asha Gopalan Nair has raised an objection stating that the second contention, namely, delay in passing the order has not been raised before the High Court, since it goes against the constitutional mandate as provided in Article 22(5), we permitted the counsel for the appellant and also discussed the same.

29. In the light of the above discussion and conclusion, we are unable to accept the reasoning of the High Court. Consequently, we set aside the judgment dated 14.08.2008 in Criminal Writ Petition No. 455 of 2008 and quash the detention order dated 14.11.2006. Inasmuch as the detention period has already expired, no further direction is required for his release. The appeal is allowed.

R.P. Appeal allowed.

KAVITA SOLUNKE
v.
STATE OF MAHARASHTRA AND ORS.
(Civil Appeal No. 5821 of 2012)

AUGUST 9, 2012

[T.S. THAKUR AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Service Law - Appointment in Scheduled Tribe category - Protection of continuance in service - Entitlement to - Appointment of appellant in an aided school in Maharashtra against a reserved post of teacher meant for Scheduled Tribe candidates - Appellant had claimed to be a member of the 'Halba' Scheduled Tribe - 10 years later, caste credentials of appellant verified by the Scheduled Tribe Certificate Scrutiny Committee - School record of appellant revealed that appellant's father was a 'Koshti' which caste was not recognised as a Scheduled Tribe in Maharashtra - Scrutiny Committee declared that appellant was a 'Koshti' and not a 'Halba' - Consequent termination of appellant from service by school authority - Challenge to - Appellant contended that her appointment having attained finality, it could not have been set aside and that even when she was found to be a 'Koshti' and not a 'Halba' by the Scrutiny Committee, she was entitled to protection of continuance in service - Reliance placed by appellant upon the Constitution Bench decision of Supreme Court in Milind's case - Held: The Supreme Court had in Milind's case noticed the fact that appointments and admissions were made for a long time treating 'Koshti' as a Scheduled Tribe and directed that such admissions and appointments wherever the same had attained finality will not be affected - 'Halba-Koshti' was treated as 'Halba' even before the appellant joined service as a teacher - Also, appellant had not fabricated or falsified the particulars of being a Scheduled

Tribe with a view to obtain undeserved benefit in the matter of appointment as a teacher - No reason why benefit of protection against ouster from service should not be extended to appellant subject to the usual condition that she shall be reinstated if already ousted - However, for the period the appellant had not served the institution (aided school) she shall not be entitled to claim any salary/back wages - Constitution (Scheduled Tribes) Order, 1950 - Constitution of India, 1950 - Articles 341 and 342.

Claiming to be a member of the 'Halba' Scheduled Tribe, the appellant applied to an aided school in Dongaon, Maharashtra against a reserved post of teacher meant for Scheduled Tribe candidates. She was appointed on the said post and confirmed in service in due course. A decade after her initial appointment, the caste credentials of appellant were verified by the Scheduled Tribe Certificate Scrutiny Committee. In course of inquiry, the school record of the appellant was looked into which showed that the appellant's father was a 'Koshti' by caste which caste was not recognised as a Scheduled Tribe in Maharashtra. The Committee declared that the appellant was a 'Koshti' and not a 'Halba' and accordingly cancelled her Caste Certificate. This led to the school passing an order whereby the services of the appellant were terminated with immediate effect. Aggrieved, the appellant filed appeal before the School Tribunal which was dismissed. The appellant then preferred a writ petition which was dismissed by the High Court.

In the instant appeal, the appellant contended that her appointment having attained finality, it could not have been set aside and that even when she was found to be a 'Koshti' and not a 'Halba' by the Scrutiny Committee, she was entitled to protection of continuance in service. In this regard, she relied upon the decision of the Constitution Bench of this Court in Milind's case.

Allowing the appeal, the Court

HELD: 1.1. In Milind's case, the Constitution Bench of this Court was examining whether Koshti was a sub-tribe within the meaning of Halba/Halbi as appearing in the Constitution (Scheduled Tribes) Order, 1950. This Court held that the Courts cannot and should not expand their jurisdiction while dealing with the question as to whether a particular caste or sub-caste, tribe or sub-tribe is included in any one of the Entries mentioned in the Presidential Orders issued under Articles 341 and 342. This Court declared that the holding of an inquiry or production of any evidence to decide or declare whether any tribe or tribal community or part thereof or a group or part of a group is included in the general name, even though it is not specifically found in the entry concerned would not be permissible and that the Presidential Order must be read as it is. Having said so, this Court noticed the stand taken by the Government on the issue of 'Halba-Koshti' from time to time and the circulars, resolutions, instructions but held that even though the said circulars, instructions had shown varying stands taken by the Government from time to time relating to 'Halba-Koshti' yet the power of judicial review exercised by the High Court did not extend to interfering with the conclusions of the competent authorities drawn on the basis of proper and admissible evidence before it. The position emerging from the circulars, resolutions and orders issued by the competent authority from time to time notwithstanding, this Court on an abstract principle of law held that an inquiry into the question whether 'Halba-Koshti' were Halbas within the meaning of the Presidential order was not legally permissible. [Paras 6, 8, 9 and 11] [259-H; 260-A-F, G-H; 261-A-C; 264-E-F]

1.2. The Constitution Bench had in Milind's case noticed the background in which the confusion had

prevailed for many years and the fact that appointments and admissions were made for a long time treating 'Koshti' as a Scheduled Tribe and directed that such admissions and appointments wherever the same had attained finality will not be affected by the decision taken by this Court. After the pronouncement of judgment in Milind's case, a batch of cases was directed to be listed for hearing before a Division Bench of this Court. The Division Bench eventually decided those cases in Om Raj's case granting benefit of protection against ouster to some of the respondents on the authority of the view taken by this Court in Milind's case. One of these cases related to the appointment of a 'Koshti' as an Assistant Engineer against a vacancy reserved for a 'Halba/ Scheduled Tribe candidate. This court extended the benefit of protection against ouster to the said candidate. If 'Halba-Koshti' has been treated as 'Halba' even before the appellant joined service as a Teacher and if the only reason for her ouster is the law declared by this Court in Milind's case, there is no reason why the protection against ouster given by this Court to appointees whose applications had become final should not be extended to the appellant also. [Para 13] [265-F-H]

1.3. There is no reason to hold that the appellant had fabricated or falsified the particulars of being a Scheduled Tribe only with a view to obtain an undeserved benefit in the matter of appointment as a Teacher. There is, therefore, no reason why the benefit of protection against ouster should not be extended to her subject to the usual condition that the appellant shall not be ousted from service and shall be reinstated if already ousted, but she would not be entitled to any further benefit on the basis of the certificate which she has obtained and which was 10 years after its issue cancelled by the Scrutiny committee. In the result, the order passed by the High Court is set aside and it is directed that the appellant be

reinstated in service subject to the condition mentioned above. It is further directed that for the period the appellant has not served the institution which happens to be an aided school shall not be entitled to claim any salary/back wages. She will, however, be entitled to continuity of service for all other intents and purposes. [Paras 16, 17][268-F-H; 269-A-B]

Addnl. General Manager/Human Resource BHEL v. Suresh Ramkrishna Burde **(2007) 5 SCC 336: 2007 (6) SCR 388 - distinguished.**

State of Maharashtra v. Milind **(2001) 1 SCC 4: 2000 (5) Suppl. SCR 65;** *State of Maharashtra v. Om Raj* **(2007) 14 SCC 488;** *State of Maharashtra v. Sanjay K. Nimje* **(2007) 14 SCC 481: 2007 (1) SCR 960 and** *Punjab National Bank v. Vilas* **(2008) 14 SCC 545 - referred to.**

R. Vishwanatha Pillai v. State of Kerala **(2004) 2 SCC 105: 2004 (1) SCR 360;** *Bank of India v. Avinash D. Mandivikar* **(2005) 7 SCC 690: 2005 (3) Suppl. SCR 170 and** *Union of India v. Dattatray* **(2008) 4 SCC 612: 2008 (2) SCR 1096 - cited.**

Case Law Reference:

2000 (5) Suppl. SCR 65	**referred to**	**Para 4**
2004 (1) SCR 360	**cited**	**Para 5**
2007 (1) SCR 960	**referred to**	**Para 5**
2005 (3) Suppl. SCR 170	**cited**	**Para 5**
2008 (2) SCR 1096	**cited**	**Para 5**
(2007) 14 SCC 488	**referred to**	**Para 13**
(2008) 14 SCC 545	**referred to**	**Para 14**
2007 (6) SCR 388	**distinguished**	**Para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5821 of 2012.

From the Judgment & Order dated 28.4.2008 of the High Court of Bombay at Nagpur in W.P. No. 1810 of 2008.

Gagan Sanghi, Rameshwar Prasad Goyal for the Appellant.

A.K. Sanghi, Madhvi Diwan, Sanjay Kharde, Asha Gopalan Nair, Shivaji M. Jadhav, Anish R. Shah, S.K. Jain, Prity Kunwar, Sarvpreet Singh for the Respondents.

The Judgment of the Court was delivered by

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

2. The High Court of Judicature at Bombay has while dismissing Writ Petition No.1810 of 2008 filed by the appellant herein refused to interfere with the order dated 20th February, 2008 passed by the Scheduled Tribe Certificate Scrutiny Committee, Amravati. The Committee in turn had declared that the appellant was a 'Koshti' by Caste and not a 'Halba' which is a notified Scheduled Tribe. The facts giving rise to the present appeal lie in a narrow compass and may be summarised as under:

Shri Shivaji High School, Dongaon, of which respondent No.5 happens to be the Head Master, invited applications in terms of advertisement dated 20th July, 1995 against three vacant posts of teachers in the said school. One each of these two posts was reserved for Scheduled Caste and Scheduled Tribe Candidates. The third post was ostensibly in open category and required a minimum qualification of B.P.Ed., which the appellant herein did not possess. The appellant claiming to be a 'Halba' applied for the solitary post reserved for the Scheduled Tribe candidates and was appointed as a low grade co-teacher in the pay scale of Rs.1200-2040 with effect from 1st August, 1995 or the date she joined the said post. The appointment was on probation for an initial period of two years which was duly approved by the Zila Parishad Education Officer in terms of his order dated 12th July, 1996. It is not in dispute that the appellant satisfactorily completed the

period of probation and was confirmed in service as an Assistant Teacher in due course.

A decade after her initial appointment, respondent No.5 asked the appellant to get her caste credentials verified from the Scheduled Tribe Certificate Scrutiny Committee. The appellant complied with the said direction and submitted her certificate to the Committee concerned, which in turn forwarded it for a proper vigilance inquiry. In the course of the said inquiry, the school record of the appellant was also looked into which showed that the appellant's father was a 'Koshti' by caste which caste was not a Scheduled Tribe in Maharashtra.

The Committee, therefore, concluded that the Caste Certificate of the appellant was invalid and accordingly cancelled the same. This led to the school passing an Order dated 23rd February, 2008 whereby the services of the appellant were terminated with immediate effect. The termination Order said:

> "……..You were appointed on the post reserved for candidate of Scheduled Tribes. At the time of appointment you produced certificate showing that you belong to the category of Scheduled Tribes. There after the said Certificate was sent for verification to the Caste Scrutiny Committee. The said Committee after giving opportunity of hearing and adducing of evidence decided the enquiry and came to the conclusion that you do not belong to the category as mentioned in the certificate produced by you and consequently invalidated the caste certificate produced by you are not entitled to continue on the post as the post is reserved for the candidate of Scheduled Tribes Community."

Aggrieved by the above, the appellant filed an appeal before the School Tribunal under Section 9 of the Maharashtra Employees of Private School (Condition of Service) Regulation Act, 1977 which failed and was dismissed by the Tribunal by

its order dated 25th September, 2008. The appellant then preferred a writ petition before the High Court of Nagpur challenging the order passed by the Scheduled Tribe Certificate Scrutiny Committee invalidating her caste claim. The High Court saw no reason to interfere and dismissed the said petition by the order impugned before us. The High Court observed:

> "... neither the petitioner personally nor through her agent appeared before the Caste Scrutiny Committee nor submitted any reply to the Vigilance Cell Inquiry Report. Perusal of the order of Caste Scrutiny Committee further reveals that the Vigilance Cell collected the document dated 18.10.1956 i.e., extract of School entry in respect of father of the petitioner, wherein caste of father of the petitioner mentioned as "Koshti". Similarly, the another document collected by the Vigilance Cell further shows that the petitioner does not belong to "Halba" Scheduled Tribe. Petitioner also failed to establish affinity with the "Halba" Scheduled Tribe. In the circumstances, the conclusion arrived at by the Caste Scrutiny Committee is just and proper and needs no interference."

3. The present appeal assails the correctness of the above order as already noticed.

4. Learned counsel appearing for the appellant raised a short point before us. He contended that the appointment of the appellant having attained finality, could not have been set aside on the ground that Koshti- Halbas were not 'Halbas' entitled to the benefit of reservation as Scheduled Tribes. Relying upon the decision of the Constitution Bench of this Court in *State of Maharashtra v. Milind* (2001) 1 SCC 4, it was urged by the learned counsel that the appellant was entitled to the protection of continuance in service, no matter 'Halba-Koshtis' were not recognised as 'Halbas' by this Court. The High Court had not, according to the learned counsel, correctly appreciated the decision of this Court in *Milind's* case (supra) and thereby fallen in an error in dismissing the writ petition filed by the appellant.

He also placed reliance upon the Office Memorandum issued by the Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel & Training dated 10th August, 2010 whereby protection against ouster of those appointed in the Scheduled Tribe category had been extended to persons appointed on the basis of their being 'Halba-Koshti' in the State of Maharashtra. It was further urged that relying upon the said subsequent development, this Court had allowed one Raju Gadekar, a candidate similarly placed as the appellant to seek the benefit under the circular by moving a suitable application before the High Court. There was according to the learned counsel no reason to take a different view in the case of the appellant, especially when this Court had in *Milind's* case (supra) followed in subsequent decisions, extended protection against ouster from service to those appointed in the Scheduled Tribe category on the basis of the certificates showing the persons appointed to be a 'Koshti-Halba' by caste.

5. On behalf of the respondent, it was urged that the decision of this Court in *Milind's* case (supra) was distinguishable from the facts of the case at hand inasmuch as that case dealt with admission to a professional course and not with appointment to any public office. It was further argued that the decision of this Court in *Milind's* case (supra) had been explained by this Court in subsequent decisions including *R. Vishwanatha Pillai v. State of Kerala* (2004) 2 SCC 105; *State of Maharashtra v. Sanjay K. Nimje* (2007) 14 SCC 481; *Bank of India v. Avinash D. Mandivikar* (2005) 7 SCC 690 and *Union of India v. Dattatray* (2008) 4 SCC 612 and the benefit limited only to cases arising out of admission to professional courses where the candidate had already completed the course and their ouster would result in no benefit to anyone.

6. In *Milind's* case (supra), the Constitution Bench of this Court was examining whether Koshti was a sub-tribe within the meaning of Halba/Halbi as appearing in the Constitution

(Scheduled Tribes) Order, 1950. The respondent in that case had obtained a Caste Certificate from the Executive Magistrate to the effect that he belonged to 'Halba' Scheduled Tribe. He was on that basis selected for appointment to the MBBS Degree Course in the Government Medical College for the session 1985-86 against a seat reserved for Scheduled Tribe candidates. The certificate relied upon by the respondent-Milind was sent to the Scrutiny Committee, the Committee recorded a finding after inquiry to the effect that the respondent did not belong to Scheduled Tribe. In an appeal against the said Order, the Appellate Authority concurred with the view taken by the Committee and declared that the respondent-Milind belonged to 'Koshti Caste' and not to 'Halba Caste' Schedule Tribe.

7. In a writ petition filed against the said order by Milind, the High Court held that it was permissible to examine whether any sub-division of a tribe was a part and parcel of the tribe mentioned therein and whether 'Halba-Koshti' was a sub-division of the main tribe 'Halba' within the meaning of Entry 19 in the Constitution (Scheduled Tribes) Order, 1950. The High Court further held that Halba-Koshti was indeed a sub-tribe of Halba appearing in the Presidential Order.

8. In an appeal filed against the above order of the High Court, this Court held that the Courts cannot and should not expand their jurisdiction while dealing with the question as to whether a particular caste or sub- caste, tribe or sub-tribe is included in any one of the Entries mentioned in the Presidential Orders issued under Articles 341 and 342. Allowing the State Government or the Courts or other authorities or tribunals to hold an inquiry as to whether a particular caste or tribe should be considered as one included in the Schedule to the Presidential order, when it is not so specifically included would lead to problems. This Court declared that the holding of an inquiry or production of any evidence to decide or declare whether any tribe or tribal community or part thereof or a group or part of a group is included in the general name, even though it is not

specifically found in the entry concerned would not be permissible and that the Presidential Order must be read as it is.

9. Having said so, this Court noticed the stand taken by the Government on the issue of 'Halba-Koshti' from time to time and the circulars, resolutions, instructions but held that even though the said circulars, instructions had shown varying stands taken by the Government from time to time relating to 'Halba-Koshti' yet the power of judicial review exercised by the High Court did not extend to interfering with the conclusions of the competent authorities drawn on the basis of proper and admissible evidence before it. This Court observed:

> ".....The jurisdiction of the High Court would be much more restricted while dealing with the question whether a particular caste or tribe would come within the purview of the notified Presidential Order, considering the language of Articles 341 and 342 of the Constitution. These being the parameters and in the case in hand, the Committee conducting the inquiry as well as the Appellate Authority, having examined all relevant materials and having recorded a finding that Respondent 1 belonged to "Koshti" caste and has no identity with "Halba/Halbi" which is the Scheduled Tribe under Entry 19 of the Presidential Order, relating to the State of Maharashtra, the High Court exceeded its supervisory jurisdiction by making a roving and in-depth examination of the materials afresh and in coming to the conclusion that "Koshtis" could be treated as "Halbas". In this view the High Court could not upset the finding of fact in exercise of its writ jurisdiction."

10. What is important is that this Court noticed the prevailing confusion arising out of different circulars and instructions on the question of 'Halba-Koshti' being Scheduled Tribes. Dealing with the observations made by the High Court and referring to circulars, instructions and resolution issued by the Government from time to time, this court observed:

> "33. The High court in paras 20 to 23 dealt with circulars/ resolutions/ instructions/orders made by the Government from time to time on the issue of "Halba-Koshtis". It is stated in the said judgment that up to 20-7-1962 "Halba-Koshtis" were treated as "Halbas" in the specified areas of Vidarbha. The Government of Maharashtra, Education and Social Welfare Department issued Circular No. CBC 1462/3073/M to the effect that "Halba-Koshtis" were not Scheduled Tribes and they are different from "Halba/ Halbis". In the said circular it is also stated that certain persons not belonging to "Halba" Tribe have been taking undue advantage and that the authorities competent to issue caste certificates should take particular care to see that no person belonging to "Halba-Koshtis" or "Koshti" community is given a certificate declaring him as a member of Scheduled Tribes. On 22-8- 1967 the abovementioned circular of 20-7-1962 was withdrawn. Strangely, on 27-9-1967, another Circular No. CBC-1466/ 9183/M was issued showing the intention to treat "Halba-Koshti" as "Halba". On 30-5-1968 by Letter No. CBC-1468-2027-O, the State Government informed the Deputy Secretary to the Lok Sabha that "Halba-Koshti" is "Halba/ Halbi" and it should be specifically included in the proposed amendment Act. The Government of Maharashtra on 29-7-1968 by Letter No. EBC-1060/49321-J-76325 informed the Commissioner for Scheduled Castes and Scheduled Tribes that "Halba-Koshti" community has been shown included in the list of Scheduled Tribes in the State and the students belonging to that community were eligible for the Government of India Post-Matric Scholarships. On 1-1-1969 the Director of Social Welfare, Tribal Research Institute, Pune, by his Letter No. TRI/I/H.K./68-69 stated that the State Government could not in law amend the Scheduled Tribes Order and that a tribe not specifically included, could not be treated as Scheduled Tribe. In this view the Director sought for clarification. The Government of India on 21-4-1969 wrote to the State Government that

in view of Basavalingappa case "Halba-Koshti" community could be treated as Scheduled Tribe only if it is added to the list as a sub-tribe in the Scheduled Tribes Order and not otherwise. Thereafter, few more circulars were issued by the State Government between 24-10-1969 and 6-11-1974 to recognise "Halba-Koshtis" as "Halbas" and indicated as to who were the authorities competent to issue certificates and the guidelines were given for inquiry. There was again departure in the policy of the State Government by writing a confidential Letter No. CBC-1076/1314/Desk-V dated 18-1-1977. The Government informed the District Magistrate, Nagpur, that "Halba- Koshtis" should not be issued "Halba" caste certificate. Thereafter, few more circulars, referred to in para 22 of the judgment, were issued. It may not be necessary to refer to those again except to the circular dated 31-7-1981 bearing No. CBC- 1481/(703)/D.V. by which the Government directed that until further orders insofar as "Halbas" are concerned, the School Leaving Certificate should be accepted as valid for the purpose of the caste. Vide resolution dated 23-1-1985 a new Scrutiny Committee was appointed for verification of caste certificates of the Scheduled Tribes. The High Court had observed in para 23 of the judgment that several circulars issued earlier were withdrawn but the said circular dated 31-7-1981 was not withdrawn. For the first time on 8- 3-1985 the Scrutiny Committee was authorised to hold inquiry if there was any reason to believe that the certificate was manipulated or fabricated or had been obtained by producing insufficient evidence. Referring to these circulars/resolutions the High Court took the view that the caste certificate issued to Respondent 1 could be considered as valid and up to 8-3-1985 the inquiry was governed by circular dated 31-7-1981. The High Court dealing with the stand of the State Government on the issue of "Halba-Koshti", from time to time, and also referring to circulars/resolutions/instructions held in favour of Respondent 1 on the ground that the appellant was

bound by its own circulars/orders. No doubt, it is true, the stand of the appellant as to the controversy relating to "Halba-Koshti" has been varying from time to time but in the view we have taken on Question 1, the circulars/resolutions/instructions issued by the State Government from time to time, some times contrary to the instructions issued by the Central Government, are of no consequence. They could be simply ignored as the State Government had neither the authority nor the competency to amend or alter the Scheduled Tribes Order.

But we make it clear that he cannot claim to belong to the Scheduled Tribe covered by the Scheduled Tribes Order. In other words, he cannot take advantage of the Scheduled Tribes Order any further or for any other constitutional purpose. Having regard to the passage of time, in the given circumstances, including interim orders passed by this Court in SLP (C) No. 16372 of 1985 and other related matters, we make it clear that the admissions and appointments that have become final, shall remain unaffected by this judgment."

11. A careful reading of the above would show that both the High Court as also this Court were conscious of the developments that had taken place on the subject whether 'Halba-Koshti' are 'Halbas' within the meaning of the Presidential Order. The position emerging from the said circulars, resolutions and orders issued by the competent authority from time to time notwithstanding, this Court on an abstract principle of law held that an inquiry into the question whether 'Halba-Koshti' were Halbas within the meaning of the Presidential order was not legally permissible.

12. The appellant before us relies upon the above passage extracted above to argue that her appointment had attained finality long before the judgment of this Court was delivered in Milind's case and even when she was found to be

a 'Koshti' and not a 'Halba' by the Verification Committee, she was entitled to protection against ouster.

13. We find merit in that contention. If 'Halba-Koshti' has been treated as 'Halba' even before the appellant joined service as a Teacher and if the only reason for her ouster is the law declared by this Court in Milind's case, there is no reason why the protection against ouster given by this Court to appointees whose applications had become final should not be extended to the appellant also. The Constitution Bench had in Milind's case noticed the background in which the confusion had prevailed for many years and the fact that appointments and admissions were made for a long time treating 'Koshti' as a Scheduled Tribe and directed that such admissions and appointments wherever the same had attained finality will not be affected by the decision taken by this Court. After the pronouncement of judgment in *Milind's* case, a batch of cases was directed to be listed for hearing before a Division Bench of this Court. The Division Bench eventually decided those cases by an order dated 12th December 2000 (*State of Maharashtra v. Om Raj* (2007) 14 SCC 488) granting benefit of protection against ouster to some of the respondents on the authority of the view taken by this Court in *Milind's* case. One of these cases, namely, Civil Appeal No.7375 of 2002 arising out of SLP No.6524 of 1988 related to the appointment of a 'Koshti' as an Assistant Engineer against a vacancy reserved for a 'Halba/Scheduled Tribe candidate. This court extended the benefit of protection against ouster to the said candidate also by a short order passed in the following words:

> "4. Leave granted.
>
> 5. The appellant having belonged to Koshti caste claimed to be included in the Scheduled Tribe of Halba and obtained an appointment as Assistant Engineer. When his appointment was sought to be terminated on the basis that he did not belong to Scheduled Tribe by the Government a writ petition was filed before the High Court challenging

> that order which was allowed. That order is questioned in this appeal. The questions arising in this case are covered by the decision in *State of aharashtra v. Milind*[1] and were got to be allowed, however, the benefits derived till now shall be available to the appellant to the effect that his appointment as Assistant Engineer shall stand protected but no further. The appeal is disposed of accordingly."

14. Reference may also be made to *Punjab National Bank v. Vilas* (2008) 14 SCC 545. That too was a case of appointment based on a certificate which was later cancelled on the ground that 'Halba Koshti' was not the same as 'Halba' Scheduled Tribe. The High Court had set aside the termination of the service of the affected candidates relying upon a Government resolution dated 15th June 1995 as applicable to Punjab National Bank. While upholding the said order, H.K. Sema, J. held the candidate to be protected against ouster on the basis of the resolution. V.S. Sirpurkar, J., however, took a slightly different view and held that the appointment made by the Bank having become final the same was protected against ouster in terms of the decision of the Constitution Bench in *Milind's* case (supra). The question whether the Government resolution protected the candidates against ouster from service was for that reason left open by His Lordship. Reliance in support of that view was placed upon the decision of this Court in Civil Appeal No. 7375 of 2000 (wrongly mentioned in the report as Civil appeal No. 3375 of 2000) mentioned above. The Court observed:

> "The situation is no different in case of the present respondent. He also came to be appointed and/or promoted way back in the year 1989 on the basis of his caste certificate which declared him to be Scheduled Tribe. Ultimately, it was found that since a "Koshti" does not get the status of a Scheduled Tribe, the Caste Scrutiny Committee invalidated the said certificate holding that the respondent was a Koshti and not a Halba. I must hasten

to add that there is no finding in the order of the Caste Scrutiny Committee that the petitioner lacked in bona fides in getting the certificate. I say this to overcome the observations in para 21 in Sanjay K. Nimje case. But it is not a case where the respondent pleaded and proved bona fides. Under such circumstances the High Court was fully justified in relying on the observations made in Milind case. The High Court has not referred to the judgment and order in Civil Appeal No. 3375 of 2000 decided on 12-12-2000 to which a reference has been made above. However, it is clear that the High Court was right in holding that the observations in Milind case apply to the case of the present respondent and he stands protected thereby".

15. Our attention was drawn by counsel for the respondents to the decision of this Court in *Addnl. General Manager/Human Resource BHEL v. Suresh Ramkrishna Burde* (2007) 5 SCC 336 in which the protection against ouster granted by the decision in *Milind's* case was not extended to the respondent therein. A bare reading of the said decision, however, shows that there is a significant difference in the factual matrix in which the said case arose for consideration. In *Burde's* case, the Scrutiny Committee had found that the caste certificate was false and, therefore, invalid. That was not the position either in Milind's case nor is that the position in the case at hand. In *Milind's* case, the Scrutiny Committee had never alleged any fraud or any fabrication or any misrepresentation that could possibly disentitle the candidate to get relief from the Court. In the case at hand also there is no such accusation against the appellant that the certificate was false, fabricated or manipulated by concealment or otherwise. Refusal of a benefit flowing from the decision of this Court in *Milind's* case may, therefore, have been justified in *Burde's* case but may not be justified in the case at hand where the appellant has not been accused of any act or omission or commission of the act like the one mentioned above to disentitle her to the relief prayed for. The reliance upon *Burde's*

case (supra), therefore, if of no assistance to the respondent.

The decision of this Court in *State of Maharashtra v. Sanjay K. Nimje* (2007) 14 SCC 481 relied upon by learned counsel for the respondents was distinguished even by V.S. Sirpurkar, J. in *Vilas's* case. The distinction is primarily in terms whether the candidate seeking appointment or admission is found guilty of a conduct that would disentitle him/her from claiming any relief under the extraordinary powers of the Court. This Court found that if a person secures appointment or admission on the basis of false certificate he cannot retain the said benefit obtained by him/her. The Courts will refuse to exercise their discretionary jurisdiction depending upon the facts and circumstances of each case. The following passage from decision in the *Nimje's* case is apposite:

> "In a situation of this nature, whether the Court will refuse to exercise its discretionary jurisdiction under Article 136 of the Constitution of India or not would depend upon the facts and circumstances of each case. This aspect of the matter has been considered recently by this Court in *Sandeep Subhash Parate v. State of Maharashtra* (2006) 7 SCC 501."

16. Applying the above to the case at hand we do not see any reason to hold that the appellant had fabricated or falsified the particulars of being a Scheduled Tribe only with a view to obtain an undeserved benefit in the matter of appointment as a Teacher. There is, therefore, no reason why the benefit of protection against ouster should not be extended to her subject to the usual condition that the appellant shall not be ousted from service and shall be re-instated if already ousted, but she would not be entitled to any further benefit on the basis of the certificate which she has obtained and which was 10 years after its issue cancelled by the Scrutiny committee.

17. In the result, we allow this appeal, set aside the order passed by the High Court and direct the reinstatement of the

appellant in service subject to the condition mentioned above. We further direct that for the period the appellant has not served the institution which happens to be an aided school shall not be entitled to claim any salary/back wages. She will, however, be entitled to continuity of service for all other intents and purposes. The respondent shall do the needful within a month from the date of this order. The parties are left to bear their own costs.

B.B.B. Appeal allowed.

VICE CHANCELLOR, GURU GHASIDAS UNIVERSITY
v.
CRAIG MCLEOD
(Civil Appeal No. 5889 of 2012)

AUGUST 16, 2012

[A.K. PATNAIK AND MADAN B. LOKUR, JJ.]

CONSTITUTION OF INDIA, 1950:

Art. 136 - Interference with interim order passed by High Court staying operation of orders of the University against a student charged with beating and threatening a teacher - Held: There is a self-imposed limited discretion for interference available to Supreme Court, and it would, generally, be more appropriate for an aggrieved litigant to approach the High Court for rectifying any error that may have been committed in passing (or declining to pass) an interim order - Of course, in an emergent and appropriate situation it is always open to a litigant to approach Supreme Court in its remedial jurisdiction - In the instant case, there was no legal basis for interdicting completion of inquiry against the student - While the High Court may have intended to bring a quietus to the entire episode, it should have kept in mind that maintenance of discipline in the University is equally important for a conducive academic environment and that the larger interests of the academic community are more central than the individual interests of a student - In the circumstances, the impugned interim order is set aside - Liberty granted to the student to revive his writ petition which he filed (and subsequently withdrawn) challenging the order of the University by which he was rusticated from the University - Interim orders - Education/Educational Institutions - Maintaining of discipline on campus.

An FIR was lodged against the respondent, a student

of B.E. (Computer Science and Engineer) of the appellant-University for beating and threatening a teacher on campus. The University also initiated action against the respondent and pending final decision, by an order dated 2.2.2010, suspended him from attending his classes and restrained him from entering the University premises. In the writ petition filed by the respondent, the High Court, by the interim order dated 9.8.2010, stayed the directions passed by the University. The University challenged the said interim order in the instant appeal. Subsequently, by order 7.1.2011, the University rusticated the respondent from the University for a period of five years. The respondent challenged the said order in W.P.(C) No. 890 of 2012, which was withdrawn by him with liberty to move an appropriate application in the Supreme Court in the instant appeal. However, no such application was filed.

Disposing of the appeal, the Court

HELD: 1.1. It is only in an atypical case that this Court entertains a petition against a discretionary interim order passed by the High Court where repercussions are grave or the legal basis for passing the interim order are obscure; or there is a miscarriage of justice; or it is imperative that this Court exercises its corrective jurisdiction. [para 16] [277-A-C]

Southern Petrochemical Industries Corpn. Ltd. v. Madras Refineries Ltd., **(1998) 9 SCC 209;** *Maharashtra SEB v. Vaman,* **(1999) 3 SCC 132, and** *United Bank of India v. Satyawati Tondon* **2010 (9) SCR 1 = (2010) 8 SCC 110;** *Union of India v. Swadeshi Cotton Mills Co.Ltd.* **1979 (1) SCR 735 = (1978) 4 SCC 295;** *Joginder Nath Gupta v. Satish Chander Gupta* **(1983) 2 SCC 325;** *Kishor Kirtilal Mehta and Ors. v. Lilavati Kirtilal Mehta Medical Trust,* **2007 (8) SCR 86 = (2007) 10 SCC 21 - relied on**

1.2 There is, therefore, a self-imposed limited discretion for interference available to this Court, and it would, generally, be more appropriate for an aggrieved litigant to approach the High Court for rectifying any error that may have been committed in passing (or declining to pass) an interim order. Of course, in an emergent and appropriate situation it is always open to a litigant to approach this Court in its remedial jurisdiction. [para 17] [277-D-E]

1.3 Insofar as the instant case is concerned, the respondent was alleged to have assaulted a professor on campus. This by itself is a rather serious allegation. The turn of events, given the lapse of time, did not form a legal basis for interdicting completion of the inquiry against the respondent. While the High Court may have intended to bring a quietus to the entire episode, it should have kept in mind that maintenance of discipline in the University is equally important for a conducive academic environment and that the larger interests of the academic community are more central than the individual interests of a student. In the circumstances, the impugned interim order is set aside. [para 18-19, 23] [277-F-H; 278-A-B, H]

Varanaseya Sanskrit Vishwavidyalaya and Another v. Rajkishore Tripathi (Dr.), **1977 (2) SCR 213 = (1977) 1 SCC 279 - relied on**

1.4 In view of the subsequent developments, particularly, the passing of the office order dated 07.01.2011 by the Vice Chancellor of the University, liberty is granted to the respondent to revive W.P.(C) No. 890 of 2012 filed (and subsequently withdrawn) by him in the High Court challenging the order dated 07.01.2011. [para 21-22] [278-D-F]

Case Law Reference:

(1998) 9 SCC 209	**relied on**	**para 16**

(1999) 3 SCC 132	**relied on**	**para 16**
2010 (9) SCR 1	**relied on**	**para 16**
1979 (1) SCR 735	**relied on**	**para 16**
(1983) 2 SCC 325	**relied on**	**para 16**
2007 (8) SCR 86	**relied on**	**para 16**
1977 (2) SCR 213	**relied on**	**para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5889 of 2012.

From the Judgment & Order dated 09.08.2010 of the High Court of Chatisgarh at Bilaspur in W.P. (C) No. 694 of 2010.

Rakesh Khanna, S.S. Nehra, K.K Mishra, Seema Rao for the Appellant.

Ajit Kumar Sinha, Ashwarya Sinha, Abhishek Prasad, Ambhoj Kumar Sinha for the Respondent.

The Judgment of the Court was delivered by

MADAN B. LOKUR, J. 1. Leave granted.

2. The Vice Chancellor, Guru Ghasidas University is aggrieved by an interim order dated 09.08.2010 passed by the High Court of Chhattisgarh at Bilaspur in W.P.(C) No. 694 of 2010 filed by Craig Mcleod.

3. The subject matter of the impugned interim order, is three directions given by the University on 02.02.2010. These three directions are: (1) suspending Craig Mcleod from attending classes in the University of which he is a student, (2) stopping him from availing the facilities of the University till final orders are passed in respect of his alleged gross misbehavior, and (3) restraining from entering the University premises.

4. All three directions were stayed by the High Court by the impugned interim order till the disposal of the Writ Petition.

The interim stay was subject to the condition that Craig Mcleod gives an undertaking, inter alia, of good behaviour. The impugned interim order also directed the University not to pass a final order in respect of the alleged gross misbehaviour of Craig Mcleod.

5. In our opinion the impugned interim order is not sustainable and while passing final orders, we have taken subsequent developments into consideration.

The facts:

6. It is alleged that on 02.02.2010 Craig Mcleod grossly misbehaved on campus with two Professors of the University. As a result of the incident, a First Information Report was lodged with the police and the Proctorial Board of the University took an emergent decision to expel him from the University for violating the code of conduct and for beating and threatening a teacher. Pending a final decision on the allegations against him, Craig Mcleod was suspended from attending his classes, stopped from availing facilities of the University and restrained from entering the University premises by an order dated 02.02.2010.

Proceedings in the High Court:

7. Feeling aggrieved, Craig Mcleod challenged the said order by filing Writ Petition (C) No. 694 of 2010 in the High Court of Chhattisgarh. On 17.02.2010 notice was issued in the Writ Petition and in the interim, the passing of an order of rustication was stayed. This interim order was continued for a couple of months.

8. On 17.06.2010, the High Court granted liberty to the University to take a final decision in the matter of the alleged gross misbehaviour of Craig Mcleod within a week. In other words, the interim order was not extended.

9. Soon thereafter, some developments appear to have taken place but they are not clear from the record before us.

Be that as it may, on 22.07.2010 the High Court recorded that Craig Mcleod had filed an affidavit dated 21.07.2010 in the High Court tendering an unconditional apology to the teacher concerned for the incident, which he stated was unintentional. The order passed by the High Court also recorded that Craig Mcleod stated that he would go to the University on 26.07.2010 and personally tender an apology to the concerned teachers. The case was then adjourned to 06.08.2010.

10. When the matter was taken up on 06.08.2010, the High Court was informed by the University and the concerned Professors that Craig Mcleod did come to the University to tender an apology but he was accompanied by several persons. It appears that an apology was not tendered by him and in any event the apology, if tendered, was not sincere in view of the above situation. This was, of course, contested by Craig Mcleod.

11. Based, however, on the affidavit of apology dated 21.07.2010, the impugned interim order dated 09.08.2010 came to be passed by the High Court.

Proceedings in this Court and pendent lite developments:

12. Feeling aggrieved by the impugned interim order dated 09.08.2010 the University preferred a Petition for Special Leave to appeal (now a Civil Appeal). On 29.11.2010, this Court passed the following order :

> "Issue Notice.
>
> Interim stay of the impugned order of the High Court to the extent it stays the passing of the final order in the disciplinary enquiry against the respondent. Consequently, the Enquiry Authority may submit his report, subject to final decision."

13. When we took up the matter for final disposal, learned counsel for the parties brought to our notice certain developments that had taken place during the pendency of this

appeal. Firstly, on 07.01.2011 an office order was passed by the Vice Chancellor of the University rusticating Craig Mcleod from the University for a period of 5 years. It was also ordered that he was not entitled to get admission in any course in the University or any affiliated college of University during this period of 5 years. The operative portion of the order passed by the Vice Chancellor reads as follows:-

> "The Shri Craig Mcleod S/o Shri Rodney Mcleod, a student of B.E. (Computer Science and Engineering) is hereby rusticated from the University for a period of 5 years w.e.f. today and further he will not be entitled to get admission in any course in the University or any affiliated college of the University during this period of 5 years."

14. Thereafter, Craig Mcleod challenged the order dated 07.01.2011 by filing W.P.(C) No. 890 of 2012 in the High Court of Chhattisgarh. This Writ Petition came up for hearing on 10.05.2012 when it was withdrawn by him with liberty to move an appropriate application in this Court since this appeal was still pending. The order passed by the High Court on 10.05.2010 reads as follows:-

> "In view of the order passed by the Hon'ble Supreme Court on 29/11/2010 in SLP(C) No. 32358/2010 arising out of an interim order passed by this court on 09/08/2010 in W.P. (C) No. 694/2010, wherein the Hon'ble Supreme Court directed that "the Enquiry Authority may submit his report, subject to final decision", learned counsel for the petitioner seeks permission of the Court to withdraw the Writ Petition with liberty to move appropriate application before Hon'ble Supreme Court.
>
> Accordingly, the writ petition is dismissed as withdrawn with the liberty aforesaid."

15. We may note that despite liberty having been granted to him, Craig Mcleod has not filed any application in this Court. We have, however, heard learned counsel for the parties.

Discussion:

16. It is only in an atypical case that this Court entertains a petition against a discretionary interim order passed by the High Court (*Southern Petrochemical Industries Corpn. Ltd. v. Madras Refineries Ltd.,* (1998) 9 SCC 209, *Maharashtra SEB v. Vaman,* (1999) 3 SCC 132, and *United Bank of India v. Satyawati Tondon,* (2010) 8 SCC 110) where, for example, the repercussions are grave or the legal basis for passing the interim order are obscure (*Union of India v. Swadeshi Cotton Mills Co.Ltd.,* (1978) 4 SCC 295); or there is a miscarriage of justice (*Joginder Nath Gupta v. Satish Chander Gupta,* (1983) 2 SCC 325); or it is imperative that this Court exercises its corrective jurisdiction (*Kishor Kirtilal Mehta and Ors. v. Lilavati Kirtilal Mehta Medical Trust,* (2007) 10 SCC 21).

17. There is, therefore, a self-imposed limited discretion for interference available to this Court, and it would, generally, be more appropriate for an aggrieved litigant to approach the High Court for rectifying any error that may have been committed in passing (or declining to pass) an interim order. Of course, in an emergent and appropriate situation it is always open to a litigant to approach this Court in its remedial jurisdiction.

18. Insofar as the present case is concerned, Craig Mcleod was alleged to have assaulted a professor on campus. This by itself is a rather serious allegation. While appreciating this, the High Court had, on 7.6.2010, permitted the University to take a final decision in respect of the alleged gross misbehaviour of Craig Mcleod. About two months later, the High Court completely changed its view apparently because in the meantime Craig Mcleod had tendered an apology to the High Court (which was not necessary) and then tendered or offered to tender an apology to the concerned Professor, which he did not accept since it was not sincere.

19. The turn of events, given the lapse of time, did not form a legal basis for interdicting completion of the inquiry against

Craig Mcleod. While the High Court may have intended to bring a quietus to the entire episode, it should have kept in mind that maintenance of discipline in the University is equally important for a conducive academic environment and that the larger interests of the academic community are more central than the individual interests of a student. In *Varanaseya Sanskrit Vishwavidyalaya and Another v. Rajkishore Tripathi (Dr.),* (1977) 1 SCC 279 it was observed that in matters of discipline or administration of the internal affairs of a University, the courts should be most reluctant to interfere.

20. It is under these circumstances that we have entertained this appeal against an interim order.

Conclusion:

21. Now, several significant developments have taken place overtaking the 'cause of action' for approaching this Court, particularly the passing of the office order dated 07.01.2011 by Vice Chancellor of the University. In our opinion, it is not necessary or even appropriate at this stage to judge the validity of the office order dated 07.01.2011. We may only mention that learned counsel for Craig Mcleod submitted that the order dated 07.01.2011 is in violation of the order passed by this Court on 29.11.2010.

22. Therefore, without going into the larger issues raised before us, we grant liberty to Craig Mcleod to revive W.P.(C) No. 890 of 2012 filed (and subsequently withdrawn) by him in the High Court challenging the office order dated 07.01.2011 passed by the Vice Chancellor of the University. We expect the High Court to permit revival of the Writ Petition and decide it expeditiously since it is stated that Craig Mcleod has already lost two years of his education as result of this litigation.

23. Under the circumstances, the impugned interim order is set aside and this appeal is accordingly disposed of.

R.P. Appeal disposed of.

RAJU JHURANI
v.
M/S GERMINDA PVT. LTD.
(Civil Appeal No. 5886 of 2012)

AUGUST 16, 2012

[ALTAMAS KABIR AND J. CHELAMESWAR, JJ.]

COMPANIES ACT, 1956:

ss. 433, 434 and 439 - Petition for winding-up of the tenant company filed by land-lord for non-payment of arrears of rent due - Rejected by High Court as barred by provisions of O.2, r.2 CPC - Held: Order 2, CPC deals with the frame of suits, and the various rules contained therein also refer to suits for obtaining the relief of a civil nature - On the other hand, proceeding u/ss 433, 434 and 439 of the Companies Act, 1956, is not a suit, but a petition which does not attract the provisions of O. 2, r.2 CPC - Therefore, the findings of the Single Judge, as also the Division Bench of the High Court, in regard to the application of the provisions of O. 2, r. 2 CPC are set aside - However, the Division Bench has rightly held that the relief of arrears of rent claimed by appellant-landlord, in the instant case, will not lie in a winding-up petition, but in a suit filed for the said purpose, particularly, when the said relief is not available under the rent laws - Code of Civil Procedure, 1908 - O.2, r.2 - West Bengal Premises Tenancy Act, 1956.

Consequent upon the decree of the suit of the appellant-landlord for ejectment of the respondent-tenant on the ground of default in making payment of rents under the West Bengal Premises Tenancy Act, 1956 and the latter's vacating the premises, the landlord filed a winding-up petition before the Company Court for payment of arrears of rent amounting to Rs.7,22,381/-

from the month of June, 1998, till August, 2004 with interest amounting to Rs. 8,92,211/. The Single Judge of the High Court dismissed the said petition as barred by O.2 r.2 CPC. The appeal of the landlord having been dismissed by the Division Bench of the High Court, he filed the appeal.

Allowing the appeal in part, the Court

HELD: 1.1. Order 2, CPC deals with the frame of suits, and the various rules contained therein also refer to suits for obtaining the reliefs of a civil nature. On the other hand, proceeding u/ss 433, 434 and 439 of the Companies Act, 1956, is not a suit, but a petition which does not attract the provisions of O. 2, r.2 CPC, which deals with suits. It has been pointed out that the West Bengal Premises Tenancy Act, 1956, does not make any provision for recovery of arrears of rent and provision has only been made u/s17 thereof for deposit of the arrears of rent which are admitted by the tenant at the time of entering appearance and filing written statement in the suit for eviction. Provision has also been made for payment of such arrears in instalments, but there is no provision for recovery of the arrears of rent for which a separate suit has to be filed, as has been indicated by the Division Bench of the High Court. Therefore, the findings of the Single Judge, as also the Division Bench of the High Court, in regard to the application of the provisions of O. 2, r. 2 CPC to a winding-up proceeding under the Companies Act that may be filed for recovery of the dues payable by the respondent-tenant to the appellant-landlord, are set aside. [para 12 and 14] [285-F-H; 286-A-B, E]

1.2 However, the Division Bench has rightly held that the relief of arrears of rent claimed by the appellant-landlord, in the instant case, will not lie in a winding-up petition, but in a suit filed for the said purpose,

particularly, when the said relief is not available under the rent laws which only deal with protection of tenants from eviction and the right of the landlords to recover the tenanted premises on the grounds specified therein. There are various stages involved in deciding the amount of rents payable and the periods of default and also the amount to be ultimately calculated on account of such default; and the same cannot be tried in a summary way, without adducing proper evidence. It is, therefore, necessary that such issues be heard and tried in a properly constituted suit for recovery of such dues, in which the issue relating to the actual dues payable by the respondent-tenant to the appellant-landlord can be decided. [para 13, 14] [286-C-D, F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5886 of 2012.

From the Judgment & Order dated 14.08.2006 of the High Court at Calcutta in A.C. No. 54 of 2005.

Shobha for the Appellant.

Gaurav Mitra, S. Udaya Kumar Sagar, Bina Madhavan, Karan Kanwal, Lawyer's Knit & Co. for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. An interesting point has been raised in this Appeal as to whether the provisions of Order 2 Rule 2 of the Code of Civil Procedure (CPC) would have any impact on a proceeding under Sections 433, 434 and 439 of the Companies Act, 1956.

3. This Appeal is directed against the judgment and order dated 14th August, 2006, passed by the Calcutta High Court in A.C. No.54 of 2005 dismissing the Appeal on the ground that in the absence of any specific finding whatsoever as to the rate of rent and the period of default committed by the respondent-tenant, the proceedings under the Companies Act, 1956, for

winding-up was not maintainable.

4. The Appellant herein as landlord filed a suit for eviction against the respondent company on the ground of default in making payment of the rents and also on grounds of reasonable requirement, in the City Civil Court at Calcutta, under the provisions of the West Bengal Premises Tenancy Act, 1956. The same was registered as Ejectment Suit No.201 of 1999. The said suit was decreed only on the ground of default, but only upon recording that notice under Section 13(6) of the aforesaid Act had been duly served and that the ground of default had been proved, the Trial Court decreed the suit. There was no finding whatsoever as to the period of default in the said judgment.

5. After the passing of the decree, as the Respondent did not hand over vacant possession of the suit premises, the Appellant put the decree into execution and pursuant thereto vacant possession of Flat No.10-D in the 10th Floor and car parking space No.4 in the ground floor of the premises No.28-B, Shakespeare Sarani, Calcutta, was made over to the Appellant through Court Bailiff on 22nd February, 2002. Having obtained vacant possession of the suit premises, the Appellant issued notice to the Respondent Company demanding payment of arrears of rent, Corporation taxes, etc. but without yielding any result. Consequently, the Appellant had no other option, but to file a winding-up petition before the concerned Company Court for payment of arrears of rent amounting to Rs.7,22,381/- from the month of June, 1998, till August, 2004 at the rate of Rs.12,650/- per month, together with interest amount of Rs.8,92,211/- at the rate of 18% per annum. The learned Single Judge (Company Affairs) dismissed the winding-up petition on the ground of the alleged bar of Order 2 Rule 2 CPC as well as the observations made that the Appellant could approach any other appropriate forum with regard to the claim raised by him in the winding-up petition and that no summary order could be passed since the relationship between the parties had already been terminated.

6. The Division Bench dismissed the Appeal filed by the Appellant herein on the ground that the winding-up petition was not maintainable as there was no admitted arrears of rent for any particular period and there was no ascertained amount due in respect of which a winding-up order could be passed. The Appellate Court, however, also observed that the Appellant as the petitioning creditor would be entitled to claim the amount of arrears claimed by him in an appropriate proceeding before the appropriate forum.

7. Questioning the said order of the Division Bench dismissing the appeal, learned Advocate, Ms. Shobha, urged that both the learned Single Judge, as well as the Division Bench, proceeded on an erroneous interpretation of the provisions of Order 2 Rule 2 CPC and Sections 433, 434 and 439 of the Companies Act, 1956. Ms. Shobha contended that the eviction suit had been decreed only on the ground of default, since under the West Bengal Premises Tenancy Act, 1956, there is no provision for a decree for recovery of rents. In fact, in the absence of any provision in the Act, the Court could not have made any decree towards the rents payable by the Respondent-tenant to the Appellant-landlord. However, although, the default period or the rate of rent had not been computed by the Trial Court, the Trial Court had found that the Respondents had defaulted in payment of rent from the month of June, 1998. It was submitted that in order to ascertain the dues on the basis of the aforesaid finding, was only a matter of calculation and mathematics and could be easily ascertained. A proceeding for winding-up would, therefore, be maintainable in respect of the debts, which the Company was unable to pay.

8. On the question of the bar under Order 2 Rule 2 CPC, Ms. Shobha submitted that the same relates to suits which were required to include the whole of the claim which the Plaintiff was entitled to make in respect of the cause of action, with liberty to relinquish any portion of his claim to bring the suit within the jurisdiction of any Court, but having so relinquished such claim

or portion thereof, the Plaintiff would no longer be entitled to sue in respect of the portion so omitted or relinquished. Ms. Shobha also pointed out that Clause (3) of Rule 2 of Order 2 also prohibits a person from suing for any relief which may have been omitted by the Plaintiff, except with the leave of the Court. In contradistinction to the above, the provisions of Section 439 of the Companies Act, 1956, provide for an application to be made to the Court for the winding-up of the Company to be presented by a petition, subject to the provisions indicated in the Section. Ms. Shobha pointed out that the proceedings under Section 439 not being a suit, but a Petition, the provisions of Order 2 Rule 2 CPC would not be attracted since the bar indicated therein is with regard to suits. On the basis of such distinction, Ms. Shobha submitted that the learned Single Judge had wrongly interpreted the provisions of Order 2 Rule 2 CPC in holding that the winding-up petition filed by the Appellant for recovery of its arrear rents/dues was not maintainable in law.

9. On the question of the findings of the Division Bench that in the absence of any finding regarding the rate of rent and the arrears due, a procedure under Section 439 of the Companies Act was not maintainable, Ms. Shobha urged that such an interpretation was erroneous and based on an incorrect understanding of the provisions of Section 439 of the Companies Act, 1956, in relation to Order 2 Rule 2 CPC. Ms. Shobha reiterated that once it had been held by the Court that the Respondent-tenant had defaulted in payment of rent for a particular month, viz. June 1998, it was only a matter of calculation and mathematics to ascertain the dues which were payable by the Respondent-tenant to the Appellant-landlord. The relief in the winding-up petition being ascertainable, the Division Bench of the High Court erred in law in holding otherwise.

10. Ms. Shobha further submitted that recognizing the fact that the Respondent-tenant was in default of payment of rent since the month of June, 1998, the Division Bench had observed that the Appellant would be at liberty to enforce his rights to the

arrear rentals before the appropriate forum. In other words, according to Ms. Shobha, the Division Bench recognized the right of the Appellant to recover its dues from the Respondent-tenant, though not by means of a winding-up petition under Section 439 of the Companies Act, 1956.

11. On the other hand, Mr. Gaurav Mitra, learned Advocate, appearing for the Respondent Company, reiterated the submissions which had found favour both with the learned Single Judge as also the Division Bench of the High Court. It was reiterated that the Appellant-landlord ought to have included all the reliefs in the eviction suit and having omitted to sue for the arrear rents, he was no longer entitled to claim the same on account of the bar imposed under Order 2 Rule 2 CPC. Mr. Mitra also supported the view expressed by the Division Bench of the High Court holding that a winding-up proceeding was not a proper remedy for the recovery of undetermined dues, particularly when so many different criteria were involved in ascertaining the amount due and/or payable by the Respondent-tenant to the Appellant-landlord. Learned counsel submitted that the judgment and order of the learned Single Judge and the Division Bench of the Calcutta High Court did not require any interference and the Appeal was, therefore, liable to be dismissed.

12. Having considered the submissions made on behalf of the respective parties, we are inclined to accept Ms. Shobha's submissions as far as the provisions of Order 2 Rule 2 CPC are concerned. Order 2 CPC deals with the frame of suits and the various rules contained therein also refer to suits for obtaining the reliefs of a civil nature. On the other hand, a proceeding under Sections 433, 434 and 439 of the Companies Act, 1956, is not a suit, but a Petition which does not attract the provisions of Order 2 Rule 2 CPC, which deals with suits. Ms. Shobha has submitted that the West Bengal Premises Tenancy Act, 1956, does not make any provision for recovery of arrear rents and provision has only been made under the provisions of Section 17 for deposit of the arrear rents

which are admitted by the tenant at the time of entering appearance and filing Written Statement in the suit for eviction. Provision has also been made for payment of such arrears in instalments, but there is no provision for recovery of the arrear rents for which a separate suit has to be filed, as has been indicated by the Division Bench of the Calcutta High Court.

13. Viewed in the context of what has been stated hereinabove, we are unable to accept the second limb of Ms. Shobha's submissions. There are various stages involved in deciding the amount of rents payable and the periods of default and also the amount to be ultimately calculated on account of such default and the same cannot be tried in a summary way, without adducing proper evidence. It is, therefore, necessary that such issues be heard and tried in a properly constituted suit for recovery of such dues, in which the issue relating to the actual dues payable by the Respondent-tenant to the Appellant-landlord can be decided.

14. We, therefore, set aside the findings of the learned Single Judge, as also the Division Bench, in regard to the application of the provisions of Order 2 Rule 2 CPC to a winding-up proceeding under the Companies Act that may be filed for recovery of the dues payable by the Respondent-tenant to the Appellant-landlord. We are, however, ad idem with the Division Bench that the relief of the Appellant-landlord, if any, in this case, will not lie in a winding-up petition, but in a suit filed for the said purpose, particularly when the said relief is not available under the rent laws which only deal with protection of tenants from eviction and the right of the landlords to recover the tenanted premises on the grounds specified therein.

15. The Appeal is, therefore, allowed in part to the aforesaid extent.

16. Having regard to the facts of the case, the parties shall bear their own costs throughout.

R.P. Appeal Partly allowed.

SUPREME COURT BAR ASSOCIATION & ORS.

v.

B.D. KAUSHIK

I.A. No. 6

IN

(Civil Appeal Nos. 3401 of 2003 etc.)

AUGUST 16, 2012

[ALTAMAS KABIR AND J. CHELAMESWAR, JJ.]

BAR ASSOCIATION:

Supreme Court Bar Association - Eligibility of Members to contest and vote at the election to Executive Committee - "ONE BAR ONE VOTE" principle - Applicability of - Order of Supreme Court dated 20.7.2012[1] - Modified to the effect that the person who had contested elections or had cast his vote in an election to the Executive Committee of any court annexed Bar Association other than Supreme Court Bar Association (SCBA) and Supreme Court Advocates-on-Record Association (SCAORA) during any of the years 2007 to 2012 could not be allowed to vote to elect the office bearers of the SCBA or to attend the General Body meeting of the SCBA.

CIVIL APPELLATE JURISDICTION : I.A. No. 6.

IN

Civil Appeal No. 3401 & 3402 of 2003.

From the Judgment & Order dated 05.04.2003 of the Civil Judge, Delhi in Civil Suit Nos. 100 & 101 of 2003.

Ranjit Kumar, Dinesh Dwivedi, Sushil K. Jain, Atulesh Kumar, Chanda B. Prasad, Arun Kumar, Narendra Kumar,

1. Supreme Court Bar Association and Ors. vs. B.D. Kaushik 2012 SCR.

Ranjit Kr. Sharma, Milind Kumar, Tripurari Ray, Ravi Shankar Kumar, B.K. Choudhary, Yugal Kishore Prasad, Rajesh Ranjan Rajesh , Parmanand Pandey, Rajesh Aggarwal, Shivaji M. Jadhav, Jitender Mohan Sharma, Dinesh Kumar Garg, Nitin Kumar Thakur, [Caveator-in-person] for the appearing parties.

The Order of the Court was delivered

O R D E R

1. I.A.No.6 has been filed on behalf of the Supreme Court Bar Association and Supreme Court Advocate-on-Record Association, through its Secretary, Mrs. B.Sunita Rao, advocate, for clarification and modification of the judgment/ order dated 20th July, 2012, wherein, while considering the application filed by the SCBA(I.A. No.5 of 2011), certain suggestions made by the Implementation Committee had been accepted.

2. Appearing in support of the said application, copies of which have been served on all the interested parties, including the members of the Implementation Committee, represented by Mr. P.P. Rao and Mr. Ranjit Kumar, learned senior advocates, Mr. Sushil Kumar Jain, learned advocate submitted that one omission appears to have been made in paragraph 14 of the judgment, wherein while considering the principle of ONE BAR ONE VOTE, we had indicated that persons who had contested elections to the Executive Committee of any Court annexed Bar Association, other than the SCBA, during any of the years from 2007 to 2012, could not be allowed to vote to elect the Office Bearers of the SCBA on the aforesaid principle, or to attend the General Body meetings of the SCBA. It was further mentioned that the same would also include a person who had cast his vote in any election to the Executive Committee of any Court annexed Bar Association, other than the SCBA, for the above-mentioned years. It has been pointed out by Mr. Jain that through inadvertence, the Supreme Court Advocate-on-Record Association had not been excluded,

although, it formed an integral part of the SCBA.

3. The suggestion is well taken and accepted by all the interested parties represented by learned counsel, and, accordingly, we modify paragraph 14 of the said judgment dated 20th July, 2012, by including the words "AND THE SCAORA" after the words "OTHER THAN THE SCBA" appearing at lines 3 and 4 of the paragraph and also after the same words appearing in line 11 of the said paragraph. Let the said paragraph be modified and read accordingly.

4. As far as the other prayer made on behalf of the applicant is concerned, with regard to the number of filings in a year, as indicated in paragraph 9 of the judgment, we are convinced that since all advocates and members of the SCBA will be covered by the number of entries into the Supreme Court High Security Zone by the Proximity Card, the same does not require any modification at this stage.

5. I.A.6 filed in the disposed of appeal(s) is allowed to the aforesaid extent.

R.P. I.A. Partly allowed.

PATHAN HUSSAIN BASHA

v.

STATE OF A.P.

(Criminal Appeal No. 1712 of 2009)

AUGUST 16, 2012

[SWATANTER KUMAR AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Penal Code, 1860 - ss.304-B and 498-A - Suicide by married woman - Short span of time between marriage and death of the deceased - Prosecution case that deceased was being harassed and ill-treated by her husband, father-in-law and mother-in-law for non-payment of balance dowry amount - Trial court convicted all the three accused and sentenced them to life imprisonment - High Court acquitted the accused-father-in-law but confirmed conviction and sentence of the accused-husband and mother-in-law (i.e. the appellants) - On appeal, held: The ingredients of s.304B r/w s.498A IPC were completely satisfied in the instant case - By a deeming fiction in law, the onus was on the accused to prove as to how the deceased died - It was for the accused to show that the death of the deceased did not result from any cruelty or demand of dowry by the accused persons - Denial cannot be treated to be discharge of onus - Onus has to be discharged by leading proper and cogent evidence - Maintaining silence cannot be equated to discharge of onus by the accused - On facts, the prosecution established the guilt of the accused by reliable and cogent evidence - There being no rebuttal thereto, no occasion for interference by Supreme Court - Appellants were rightly held guilty by the courts below - However, keeping in view the attendant circumstances and in the interest of justice, punishment awarded to them reduced to ten years rigorous imprisonment.

In a case of death of a married woman, her husband

and parents-in-law were charged with offences under Sections 304-B and 498-A IPC. The prosecution case was that at the time of marriage of the deceased, it was promised that a dowry of Rs. 25,000/-, would be paid by the side of the wife to the husband; that out of this amount, a sum of Rs. 15,000/- was paid at that time and it was promised that the balance dowry of Rs. 10,000/- would be paid after four months, upon which the marriage was performed; that the deceased's father could not pay the balance amount within time as he lacked the resources; that despite pressure from accused-husband and parents-in-law, the deceased was not able to get the balance amount of dowry from her family; that for non-payment of dowry, the accused persons harassed the deceased and subjected her to cruelty and even refused to send her to her parental house; that deceased was unable to bear such cruelty by the accused persons and consequently committed suicide by hanging herself in the house of the accused. The trial court convicted all the three accused under ss.304B and 498A IPC and sentenced them to life imprisonment. In appeal, the High Court acquitted the accused-father-in-law, but confirmed the conviction of accused-husband and mother-in-law (i.e. the appellants). Hence the present appeals.

Partly allowing the appeals, the Court

HELD: 1. From the evidence, it is clear that the dowry demands were being raised by the accused persons persistently from the family of the deceased and for that they even harassed the deceased, by beating and abusing her. The deceased had informed her parents of the ill-treatment and the cruelty inflicted on her for non-giving of dowry. The period intervening between the marriage and the death of the deceased was very small. They were married in the year 2002 and she committed suicide by hanging on 15th February, 2003. The witnesses, including LW-1 (father of the deceased) stated

that for the first few months they were happy, but thereafter, there were quarrels between the accused-husband and the deceased. Accused-husband when he had gone to the parental house of the deceased, demanded different items like fan, ring and Rs. 1,000/- in cash, and the balance of the agreed dowry amount. Since, these demands were not satisfied instantaneously, he even left the deceased at her parental house. [Paras 12, 13] [298-C-F]

2. It is clear that the ingredients of Section 304B read with Section 498A IPC are completely satisfied in the present case. By a deeming fiction in law, the onus shifts on to the accused to prove as to how the deceased died. It was for the accused to show that the death of the deceased did not result from any cruelty or demand of dowry by the accused persons. The accused-hsuband did not care to explain as to how the death of his wife occurred. Denial cannot be treated to be the discharge of onus. Onus has to be discharged by leading proper and cogent evidence. It was expected of the accused to explain as to how and why his wife died, as well as his conduct immediately prior and subsequent to the death of the deceased. Maintaining silence cannot be equated to discharge of onus by the accused. In the present case, the prosecution by reliable and cogent evidence established the guilt of the accused. There being no rebuttal thereto, there is no occasion to interfere in the judgments of the courts under appeal. [Para 15] [305-G-H; 306-A-C]

Biswajit Halder alias Babu Halder and Others v. State of W.B. **(2008) 1 SCC 202: 2007 (4) SCR 120 and** *Ashok Kumar v. State of Haryana* **(2010) 12 SCC 350: 2010 (7) SCR 1119 - relied on.**

3. The High Court acquitted the accused-father-in-law, as there was no direct evidence against him. His

acquittal was not challenged by the State before this Court, thus, this Court is not called upon to discuss this aspect of the matter. The appellants (i.e. accused-husband and mother-in-law) were rightly found guilty of the offence by the courts. While there is no reason to differ with the concurrent findings recorded by the trial court and the High Court, there is some substance in the argument raised on behalf of the appellants that keeping in view the prosecution evidence, the attendant circumstances, the age of the accused and the fact that they have already been in jail for a considerable period, the Court may take lenient view as far as the quantum of sentence is concerned. The offences having been proved against the accused and keeping in view the attendant circumstances, ends of justice would be met, if the punishment awarded to the appellants is reduced. Consequently, ten years Rigorous Imprisonment is awarded to the appellants. [Paras 16, 17, 18] [306-C-G]

Case Law Reference:

2007 (4) SCR 120	**relied on**	**Para 13**
2010 (7) SCR 1119	**relied on**	**Para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1712 of 2009 etc.

From the Judgment & Order dated 26.10.2006 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Criminal Appeal No. 2368 of 2004.

WITH

Crl. Appeal No. 1706 of 2009.

Param Kumar Mishra (for Kumud Lata Das) for the Appellant

D. Mahesh Babu for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Accused Pathan Hussain Basha, was married to Pathan Haseena Begum (now deceased) on 23rd June, 2002 at Guntur. It was an arranged marriage. At the time of marriage, it was promised that a dowry of Rs. 25,000/-, besides other formalities, would be paid by the side of the wife to the husband. Out of this amount, a sum of Rs. 15,000/- was paid at that time and it was promised that the balance dowry of Rs. 10,000/- would be paid in the month of October, 2002, upon which the marriage was performed.

2. The father of the bride could not pay the balance amount within time, because he lacked the resources. The accused Pathan Hussain Basha, his father Pathan Khadar Basha, and mother Pathan Nazeer Abi forced her to get the balance amount of dowry. Despite such pressure, she was not able to get that money from her family. It is the case of the prosecution that for non-payment of dowry, the accused persons harassed the deceased and subjected her to cruelty. They even refused to send her to her parental house. This was informed by the deceased to various persons, including her relatives and elders. She was unable to bear the cruelty to which she was subjected, by the accused persons. On 15th February, 2003, at about 11 a.m., the deceased committed suicide by hanging herself in the house of the accused.

3. When Pathan Basheerunnisa, LW3 returned from her work, the accused sent her out giving her money to bring the soaps upon which she went out and when she came back, she found the accused absent and the bride hanging in the house. Subsequently, LW-3 Pathan Basheerunnisa sent her grandson Pathan Inayatullah Khan, LW-4 to the house of the parents of the deceased to inform them about the incident. When the parents of the deceased came to the house of the accused and found the deceased hanging from the beam with a saree, they untied her and took her to the Government General Hospital, Guntur hoping that the deceased may be alive. However, upon medical examination by the doctor, she was declared brought dead.

4. The father of the deceased Pathan Yasin Khan, LW-1 and her mother Pathan Shamshad Begum, LW-2 were present at that time. LW-1, lodged the report, which was registered by Sri K. Srinivasarao, LW-16, the Sub-Inspector of Police. The FIR was registered under Section 304B and Section 498A of the Indian Penal Code, 1860 (for short the "IPC"). Thereafter, investigation was conducted by one Shri P. Devadass, LW-17. He inspected the site from where he recovered and seized the saree that had been used for hanging. This was done in the presence of LW-10 and LW-11, Shaik Ibrahim and Mohd. Ghouse, respectively. Thereupon, the body was sent for post-mortem examination through Constable P. Venkateswara Reddy, LW-15. LW-17, P. Devdass, also took photographs of the scene. LW-13, Dr. M. Madhusudana Reddy conducted autopsy over the body of the deceased and prepared post-mortem certificate giving the cause of death as asphyxia, as a result of hanging.

5. On 16th February, 2003, at about 5 p.m., Investigating Officer arrested all the three accused persons. They faced the trial and were convicted by learned Sixth Additional Munsif Magistrate, Guntur for committing an offence under Sections 498A and 304B IPC.

6. They were committed to the Court of Sessions, Guntur Division, Guntur for such an offence. They faced the trial and the learned Sessions Judge vide its judgment dated 4th October, 2004 found them guilty of the said offences and punished them as follows:-

> "Hence A.1 to A.3 are sentenced to undergo R.I. for THREE YEARS and further sentenced to pay a fine of Rs. 1,000/- each (total fine amount Rs. 3,000/-) offence punishable u/s. 498-A IPC. I.D. of the fine amount of Rs. 1000/- to undergo SI for 9 months. And further A.1 to A.3 are sentenced to undergo imprisonment for LIFE for the offence u/s. 304-B IPC. Both the sentences shall run concurrently. The undergone remand period of A.1 to A.3 shall be set off u/s. 428 Cr.P.C. M.O.1 shall be destroyed after expiry of appeal time. The unmarked property if any shall be destroyed after expiry of appeal time."

7. The judgment dated 4th October, 2004 passed by the learned Trial Court was challenged in appeal before the High Court. The High Court of Andhra Pradesh, vide its judgment dated 26th October, 2006, while allowing the appeal in part, convicted accused Nos.1 and 2 for the aforementioned offences, however, acquitted accused No. 3, namely, Pathan Khadar Basha. The sentence awarded by the Trial Court was confirmed. This gave rise to filing of the present appeals.

8. First and the foremost, we must consider what is the evidence led by the prosecution to bring home the guilt of accused. Accused were charged with offences under Sections 498A and 304B of the IPC. The FIR in the present case was lodged by LW-1, who is the father of the deceased. According to this witness, on 23rd January, 2002, the marriage of his daughter was solemnised with accused Pathan Hussain Basha and he had accepted to give Rs. 25,000/- in marriage. He had given only Rs. 15,000/- and had agreed to pay Rs. 10,000/-, after four months. This witness has further specifically stated that the said accused treated his daughter in a proper manner for about two months. In the marriage, he had also given a gold chain, a double bed, an iron safe and other items. He had called his son-in-law, accused No. 1, to his house, as per custom, at that point the accused demanded a ceiling fan. A ceiling fan was lying with the witness and he gave that to his son in law, however, he protested the same on the ground that the old fan is not acceptable to him and he would like to have a new fan, which was bought for Rs. 650/- by the witness and given to his son-in-law. When he again invited his son-in-law and the mother-in-law of his daughter, even then he had gifted some presents to them. The accused asked for Rs. 1,000/- with a ring for the deceased. The witness could pay only Rs. 500/- upon which the accused refused to take the deceased to the matrimonial home and went away. Later on, the accused came

to fetch deceased. Subsequently, the mother-in-law of the deceased, again, demanded the balance dowry amount of Rs. 10,000/-, which he could not pay. His daughter, after the Ramzan festival, had informed him that the accused persons were harassing her and were even beating and abusing her. All three accused used to beat her for the remaining amount of dowry. On 15th February, 2003, a boy had come to him and told him that his daughter had died by hanging herself, whereupon he went to the house of the accused and found that his daughter was hanged to a wooden beam with a saree and she was dead. The saree was removed, she was taken to the hospital where she was reported to have 'brought dead'. The statement of this witness i.e. LW-1 is corroborated by LW-3 and LW-7.

9. It is stated by LW-3 that she knew all the accused persons as she was residing in the house of the accused and the deceased. According to this witness also, in the beginning they were happy, however after some time, she used to hear some quarrel between the deceased and the accused persons. Accused No. 2, Pathan Nazeer Abi had given her some amount and asked her to go and bring the soaps. After bringing the soaps, she went to the house of the accused persons and found that the accused was absent and the deceased was hanging on one side of the room. After seeing this, she raised cries and people came to the scene. LW-4, Pathan Inayatullah Khan, the grandson of LW-3, went to the house of the parents of the deceased and informed them about the unfortunate incident.

10. LW-7 stated on oath that he was present at the time of giving of dowry to the accused by the family of the deceased. He confirmed the fact that Rs. 15,000/- was given at the time of marriage and Rs. 10,000/- was to be given within some time, which the father of the deceased failed to provide. According to him, the accused persons used to harass the deceased primarily for non-payment of the amount of dowry, as a result of which, she was forced to commit suicide.

11. In fact, there is no dispute to the fact that the deceased

died of hanging. Dr. M. Madhusudana Reddy, LW-13 who was the Associate Professor in Forensic Medicine at Guntur Medical College, performed the post-mortem over the body of the deceased. In the medical report, LW13, he noticed "Oblique ligature mark of 17 x 2.5 cm present over front and left sides of neck" as well as noticed "Abrasion 1.5 x 1 cm present over lower part of middle of chin." Injuries were found to be antemortem in nature, and the cause of death was stated to be asphyxia, as a result of hanging

12. LW-14 is a witness to the seizure of the body and she noticed injuries on the body of the deceased. From the above evidence, it is clear that the dowry demands were being raised by the accused persons persistently from the family of the deceased and for that they even harassed the deceased, by beating and abusing her. She had informed her parents of the ill-treatment and the cruelty inflicted on her for non-giving of dowry.

13. The period intervening between the marriage and the death of the deceased is very small. They were married in the year 2002 and she committed suicide by hanging on 15th February, 2003. The witnesses, including LW-1 have stated that for the first few months they were happy, but thereafter, there were quarrels between the accused and the deceased. Accused Pathan Hussain Basha, when he had gone to the parental house of the deceased, demanded different items like fan, ring and Rs. 1,000/- in cash, and the balance of the agreed dowry amount. Since, these demands were not satisfied instantaneously, he even left the deceased at her parental house. At this stage, it will be appropriate for us to examine as to what are the ingredients of an offence punishable under Section 304B of the IPC. In the case of *Biswajit Halder alias Babu Halder and Others v. State of W.B.* [(2008) 1 SCC 202], the Court stated the ingredients of this provision as follows:-

"10. The basic ingredients to attract the provisions of Section 304-B are as follows:

(1) the death of a woman should be caused by burns or fatal injury or otherwise than under normal circumstances;

(2) such death should have occurred within seven years of her marriage;

(3) she must have been subjected to cruelty or harassment by her husband or any relative of her husband; and

(4) such cruelty or harassment should be for or in connection with demand for dowry.

11. Alongside insertion of Section 304-B in IPC, the legislature also introduced Section 113-B of the Evidence Act, which lays down when the question as to whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the court shall presume that such person had caused the dowry death.

12. Explanation appended to Section 113-B lays down that:

> "For the purpose of this section, 'dowry death' shall have the same meaning as in Section 304-B of Indian Penal Code."

13. If Section 304-B IPC is read together with Section 113-B of the Evidence Act, a comprehensive picture emerges that if a married woman dies in unnatural circumstances at her matrimonial home within 7 years from her marriage and there are allegations of cruelty or harassment upon such married woman for or in connection with demand of dowry by the husband or relatives of the husband, the case would squarely come under "dowry death" and there shall be a presumption against the husband and the relatives."

14. Besides examining the ingredients of the provision, it

would also be necessary for us to examine the meaning and connotation of the expressions 'dowry death', 'soon before her death' and 'in connection with, any demand for dowry' as appearing in the said section. Amongst others, lapse of time between the date of marriage and the date of death is also a relevant consideration for the Court while examining whether the essential ingredients of the provision are satisfied or not in a given case. In the case of *Ashok Kumar v. State of Haryana* [(2010) 12 SCC 350], this Court explained these terms in some elucidation and the effect of the deeming fiction appearing in the section, as follows:-

> "11. The appellant was charged with an offence under Section 304-B of the Code. This penal section clearly spells out the basic ingredients as well as the matters which are required to be construed strictly and with significance to the cases where death is caused by burns, bodily injury or the death occurring otherwise than under normal circumstances, in any manner, within seven years of a marriage. It is the first criteria which the prosecution must prove. Secondly, that "soon before her death" she had been subjected to cruelty or harassment by the husband or any of the relatives of the husband for, or in connection with, any demand for dowry then such a death shall be called "dowry death" and the husband or the relative, as the case may be, will be deemed to have caused such a death. The Explanation to this section requires that the expression "dowry" shall have the same meaning as in Section 2 of the Act.
>
> 12. The definition of "dowry" under Section 2 of the Act reads as under:
>
> > "2. Definition of dowry.-In this Act, 'dowry' means any property or valuable security given or agreed to be given either directly or indirectly-
> >
> > (a) by one party to a marriage to the other party to

the marriage; or

(b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person,

at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.

* * *

Explanation II.-The expression 'valuable security' has the same meaning as in Section 30 of the Penal Code (45 of 1860)."

13. From the above definition it is clear that, "dowry" means any property or valuable security given or agreed to be given either directly or indirectly by one party to another, by parents of either party to each other or any other person at, before, or at any time after the marriage and in connection with the marriage of the said parties but does not include dower or mahr under the Muslim Personal Law. All the expressions used under this section are of a very wide magnitude.

14. The expressions "or any time after marriage" and "in connection with the marriage of the said parties" were introduced by the amending Act 63 of 1984 and Act 43 of 1986 with effect from 2-10-1985 and 19-11-1986 respectively. These amendments appear to have been made with the intention to cover all demands at the time, before and even after the marriage so far they were in connection with the marriage of the said parties. This clearly shows the intent of the legislature that these expressions are of wide meaning and scope. The expression "in connection with the marriage" cannot be given a restricted or a narrower meaning. The expression

"in connection with the marriage" even in common parlance and on its plain language has to be understood generally. The object being that everything, which is offending at any time i.e. at, before or after the marriage, would be covered under this definition, but the demand of dowry has to be "in connection with the marriage" and not so customary that it would not attract, on the face of it, the provisions of this section.

15. At this stage, it will be appropriate to refer to certain examples showing what has and has not been treated by the courts as "dowry". This Court, in *Ran Singh v. State of Haryana,* (2008) 4 SCC 700 held that the payments which are customary payments, for example, given at the time of birth of a child or other ceremonies as are prevalent in the society or families to the marriage, would not be covered under the expression "dowry".

16. Again, in *Satvir Singh v. State of Punjab,* (2001)8 SCC 633 this Court held that the word "dowry" should be any property or valuable given or agreed to be given in connection with the marriage. The customary payments in connection with birth of a child or other ceremonies are not covered within the ambit of the word "dowry".

17. This Court, in *Madhu Sudan Malhotra v. Kishore Chand Bhandari,* 1988 Supp. SCC 424 held that furnishing of a list of ornaments and other household articles such as refrigerator, furniture and electrical appliances, etc. to the parents or guardians of the bride, at the time of settlement of the marriage, prima facie amounts to demand of dowry within the meaning of Section 2 of the Act. The definition of "dowry" is not restricted to agreement or demand for payment of dowry before and at the time of marriage but even include subsequent demands, was the dictum of this Court in State of A.P. v. Raj Gopal Asawa, (2004)4 SCC 470.

18. The courts have also taken the view that where the

husband had demanded a specific sum from his father-in-law and upon not being given, harassed and tortured the wife and after some days she died, such cases would clearly fall within the definition of "dowry" under the Act. Section 4 of the Act is the penal section and demanding a "dowry", as defined under Section 2 of the Act, is punishable under this section. As already noticed, we need not deliberate on this aspect, as the accused before us has neither been charged nor punished for that offence. We have examined the provisions of Section 2 of the Act in a very limited sphere to deal with the contentions raised in regard to the applicability of the provisions of Section 304-B of the Code.

19. We have already referred to the provisions of Section 304-B of the Code and the most significant expression used in the section is "soon before her death". In our view, the expression "soon before her death" cannot be given a restricted or a narrower meaning. They must be understood in their plain language and with reference to their meaning in common parlance. These are the provisions relating to human behaviour and, therefore, cannot be given such a narrower meaning, which would defeat the very purpose of the provisions of the Act. Of course, these are penal provisions and must receive strict construction. But, even the rule of strict construction requires that the provisions have to be read in conjunction with other relevant provisions and scheme of the Act. Further, the interpretation given should be one which would avoid absurd results on the one hand and would further the object and cause of the law so enacted on the other.

20. We are of the considered view that the concept of reasonable time is the best criteria to be applied for appreciation and examination of such cases. This Court in *Tarsem Singh v. State of Punjab,* (2008) 16 SCC 155 held that the legislative object in providing such a radius of time by employing the words "soon before her death" is to emphasise the idea that her death should, in all probabilities, has been the aftermath of such cruelty or harassment. In other words, there should be a reasonable, if not direct, nexus between her death and the dowry-related cruelty or harassment inflicted on her.

21. Similar view was expressed by this Court in *Yashoda v. State of M.P,* (2004)3 SCC 98 where this Court stated that determination of the period would depend on the facts and circumstances of a given case. However, the expression would normally imply that there has to be reasonable time gap between t he cruelty inflicted and the death in question. If this is so, the legislature in its wisdom would have specified any period which would attract the provisions of this section. However, there must be existence of proximate link between the acts of cruelty along with the demand of dowry and the death of the victim. For want of any specific period, the concept of reasonable period would be applicable. Thus, the cruelty, harassment and demand of dowry should not be so ancient, whereafter, the couple and the family members have lived happily and that it would result in abuse of the said protection. Such demand or harassment may not strictly and squarely fall within the scope of these provisions unless definite evidence was led to show to the contrary. These matters, of course, will have to be examined on the facts and circumstances of a given case.

22. The cruelty and harassment by the husband or any relative could be directly relatable to or in connection with, any demand for dowry. The expression "demand for dowry" will have to be construed ejusdem generis to the word immediately preceding this expression. Similarly, "in connection with the marriage" is an expression which has to be given a wider connotation. It is of some significance that these expressions should be given appropriate meaning to avoid undue harassment or advantage to either of the parties. These are penal provisions but

ultimately these are the social legislations, intended to control offences relating to the society as a whole. Dowry is something which existed in our country for a considerable time and the legislature in its wisdom considered it appropriate to enact the law relating to dowry prohibition so as to ensure that any party to the marriage is not harassed or treated with cruelty for satisfaction of demands in consideration and for subsistence of the marriage.

23. The Court cannot ignore one of the cardinal principles of criminal jurisprudence that a suspect in the Indian law is entitled to the protection of Article 20 of the Constitution of India as well as has a presumption of innocence in his favour. In other words, the rule of law requires a person to be innocent till proved guilty. The concept of deeming fiction is hardly applicable to the criminal jurisprudence. In contradistinction to this aspect, the legislature has applied the concept of deeming fiction to the provisions of Section 304-B. Where other ingredients of Section 304-B are satisfied, in that event, the husband or all relatives shall be *deemed* to have caused her death. In other words, the offence shall be deemed to have been committed by fiction of law. Once the prosecution proves its case with regard to the basic ingredients of Section 304-B, the Court will presume by deemed fiction of law that the husband or the relatives complained of, has caused her death. Such a presumption can be drawn by the Court keeping in view the evidence produced by the prosecution in support of the substantive charge under Section 304-B of the Code.

15. Applying these principles to the facts of the present case, it is clear that the ingredients of Section 304B read with Section 498A IPC are completely satisfied in the present case. By a deeming fiction in law, the onus shifts on to the accused to prove as to how the deceased died. It is for the accused to show that the death of the deceased did not result from any cruelty or demand of dowry by the accused persons. The

accused did not care to explain as to how the death of his wife occurred. Denial cannot be treated to be the discharge of onus. Onus has to be discharged by leading proper and cogent evidence. It was expected of the accused to explain as to how and why his wife died, as well as his conduct immediately prior and subsequent to the death of the deceased. Maintaining silence cannot be equated to discharge of onus by the accused. In the present case, the prosecution by reliable and cogent evidence has established the guilt of the accused. There being no rebuttal thereto, there is no occasion to interfere in the judgments of the courts under appeal.

16. The High Court acquitted Pathan Khadar Basha, the father-in-law of the deceased, as there was no direct evidence against him. His acquittal has not been challenged by the State before us, thus, we are not called upon to discuss this aspect of the matter.

17. Accused Pathan Hussain Basha and Pathan Nazeer Abi have rightly been found guilty of the offence by the courts. While we see no reason to differ with the concurrent findings recorded by the trial court and the High Court, we do see some substance in the argument raised on behalf of the appellants that keeping in view the prosecution evidence, the attendant circumstances, the age of the accused and the fact that they have already being in jail for a considerable period, the Court may take lenient view as far as the quantum of sentence is concerned. The offences having been proved against the accused and keeping in view the attendant circumstances, we are of the considered view that ends of justice would be met, if the punishment awarded to the appellants is reduced.

18. Consequently, we award ten years Rigorous Imprisonment to the appellants. The appeals are partially accepted to the extent afore-indicated.

B.B.B. Appeals partly allowed.