CHANDI PRASAD UNIYAL AND ORS.
v.
STATE OF UTTARAKHAND AND ORS.
(Civil Appeal No. 5899 of 2012)

AUGUST 17, 2012

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

Service Law - Pay scale - Fixation of pay scale based on 5th Pay Commission Report - Excess payment made due to wrong/irregular pay fixation - Recovery of - Permissibility - Whether over-payment of amount due to wrong fixation of 5th and 6th pay scale of teachers/principals based on the 5th Pay Commission Report could be recovered fr om the appellants who were serving as teachers or whether the appellants could retain the amount received on basis of irregular/wrong pay fixation in absence of any misrepresentation or fraud on their part - Held: Any amount paid/received without authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment - Appellants did not fall in any of the exceptional categories, over and above, there was a stipulation in the fixation order that in the condition of irregular/wrong pay fixation, the institution in which the appellants were working would be responsible for recovery of the amount received in excess from the salary/pension - Excess payment made accordingly ordered to be recovered from appellant's salary in twelve equal monthly installments.

The appellants-teachers/principals filed writ petition before the High Court seeking a writ of certiorari to quash an inter-departmental communication followed by a letter issued by the District Education Officer to the Manager/ Principal of few Sanskrit Colleges in Hardwar where excess payments had been made due to wrong fixation

of pay. The High Court rejected the writ petition holding that since payments were effected due to a mistake committed by the District Education Officer, the same could be recovered.

In the instant appeal, the appellants submitted that the payments were effected due to a mistake but not due to any misrepresentation or fraud committed by the appellants and hence the decision taken to recover the amount was not legal. The respondent-State, on the other hand, submitted that over-payment was effected due to wrong fixation of pay and that where payments are made under a bona fide mistake, the beneficiaries have no right to retain the same.

The question which therefore arose for consideration was whether over-payment of amount due to wrong fixation of 5th and 6th pay scale of teachers/principals based on the 5th Pay Commission Report could be recovered from the appellants who were serving as teachers or whether the appellants could retain the amount received on the basis of irregular/wrong pay fixation in the absence of any misrepresentation or fraud on their part.

Dismissing the appeal, the Court

HELD: 1.1. When the revised pay scale/pay fixation was fixed on the basis of the 5th Central Pay Scale, a condition was superimposed that in the case of irregular/ wrong pay fixation, the institution shall be responsible for recovery of the amount received in excess from the salary/pension. The appellants are bound by that condition. The excess salary was paid due to irregular/ wrong pay fixation by the concerned District Education Officer. This Court has not laid down any principle of law that only if there is misrepresentation or fraud on the part of the recipients of the money in getting the excess pay,

the amount paid due to irregular/wrong fixation of pay be recovered. [Paras 8, 9] [314-E-G, 315-A-B]

1.2. In the instant case, excess payment of public money is involved which is often described as "tax payers money" which belongs neither to the officers who have effected over-payment nor that of the recipients. The concept of fraud or misrepresentation was incorrectly brought in such situations. Possibly, effecting excess payment of public money by Government officers, may be due to various reasons like negligence, carelessness, collusion, favouritism etc. because money in such situation does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/received without authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment. Except few instances pointed out in Syed Abdul Qadir case and in Col. B.J. Akkara (retd.) case, the excess payment made due to wrong/irregular pay fixation can always be recovered. The appellants will not fall in any of these exceptional categories, over and above, there was a stipulation in the fixation order that in the condition of irregular/wrong pay fixation, the institution in which the appellants were working would be responsible for recovery of the amount received in excess from the salary/pension. [Paras 16, 17, 18] [317-G-H; 318-A-E]

1.3. There is no reason to interfere with the judgment of the High Court. However, it is ordered that the excess payment made be recovered from the appellant's salary

in twelve equal monthly installments starting from October 2012. [Para 18] [318-F]

Shyam Babu Verma v. Union of India **(1994) 2 SCC 521: 1994 (1) SCR 700;** *Sahib Ram v. State of Haryana* **1995 Supp (1) SCC 18: 1994 (3) Suppl. SCR 674;** *Yogeshwar Prasad and Ors v. National Institute of Education Planning and Administration and Ors.* **(2010) 14 SCC 323: 2010 (14) SCR 22; Col.** *B.J. Akkara (retd.) v. Government of India and Ors.* **(2006) 11 SCC 709: 2006 (7) Suppl. SCR 58 and** *Syed Abdul Qadir and Ors. v. State of Bihar and Ors.* **(2009) 3 SCC 475: 2008 (17) SCR 917 - referred to.**

State of Bihar v. Pandey Jagdishwar Prasad **(2009) 3 SCC 117: 2008 (17) SCR 297 - cited.**

Case Law Reference:

1994 (1) SCR 700	**referred to**	**Paras 3, 10, 12, 13**
1994 (3) Suppl. SCR 674	**referred to**	**Paras 3, 11, 12**
2008 (17) SCR 297	**cited**	**Para 3**
2010 (14) SCR 22	**referred to**	**Paras 3, 11,**
2006 (7) Suppl. SCR 58	**referred to**	**Paras 4, 12, 13**
2008 (17) SCR 917	**referred to**	**Paras 4, 13, 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5899 of 2012 etc.

From the Judgment & Order dated 13.09.2011 of the High Court of Uttarakhand at Nainital in Writ Petition No. 280 of 2009 (S/B)

WITH

I.A. Nos. 2 & 3.

Shivam Sharma, Ravi Kumar Tomar for the Appellants.

Rachana Srivastava for the Respodents.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Leave granted.

2. The question that arises for consideration in this appeal is whether over-payment of amount due to wrong fixation of 5th and 6th pay scale of teachers/principals based on the 5th Pay Commission Report could be recovered from the recipients who are serving as teachers. The Division Bench of the High Court rejected the writ petition filed by the appellants and took the view that since payments were effected due to a mistake committed by the District Education Officer, the same could be recovered. Aggrieved by the said judgment, this appeal has been preferred.

3. Shri Shivam Sharma, learned counsel appearing for the appellants, fairly submitted that the payments were effected due to a mistake but not due to any misrepresentation or fraud committed by the appellants and hence the decision taken to recover the amount is not legal. For establishing his contention, reliance was placed on several judgments of this Court like *Shyam Babu Verma v. Union of India* [(1994) 2 SCC 521], *Sahib Ram v. State of Haryana* [1995 Supp (1) SCC 18], *State of Bihar v. Pandey Jagdishwar Prasad* [(2009) 3 SCC 117] and *Yogeshwar Prasad and Ors v. National Institute of Education Planning and Administration and Ors.* [(2010) 14 SCC 323].

4. Mrs. Rachana Srivastava, learned counsel appearing for the respondent-State, took us through the counter affidavit filed by the State before this Court and submitted that the over-payment was effected due to wrong fixation of pay. Learned

counsel also submitted that where the payments have been made under a bona fide mistake, the beneficiaries have no right to retain the same. Learned counsel placing reliance on the judgment of this Court in *Col. B.J. Akkara (retd.) v. Government of India and Ors.* [(2006) 11 SCC 709] submitted that the High Court has correctly exercised its discretion in rejecting the writ petition after having found that the payments were effected due to wrong fixation of pay scale and this Court under Article 136 of the Constitution of India shall not interfere with the discretion exercised by the Hon'ble High Court. Reliance was also placed on another judgment of this Court in *Syed Abdul Qadir and Ors. v. State of Bihar and Ors.* [(2009) 3 SCC 475] and submitted that this court granted relief in that case since many of the teachers had retired from the service while in the present case all the appellants are still in service.

5. Parties are not in conflict on facts, however reference to few essential facts are necessary for a proper disposal of this appeal. Appellants, herein, had filed the writ petition before the High Court seeking a writ of certiorari to quash, an inter-departmental communication dated 24.10.2009 followed by a letter dated 18.11.2009 issued by the District Education Officer to the Manager/Principal of few Sanskrit Colleges in Hardwar where excess payments were made due to wrong fixation of pay. The operative portion of the communication dated 24.10.2009 reads as follows:

> "Through this meeting it has come to my knowledge that there is no similarity in the fixation of revised 5th pay scale throughout the State. Some of the District Education Officers have not taken into consideration the letters issued by this office and fixed pay scales as a result there is no similarity in the fixation of pay scale and therefore confusion has arisen among the different classes of teachers. For adjudication of the same and to bring similarity in the fixation of pay scale and to avoid any difficulty in the future, again you are hereby directed about the pay fixation

through enclosures. If pay fixation has been done by you as per the letters of this office then it is O.K. otherwise it will be fixed later on. If it has been fixed already, then the remaining salary can only be paid after availability of the amount in this office and you are requested to send demand letter to this office for release of the remaining amount. In case of fixation of payment contrary to the letters of this office, the remaining amount be not released."

6. Further, in the letter dated 18.11.2009, the District Education Officer had informed the Manager / Principal of the colleges as follows:

"With this letter a copy of model pay fixation form is being forwarded towards you so that you may ensure the correct fixation of 5th & 6th pay scale of the teachers/principals of your schools. You are requested to kindly fix the pay scale as per model pay fixation form. You are further requested to kindly make ensure to make available the revised pay scale form and service register to the finance officer, school education Hardwar and the undersigned as early possible. Only thereafter the salary of the concerned principals/teachers shall be issued and further deposit the challan in respect of excess payment in the treasury. The teachers whose pay has been wrongly fixed are as follows:-

1. Sh. Jagdish Prasad, Teacher (Literature), Sh. Jagdevsingh Sanskrit Mahavidhyalaya, Hardwar ;

2. Sh. Markandey Prasad Semwal, Teacher, Sh. Udashin Sanskrit Mahavidhyalaya, Hardwar ;

3. Sh. Chandi Prasad Uniyal, Principal, Sh. Nirmal Sanskrit Mahavidhyalaya, Kankhal, Hardwar."

Appellants herein are some of the teachers named in that letter; similar communications had gone to few other institutions, where appellants work.

7. We may point out indisputedly, the appellants 1 and 2 herein were not in the pay scale of Rs.4,250-6,400 as such they could not have got the revised pay scale of Rs.10,000-15,200/- w.e.f. 01.07.2001. Only if they were getting pay scale of Rs.8000-13,500/- on 01.01.1996, they would have been entitled to be placed in the pay scale of 10,000-15,200 as on 01.07.2001. Further, appellants 3 to 5 were working as Assistant Teachers and drawing in pay scale of Rs.3,600-5,350/- as on 01.01.1996 and were placed in the pay scale of Rs.5,500-9,000 as on 01.07.2001. Further, it was noticed that none of the appellants were working as principals and were never placed in the pay scale of 8,000-15,500 as on 01.01.1996 to get the benefit of the pay scale of 10,000-15,200 as on 01.07.2001. We also find only few persons like the appellants have been getting higher pay scale in the district of Haridwar w.e.f. 01.07.2001 and similarly situated persons in the rest of Uttarakhand are getting the same pay scale of Rs.10,000-15,200 only from 11.12.2007 and it was to rectify this anomaly, the District Education Officer, Haridwar passed the order dated 24.10.2009.

8. We may also indicate that when the revised pay scale/pay fixation was fixed on the basis of the 5th Central Pay Scale, a condition was superimposed which reads as follows:

"In the condition of irregular/wrong pay fixation, the institution shall be responsible for recovery of the amount received in excess from the salary/pension."

The appellants are further bound by that condition as well. The facts, mentioned hereinabove, would clearly demonstrate that the excess salary was paid due to irregular/wrong pay fixation by the concerned District Education Officer. The question is whether the appellants can retain the amount received on the basis of irregular/wrong pay fixation in the absence of any misrepresentation or fraud on their part, as contended.

9. We are of the considered view, after going through

various judgments cited at the bar, that this court has not laid down any principle of law that only if there is misrepresentation or fraud on the part of the recipients of the money in getting the excess pay, the amount paid due to irregular/wrong fixation of pay be recovered.

10. *Shyam Babu Verma* case (supra) was a three-Judge Bench judgment, in that case the higher pay scale was erroneously paid in the year 1973, the same was sought to be recovered in the year 1984 after a period of eleven years. The court felt that the sudden deduction of the pay scale from Rs.330-560 to Rs.330-480 after several years of implementation of said pay scale had not only affected financially but even the seniority of the petitioners. Under such circumstance, this Court had taken the view that it would not be just and proper to recover any excess amount paid.

11. In *Sahib Ram* case (supra), a two-Judge Bench of this Court noticed that the appellants therein did not possess the required educational qualification and consequently would not be entitled to the relaxation but having granted the relaxation and having paid the salary on the revised scales, it was ordered that the excess payment should not be recovered applying the principle of equal pay for equal work. In our view, this judgment is inapplicable to the facts of this case. In *Yogeshwar Prasad* case (supra), a two-Judge Bench of this Court after referring to the above mentioned judgments took the view that the grant of higher pay could not be recovered unless it was a case of misrepresentation or fraud. On facts, neither misrepresentation nor fraud could be attributed to appellants therein and hence, restrained the recovery of excess amount paid.

12. We may in this respect refer to the judgment of two-Judge Bench of this Court in *Col. B.J. Akkara (retd.)* case (supra) where this Court after referring to *Shyam Babu Verma case, Sahib Ram* case (supra) and few other decisions held as follows:

> "Such relief, restraining recovery back of excess payment, is granted by courts not because of any right in the employees, but in equity, in exercise of judicial discretion, to relieve the employees, from the hardship that will be caused if recovery is implemented. A Government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, Courts will not grant relief against recovery. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery."

13. Later, a three-Judge Bench in *Syed Abdul Qadir* case (supra) after referring to Shyam Babu Verma, Col. B.J. Akkara (retd.) etc. restrained the department from recovery of excess amount paid, but held as follows:

> "Undoubtedly, the excess amount that has been paid to the appellants - teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter affidavit, admitted that it was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the

officials concerned of the Government of Bihar. *Learned Counsel appearing on behalf of the appellants-teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellants-teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellants-teachers should be made.*

(emphasis added)"

14. We may point out that in Syed Abdul Qadir case such a direction was given keeping in view of the peculiar facts and circumstances of that case since the beneficiaries had either retired or were on the verge of retirement and so as to avoid any hardship to them.

15. We are not convinced that this Court in various judgments referred to hereinbefore has laid down any proposition of law that only if the State or its officials establish that there was misrepresentation or fraud on the part of the recipients of the excess pay, then only the amount paid could be recovered. On the other hand, most of the cases referred to hereinbefore turned on the peculiar facts and circumstances of those cases either because the recipients had retired or on the verge of retirement or were occupying lower posts in the administrative hierarchy.

16. We are concerned with the excess payment of public money which is often described as "tax payers money" which belongs neither to the officers who have effected over-payment nor that of the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such situations. Question to be asked is whether excess money has been paid or not may be due to a bona fide mistake. Possibly, effecting excess payment of public money by Government officers, may be due to various reasons like negligence, carelessness,

collusion, favouritism etc. because money in such situation does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/received without authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment.

17. We are, therefore, of the considered view that except few instances pointed out in *Syed Abdul Qadir* case (supra) and in *Col. B.J. Akkara (retd.)* case (supra), the excess payment made due to wrong/irregular pay fixation can always be recovered.

18. Appellants in the appeal will not fall in any of these exceptional categories, over and above, there was a stipulation in the fixation order that in the condition of irregular/wrong pay fixation, the institution in which the appellants were working would be responsible for recovery of the amount received in excess from the salary/pension. In such circumstances, we find no reason to interfere with the judgment of the High Court. However, we order the excess payment made be recovered from the appellant's salary in twelve equal monthly installments starting from October 2012. The appeal stands dismissed with no order as to costs. IA Nos.2 and 3 are disposed of.

B.B.B. Appeal dismissed.

STATE OF RAJASTHAN
v.
DR. RAJKUMAR AGARWAL & ANR.
(Criminal Appeal No. 1222 of 2012)

AUGUST 17, 2012

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

CODE OF CRIMINAL PROCEDURE, 1973:

s.482 - Exercise of power by High Court to quash criminal proceedings - Explained.

s.482 - High Court quashing the FIR registered against the respondent, a Surgeon in Govt. Hospital for accepting illegal gratification - Held: In the instant case, it cannot be said that the allegations made in FIR and the evidence collected do not disclose the commission of any offence and continuance of proceedings would be abuse of the process of court - This is certainly not a case where the FIR can be quashed - High Court failed to appreciate that the wholesome power vested in it u/s 482 has to be exercised with circumspection and very sparingly - In the circumstances, the impugned judgment and order is set aside.

PRACTICE AND PROCEDURE:

Affidavits in criminal proceedings - Held: It would be risky for the Courts to encourage the practice of filing affidavits by the witnesses at the stage of investigation or during the court proceedings in serious offences such as offences under the PC Act because it is easy for an influential accused to procure such affidavits and use them for quashing FIRs - Prevention of Corruption Act, 1988.

Respondent No. 1, who was working as Junior Specialist (Surgery), in the State Government Hospital,

was stated to have been caught red handed accepting a bribe of Rs.1500/-, in a trap laid by the Anti Corruption Bureau on the complaint of one 'SL' that respondent no. 1 had demanded Rs.5,000/- from him for the operation of his aunt, who had been operated upon by respondent no. 1 and was waiting for her discharge from the hospital. An FIR was registered u/ss 7 and 13(1)(d)(2) of the Prevention of Corruption Act, 1988 against respondent 1 and sanction for his prosecution was obtained from the competent authority. Respondent 1 filed a petition u/s 482 CrPC for quashing of the said FIR, which was allowed by the High Court.

Allowing the appeal of the State, the Court

HELD: 1.1. According to the prosecution, the trap was successful. The chemically treated currency notes for the purpose of trap were found with respondent 1 and the test of his hand was found positive. The patient and her husband have in their statements recorded u/s 161 CrPC partly supported the complainant. It is also pertinent to note that when the complaint was lodged, the patient was still in the hospital. Further, the police claim that they have taped the conversation between the complainant and respondent 1 and the latter is said to have refused to give his voice sample for the purpose of investigation. How far the evidence collected by the investigating agency is credible can be decided only when the evidence is tested by cross examination during the trial. But, in view of the contents of the FIR and nature of evidence collected by the investigating agency, this is certainly not a case where the FIR can be quashed. It cannot be said that the allegations made in the FIR and the evidence collected in support of the same do not disclose the commission of any offence and continuance of proceedings would be abuse of the process of court. [para 8-9] [326-E-F, H; 327-A-D; 328-C]

State of Haryana v. Bhajan Lal **1990 (3) Suppl. SCR 259 = 1992 Supp. (1) 335 - relied on.**

1.2 As has been held by this court in Shiji @ Pappu*, plenitude of the power u/s 482 CrPC by itself makes it obligatory for the High Court to exercise the same with utmost care and caution. The width and the nature of the power itself demands that its exercise is sparing and only in cases where the High Court is, for reasons to be recorded, of the clear view that continuance of the prosecution would be nothing but an abuse of the process of law. In the instant case, the High Court failed to appreciate that the wholesome power vested in it u/s 482 of the Code has to be exercised with circumspection and very sparingly. In the circumstances, the impugned judgment and order is set aside. [para 9 and 11] [327-H; 328-A-C; 328-F]

***Shiji alias Pappu & Ors. v. Radhika & Anr.* 2011 (13) SCR 135 = (2011) 10 SCC 705 - referred to**

2. Respondent 1 is relying on three affidavits, filed by the patient, her husband and another patient. It is difficult to quash the complaint on the basis of these affidavits. It would be risky for the Courts to encourage the practice of filing affidavits by the witnesses at the stage of investigation or during the court proceedings in serious offences such as offences under the PC Act because it is easy for an influential accused to procure such affidavits and use them for quashing FIRs. [para 8-9] [326-C; 327-E-F]

Case Law Reference:

1990 (3) Suppl. SCR 259	**referred to**	**para 6**
2010 (11) SCR 788	**held inapplicable**	**para 7**
2011 (13) SCR 135	**distinguished**	**para 7**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1222 of 2012.

From the Judgment & Order dated 10.09.2009 of the High Court of Judicature for Rajasthan at Jodhpur in S.B. Criminal Misc. Petition No. 307 of 2009.

Dr. Manish Singhvi, AAG, Pragati Neekhra for the Appellant.

Pallav Shishodia, Mukul Kumar for the Respondents.

The Judgment of the Court was delivered by

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

2. This appeal, by special leave, filed by the State of Rajasthan is directed against judgment and order dated 10/9/2009 delivered by the High Court of Rajasthan in Cri. Misc. Petition No.307 of 2009 filed by respondent 1 herein - Dr. Rajkumar Agarwal under Section 482 of the Code of Criminal Procedure, 1973 (for short, "the Code"). By the impugned judgment, a learned Single Judge of the High Court has quashed the complaint filed against respondent 1 by one Sohan Lal (the complainant) alleging that respondent 1 demanded Rs.5,000/- as illegal gratification for performing the operation of Smt. Sita Devi, whom he treated as his aunt. The question before this court is whether the exercise of powers under Section 482 of the Code by the High Court to quash the complaint was warranted in the facts of this case.

3. The facts, briefly stated, are as follows:

Respondent 1 was working as Junior Specialist (Surgery), Government Hospital, Suratgarh, District Sriganganagar, Rajasthan. On 11/12/2007, the Complainant submitted a written complaint to the Police Station, Anti Corruption Bureau (for short, "the ACB") Chowki, Sriganganagar stating that on 7/12/2007, respondent 1 performed the operation of uterus of his aunt - Smt. Sita Devi w/o. Navranglal in a Government Hospital at Suratgarh. According to the complainant, respondent 1

demanded Rs.5,000/- as bribe for the operation and for better treatment. The complainant gave a sum of Rs.2,500/- at the time of operation. The complainant stated that his aunt was still in the hospital and respondent 1 was demanding the remaining sum of Rs.2,500/-. According to the complainant, he did not want to give the money but he apprehended that respondent 1 may cause harm to his aunt, if he does not pay the amount.

4. It is the case of the petitioner that on the same day at about 11.00 a.m., a blank cassette "A" was inserted in a small tape-recorder and handed over to the complainant at the ACB Office. The complainant was explained about its functioning. Mr. Jagdish Rai, Ct.No.179 was sent along with the complainant to Suratgarh for verification of the demand of bribe. At 5.00 p.m., both the complainant and Mr. Jagdish Rai returned to the ACB office. The tape-recorder was played and the demand was found corroborated. Its memo was prepared and the cassette was sealed and labelled. It is the case of the appellant that preparation for trap was made. Two independent witnesses i.e. Mr. Darshan Singh, Assistant Engineer and Mr. Kripal Singh, Assistant Project (Samanvayak) Office, Sarva Shiksha Abhiyan, Sriganganagar were introduced to the complainant. Currency notes of Rs.1,500/- produced by the complainant which were to be handed over to the appellant were smeared with phenolphthalein powder. The necessary procedure was followed. A new blank cassette was inserted in the tape recorder and it was handed over to the complainant. On 12/12/2007, the Additional Superintendent of Police along with the complainant, the two independent witnesses and others left for Suratgarh. The complainant was given necessary direction for contacting respondent 1. The trap party waited there. The complainant came out of the residence of respondent 1 and gave fixed signal to the Additional Superintendent of Police. The raiding party along with the independent witnesses went to the complainant, who stated that respondent 1 had kept the bribe money of the complainant in the drawer of his table. The conversation of respondent 1 and the complainant was heard

on the tape recorder. Thereafter, the raiding party, two independent witnesses and the complainant went inside the house of respondent 1. Upon being questioned, respondent 1 stated that he had kept the money in the drawer of his table. The money was recovered and hand wash of respondent 1 was taken which turned pink. After following the necessary formalities, FIR came to be registered under Sections 7 and 13(1)(d)(2) of the Prevention of Corruption Act, 1988 (for short, **"the PC Act"**) at Police Station, ACB Chowki, Sriganganagar, against respondent 1. Sanction for prosecution was obtained from the competent authority on 23/6/2009.

5. As stated above, respondent 1 filed petition under Section 482 of the Code for quashing of the said FIR. The High Court has quashed the said FIR. The State of Rajasthan is in appeal before us.

6. Mr. Manish Singhvi, Addl. Advocate General for the appellant submitted that the High Court has fallen into a grave error in quashing the FIR. Counsel submitted that the High Court misinterpreted the ratio of the judgment of this court in *State of Haryana v. Bhajan Lal,* 1992 Supp. (1) 335. Counsel submitted that the FIR and the other material collected by the prosecution prima facie make out a strong case against respondent 1.

7. Mr. Pallav Shishodia, learned senior advocate for respondent 1, on the other hand, submitted that the High Court has rightly quashed the complaint. He pointed out that Smt. Sita Devi was not related to the complainant. Therefore, the complainant's case that he went to respondent 1 in connection with the uterus operation of Smt. Sita Devi and the amount was demanded by respondent 1 from him is inherently improbable. Counsel submitted that the complainant owns a Chemist shop near the hospital in which respondent 1 is working. The complainant does not have the necessary licence to run the Chemist shop. The illegalities committed by the complainant were known to respondent 1 and, therefore, the complainant

has falsely implicated respondent 1 in this case. Counsel pointed out that in their statements recorded under Section 161 of the Code, Smt. Sita Devi as well as her husband have stated that they were not aware whether the appellant demanded any money from respondent 1. In fact, Smt. Sita Devi and her husband have filed affidavits stating that respondent 1 never asked for money and his behaviour towards Smt. Sita Devi was good and the allegations made by the complainant are false. In support of his submission, counsel relied on the judgments of this court in *V.P. Shrivastava v. Indian Explosives Limited & Ors.* (2010) 10 SCC 361 and *Shiji alias Pappu & Ors. V. Radhika & Anr.* (2011) 10 SCC 705. Counsel submitted that since Smt. Sita Devi and her husband have not supported the prosecution case, the prosecution has become a lame prosecution and in all probability the case will end in acquittal. Therefore, the High Court has rightly quashed the complaint because if the proceedings are allowed to continue, that will be an abuse of the process of court. Counsel submitted that in any case, even if this court comes to a conclusion that the complaint discloses a prima facie cognizable offence, considering the fact that the offence is of the year 2007; that respondent 1 is on the verge of retirement and that he has suffered the agony of investigation and possibility of a criminal trial from 2007 onwards till today, this court may take a kindly view of the matter. Counsel submitted that in the facts of this case, ends of justice would be met if the High Court's order is confirmed.

8. We find no substance in Mr. Shishodia's submissions. It is true that the complainant is not related to Smt. Sita Devi but nothing has been brought on record to even prima facie establish that the complainant holds any grudge against respondent 1 because respondent 1 had knowledge about the alleged irregularities in respect of his Chemist shop. Since Mr Shishodia has referred to statements of Smt. Sita Devi and Navrang Lal recorded under Section 161 of the Code, we have perused them. In these statements, Smt. Sita Devi and Navrang

Lal have stated that the complainant was treating Smt. Sita Devi as his aunt and he had admitted her to the hospital. Navrang Lal has stated that because of his work he had to leave Suratgarh and therefore, the complainant admitted Smt. Sita Devi in the hospital. So far as the alleged demand for money made by respondent 1 is concerned, they have stated that respondent 1 did not demand any money from them and they were not aware whether respondent 1 demanded any money from the complainant. Thus, these statements support the complainant's case that he was treating Smt. Sita Devi as his aunt; that he had admitted her to the hospital and that he had dealt with respondent 1. Respondent 1 is relying on three affidavits. Affidavits have been filed by Smt. Sita Devi, Navrang Lal and another patient by name Devcharan Bhagat. Surprisingly, in these affidavits, Smt. Sita Devi and Navrang Lal have given a totally contrary version. They have gone on to say that the complainant has lodged a false complaint against respondent 1. In his affidavit Devharan Bhagat, another patient of respondent 1, has given a certificate to respondent 1 that he is an expert doctor and he had never taken any money from him for treatment. At this stage, we do not want to give any final opinion on these affidavits but we find it difficult to quash the complaint on the basis of these affidavits. As we have already noted, Smt. Sita Devi and her husband have in their statements recorded under Section 161 of the Code partly supported the complainant. Apart from these statements there is another prima facie clinching circumstance against the appellant. The police claim that they have taped the conversation between respondent 1 and the complainant. We have read the transcript of this tape recorded conversation. It is not possible for us to agree with the High Court that the transcription does not corroborate the FIR. Prima facie, we feel that if it is read against the background of the other facts, it is apparent that it relates to the operation of Smt. Sita Devi and the demand pertains to the said operation. Besides, according to the prosecution, the trap was successful. Money smeared with phenolphthalein powder was found with respondent 1. The notes recovered from

the respondent 1 tallied with the notes given by the complainant to the police for the purpose of trap and respondent 1's hand wash turned pink. It is also pertinent to note that when the complaint was lodged, Smt. Sita Devi was still in hospital, probably because after the money was handed over, she was to be discharged, and in fact, her discharge card was found on the table of respondent 1. It is also the case of the appellant that respondent 1 refused to give his voice sample for the purpose of investigation. How far the evidence collected by the investigating agency is credible can be decided only when the evidence is tested by cross examination during the trial. But, in our opinion, in view of the contents of the FIR and nature of evidence collected by the investigating agency, this is certainly not a case where the FIR can be quashed. If we examine the instant FIR in light of the principles laid down by this Court in Bhajan Lal it is not possible to concur with the High Court that the allegations made in the FIR and the evidence collected in support of the same do not disclose the commission of any offence.

9. There is yet another and a very sound reason why we are unable to quash the instant FIR. It is risky to encourage the practice of filing affidavits by the witnesses at the stage of investigation or during the court proceedings in serious offences such as offences under the PC Act. If such practice is sanctioned by this Court, it would be easy for any influential accused to procure affidavits of witnesses during investigation or during court proceedings and get the FIR and the proceedings quashed. Such a practice would lead to frustrating prosecution of serious cases. We are therefore, wary of relying on such affidavits. So far as the judgment cited by Mr. Shishodia in **V.P. Shrivastava** is concerned, it is purely on facts and can have no application to this case. **Shiji @ Pappu** also does not help respondent 1. That case involved a civil dispute. Parties had settled their civil dispute and therefore, the complainant was not ready to proceed with the proceedings. It is against this background that in **Shiji @ Pappu,** this Court

held that exercise of power under Section 482 of the Code was justifiable. However, this court added that the plentitude of the power under Section 482 of the Code by itself makes it obligatory for the High Court to exercise the same with utmost care and caution. The width and the nature of the power itself demands that its exercise is sparing and only in cases where the High Court is, for reasons to be recorded, of the clear view that continuance of the prosecution would be nothing but an abuse of the process of law. We feel that in the instant case, the High Court failed to appreciate that the wholesome power vested in it under Section 482 of the Code has to be exercised with circumspection and very sparingly. It is not possible for us, on the facts of this case, to come to a conclusion that no offence is made out at all against respondent 1 and continuance of proceedings would be abuse of the process of court.

10. Mr. Shishodia submitted that respondent 1 is on the verge of retirement. He has suffered the agony of investigation since 2007 and therefore, this court may take a kindly view of the matter. Rampant corruption is seen in every walk of our life. People, particularly those holding high office, are frequently seen accepting illegal gratification. In such serious cases showing mercy at this stage may send wrong signals. We are, therefore, unable to accede to Mr. Shishodia's request.

11. In the circumstances, we set aside the impugned judgment and order. It is not necessary for us to say the obvious that all observations made by us are prima facie observations and the court which may be seized of this matter shall deal with it strictly on merits and in accordance with law.

12. The appeal is disposed of in the afore-stated terms.

R.P. Appeal allowed.

RANJAN DWIVEDI

v.

C.B.I., THROUGH THE DIRECTOR GENERAL

(Writ Petition (Crl.) No. 200 of 2011etc.)

AUGUST 17, 2012.

[H. L. DATTU AND CHANDRAMAULI KR. PRASAD, JJ.]

CONSTITUTION OF INDIA, 1950:

Art. 21 - Speedy trial - Samastipur bomb-blast - 37 years delay in trial - Held: The Constitution does not expressly declare the right to speedy trial as a fundamental right - However, 'reasonably' expeditious trial has been held an integral and essential part of the fundamental right to life and liberty enshrined in Art. 21 - Delay, which occasioned by action or inaction of the prosecution is one of the main factors which will be taken note by the courts while interjecting a criminal trial - However, unintentional and unavoidable delays or administrative factors over which prosecution has no control may be a good cause for failure to complete the trial within a reasonable time - Such delay cannot be violative of accused's right to a speedy trial and needs to be excluded while deciding whether there is unreasonable and unexplained delay - Presumptive prejudice is not an alone dispositive of speedy trial claim and must be balanced against other factors - In the instant case, the delay is occasional by exceptional circumstances - In view of the long adjournments sought by the accused persons they cannot take advantage or the benefit of the right of speedy trial by causing the delay and then use that delay in order to assert their rights.

CRIMINAL TRIAL:

Delay in completion of trial - Samastipur bomb-blast - 37 years delay in completion of trial - Held: Prescribing a time

limit for the trial court to terminate the proceedings or, at the end thereof, to acquit or discharge the accused in all cases will amount to legislation, which cannot be done by judicial directives within the arena of judicial law making power available to constitutional courts however liberally the courts may interpret Arts. 21, 32, 141 and 142 - It is for the criminal court to exercise powers u/ss 258, 309 and 311 of the Cr.P.C. to effectuate the right to a speedy trial - In the instant case, credit should be given to the judicial officers who have taken care to see that the trial is completed at the earliest, and have painstakingly suffered with all the dilatory tactics adopted by the accused in dragging on with the proceedings for nearly thirty seven years - The system has done its best, but, has not achieved the expected result and the instant case, certainly, will not fit into the category of cases of systemic failure - The trial judge is directed to take up the case on day to day basis and conclude the proceedings as early as possible, without granting unnecessary and unwarranted adjournments - Judiciary - Conducting of trial - Appreciated - Judicial discipline - Precedent - Administration of justice - Code of Criminal Procedure, 1973 - ss. 258, 309 and 311 - Constitution of India, 1950 - Arts. 21,32,141 and 142.

The instant writ petitions were filed by two of the accused involved in the assassination of the then Railway Minister in the Samastipur bomb-blast which took place on 2.1.1975. They prayed for quashing of charges and the trial on the ground of more than 37 years delay in completion of the trial.

Dismissing the writ petitions, the Court

HELD: (Per H.L. Dattu, J)

1.1 In Abdul Rehman Antulay, Kartar Singh and P. Ramchandra Rao*, this Court has laid down guidelines as regards the right to speedy trial. The Constitution of India does not expressly declare the right to speedy trial

as a fundamental right. However, in Hussainara Khatoon's case a speedy trial has been held to be implicit in the broad sweep and content of Art. 21 of the Constitution. Subsequently, in a series of judgments, this Court has held that 'reasonably' expeditious trial is an integral and essential part of the Fundamental Right to Life and Liberty enshrined in Art. 21. [para 12-15 and 17] [342-G-H; 352-A-B]

*** *Abdul Rehman Antulay v. R.S. Nayak,* 1991 (3) Suppl. SCR 325 = (1992) 1 SCC 225, *Kartar Singh v. State of Punjab,* 1994 (2) SCR 375 = (1994) 3 SCC 569; *P. Ramachandra Rao v. State of Karnataka,* (2002) 4 SCC 578; *Hussainara Khatoon vs. Home Secretary State of Bihar, Patna* 1979 (3) SCR 169 = AIR 1979 SC 1360; *Vakil Prasad Singh v. State of Bihar* 2009 (1) SCR 517 = (2009) 3 SCC 355; *Japani Sahoo v. Chandra Sekhar Mohanty* 2007 (8) SCR 582 = (2007) 7 SCC 394; and *P. Vijayan v. State of Kerala* 2010 (2) SCR 78 = (2010) 2 SCC 398;- relied on.**

1.2 The guarantee of a speedy trial is intended to avoid oppression and prevent delay by imposing on the court and the prosecution an obligation to proceed with the trial with a reasonable dispatch. The guarantee serves a three fold purpose: Firstly, it protects the accused against oppressive pre-trial imprisonment; secondly, it relieves the accused of the anxiety and public suspicion due to unresolved criminal charges; and lastly, it protects against the risk that the evidence may be lost or memories dimmed by the passage of time, thus, impairing the ability of the accused to defend himself or herself. The purpose of both the criminal procedure rules governing speedy trials and the constitutional provisions, in particular, Art. 21, is to relieve an accused of the anxiety associated with a suspended prosecution and provide reasonably prompt administration of justice. [para 18] [352-C-E]

1.3 The reasons for the delay is one of the factors which courts would normally assess in determining as to whether a particular accused has been deprived of his or her right to speedy trial, including the party to whom the delay is attributable. Delay, which occasioned by action or inaction of the prosecution is one of the main factors which will be taken note by the courts while interjecting a criminal trial. A deliberate attempt to delay the trial, in order to hamper the accused, is weighed heavily against the prosecution. However, unintentional and unavoidable delays or administrative factors over which prosecution has no control, such as, over-crowded court dockets, absence of the presiding officers, strike by the lawyers, delay by the superior forum in notifying the designated Judge, (in the present case only), the matter pending before the other forums, including High Courts and the Supreme Court and adjournment of the criminal trial at the instance of the accused, may be a good cause for the failure to complete the trail within a reasonable time. Such delay or delays cannot be violative of accused's right to a speedy trial and needs to be excluded while deciding whether there is unreasonable and unexplained delay. The good cause exception to the speedy trial requirement focuses on only one factor i.e. the reason for the delay and the attendant circumstances bear on the inquiry only to the extent to the sufficiency of the reason itself. [para 19] [352-F-H; 353-A-D]

1.4 In the instant case, it has not been disputed that prosecution, apart from seeking 4-5 adjournments, right from 1991 till 2012, is not responsible for delay in any manner whatsoever. Therefore, the delay in trial of the petitioners from 1991 to 2012 is solely attributable to petitioners and other accused persons. [para 19] [353-D-E]

1.5 Presumptive prejudice is not an alone dispositive of speedy trial claim and must be balanced against other factors. The accused has the burden to make some showing of prejudice, although a showing of actual prejudice is not required. When the accused makes a prima-facie showing of prejudice, the burden shifts on the prosecution to show that the accused suffered no serious prejudice. [para 20] [353-F-G]

1.6 Further, the length of the delay is not sufficient in itself to warrant a finding that the accused was deprived of the right to a speedy trial. Rather, it is only one of the factors to be considered, and must be weighed against other factors. It is a balancing process while determining as to whether the accused's right to speedy trial has been violated or not. [para 21] [354-C, E]

1.7 In the instant case, the delay is occasional by exceptional circumstances. It may not be due to failure of the prosecution or by the systemic failure but it can only be said that there is a good cause for the failure to complete the trial and such delay is not violative of the right of the accused for speedy trial. [para 22] [354-F]

2.1 Prescribing a time limit for the trial court to terminate the proceedings or, at the end thereof, to acquit or discharge the accused in all cases will amount to legislation, which cannot be done by judicial directives within the arena of judicial law making power available to constitutional courts however liberally the courts may interpret Arts. 21, 32, 141 and 142. It is for the criminal court to exercise powers u/ss 258, 309 and 311 of the Cr.P.C. to effectuate the right to a speedy trial. In an appropriate case, directions from the High Court u/s 482 Cr.P.C. and Art. 226/227 can be invoked to seek appropriate relief. [para 23] [354-G-H; 355-D]

Ramchandra Rao P. v. State of Karnataka **(2002) 4 SCC 578 - followed.**

State through CBI v. Narayan Waman Nerukar (Dr), **2002 (1) Suppl. SCR 676 = (2002) 7 SCC 6; and** *State of Rajasthan v. Ikbal Hussen,* **2004 (4) Suppl. SCR 189 = (2004) 12 SCC 499 - referred to.**

Raj Deo (II) v. State of Bihar **1999 (3) Suppl. SCR 124 = (1999) 7 SCC 604;** *Raj Deo Sharma v. State of Bihar,* **(1998) 7 SCC 507;** *Common Cause, A Registered Society v. Union of India,* **1996 (2) Suppl. SCR 196 = (1996) 4 SCC 33 - stood overruled**

2.2 In view of the settled position of law and, particularly, in the facts of the case, and the long adjournments sought by the accused persons, who are seven in number, they cannot take advantage or the benefit of the right of speedy trial by causing the delay and then use that delay in order to assert their rights. [para 24] [355-E-F]

2.3 In the instant case, this Court should certainly give credit to the judicial officers, who have painstakingly suffered with all the dilatory tactics adopted by the accused in dragging on with the proceedings for nearly thirty seven years. They do deserve appreciation while conducting such a trial. It can certainly be said that the system has not failed, but, accused have been successful in dragging on the proceedings to a stage where, if it is drawn further, it may snap the Justice Delivery System. The Court is also conscious of the fact that more than thirty Judges had tried this case at one stage or the other, but, all of them have taken care to see that the trial is completed at the earliest. The system has done its best, but, has not achieved the expected result;

and the instant case certainly will not fit into the category of cases of systemic failure. [para 25] [355-H; 356-A-E]

2.4. As on date, the statements of accused u/s 313 CrPC have been recorded, the Court witnesses have been examined as well as the recording of statements of defence witness is also complete and it has been informed that the matter is posted for arguments. Therefore, at this stage the one and the only direction that requires to be issued is to direct the trial judge to take up the case on day to day basis and conclude the proceedings as early as possible, without granting unnecessary and unwarranted adjournments. [para 3 and 25] [337-H; 338-A-B; 356-E-F]

Per Chandramauli Kr. Prasad, J (Concurring)

1.1 Judicial discipline expects this Court to follow the ratio and prohibits laying down any principle in derogation of the ratio laid down by the earlier decisions of the Constitution Benches of this Court. [para 7] [357-H; 358-A]

Abdul Rehman Antulay v. R.S. Nayak **(1992) 1 SCC 225;** *P. Ramachandra Rao v. State of Karnataka,* **(2002) 4 SCC 578 - followed.**

1.2 As has been held by this Court in P. Ramachandra Rao, the propositions emerging from Art. 21 of the Constitution and expounding the right to speedy trial laid down as guidelines in Abdul Rehman Antulay's case adequately take care of right to speedy trial. The facts of the instant case do not justify quashing of the prosecution. Therefore, the trial cannot be terminated merely on the ground of delay without considering the reasons thereof. [para 9-11] [358-D, F-G]

Case Law Reference:

(As Per H.L. Dattu, J)

2002 (1) Suppl. SCR 676	**referred to**	**para 7**
2009 (1) SCR 517	**relied on**	**para 8**
2007 (8) SCR 582	**relied on**	**para 9**
2010 (2) SCR 78	**relied on**	**para 10**
1991 (3) Suppl. SCR 325	**relied on**	**para 12**
1994 (2) SCR 375	**relied on**	**para 12**
2002 (4) SCC 578	**relied on**	**para 12**
1979 (3) SCR 169	**relied on**	**para 17**
1999 (3) Suppl. SCR 124	**stood overruled**	**para 23**
(1998) 7 SCC 507	**stood overruled**	**para 23**
1996 (2) Suppl. SCR 196	**stood overruled**	**para 23**
2004 (4) Suppl. SCR 189	**referred to**	**para 23**

(As Per Chandramauli Kr. Prasad, J.)

1992 (1) SCC 225	**followed**	**para 7**
2002(4) SCC 578	**followed**	**para 7**

CRIMINAL ORIGINAL JURISDICTION : Writ Petition (Crl.) Nos. 200 of 2011 etc.

Under Article 32 of the Constitution of India.

WITH

W.P. (Crl.) No. 205 of 2011.

H.P. Raval, ASG, T.R. Andhyarujina, S.C. Patel, M.L. Lahoty, R.S. Sharma, Feroz Ahmad, Paban Kumar Sharma, Arvind Tiwary, Shabnam, Saumik Ghosal, Arvind Kumar, Laxmi

Arvind, Poonam Prasad, Pradeep Kumar Mathur, Rajiv Nanda, P.K. Dey, Sreeniwas Khalap, Arvind Kumar Sharma for the appearing parties.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. Reliefs sought in both the Writ Petitions are one and the same; therefore, they are disposed of by this common judgment.

2. These Criminal Writ Petitions, filed under Article 32 of the Constitution of India, seek for the enforcement of petitioner's fundamental right of "speedy trial" and for "quashing of Sessions Trial No. SC1/06", pending on the file of learned Additional Sessions Judge (East), Kakardooma Courts, Delhi.

3. The petitioners herein are the accused and tried for the assassination of Shri. L.N. Mishra, the then Union Railway Minister. It is the case of the prosecution that Shri. L.N. Mishra was injured in a bomb-blast at the Railway Station, Samastipur on 2.01.1975 and later succumbed to his injuries on 3.01.1975. The initial investigation was conducted by the Bihar C.I.D. and subsequently it was transferred to the Central Bureau of Investigation (for short, 'C.B.I.') who filed charge sheet on 10.11.1975. Thereafter, this case was transferred by this Court to Delhi vide its order dated 17.12.1979 due to interference by the then Bihar Government. Learned Additional Sessions Judge, Karkardooma, Delhi, after framing the charges, initiated trial against the accused persons but, unfortunately, the trial is still pending for the past 37 years. In 1987, the Petitioner(s) had preferred a Writ Petition (Crl.) No. 268/87 before this Court for quashing of the charges and proceedings in view of pending trial for over 12 years. This Court had disposed of the writ petitions vide its Order dated 10.12.1991 with a direction to the trial court to expeditiously complete the trial on day to day basis. However, the trial is still pending before the Learned Additional Sessions Judge despite the direction of this Court to expeditiously complete the trial. As of now, the statements

of accused under Section 313 of the Criminal Procedure Core (for short, 'Cr. P.C.') have been recorded, the Court witnesses have been examined as well as the recording of statements of defence witness is also complete and at the time of hearing of these petitions, we are informed by the learned counsel that the matter is now posted for arguments.

4. In view of delay in completion of trial for more than 37 years from date of the trial till date, the Petitioners have preferred the present Writ Petitions praying for quashing of the charges and trial.

5. Shri. T.R. Andhyarujina, learned Senior Counsel submits that the trial in the present case has been dragged on for more than 37 years and is still continuing and this amounts to violation of fundamental right of the accused to get speedy trial. He would submit that this Court has declared that right to speedy trial is a requirement under Article 21 of the Constitution guaranteeing right to life and liberty of a citizen. He would submit that better part of the life of the accused-petitioner has already been spent in the jail during trial and still, his fate is hanging in balance. He would contend that whether the accused would get convicted or acquitted is immaterial. The question here is; whether any judicial system would tolerate such as inordinate delay? Should the Supreme Court allow it to continue any more? He would further contend that this is a unique case for two reasons. Firstly, the prolongation of criminal trial is as long as 37 years and petitioners have spent better part of their human life in the jail. Secondly, this Court in the year 1991 while disposing of the petitioners writ petition, had issued specific directions to the trial court to expeditiously complete the trial, which mandate has been conveniently ignored by the trial court, which amounts to total ignorance and indifference to the directions issued by this Court. He would further contend that the fact that the judicial system works in a particular way cannot be a justification for its failure to complete the trial. He would submit that Article 21 not only protects the accused but also

takes into consideration the sufferings faced by his family members. He would submit systemic failure has sufficiently punished the petitioners and the very fact of delay shows prejudice caused to the petitioners. He would further submit that this is the ideal case where this Court can correct the short-fallings in the criminal justice delivery system by limiting the time for the completion of the trial. He would point out that this Court, on the earlier occasion, had issued direction to the trial court to expeditiously complete the trial on day to day basis, but even after two decades, the trial is still not complete in the year 2012. He would submit that this Court may quash the excruciatingly long trial on the ground that it is a unique case which has not only seriously prejudiced petitioners but also brutally violated their right to speedy trial, which is a part of their right to life. He would contend that in a case of delay of 10 to 15 years, this Court can order for expeditious completion of the trial, but not in a case where the delay is for more than 37 years, and therefore, this Court should certainly intervene and give quietus to the trial.

6. The Petitioner in W.P. (Crl.) No. 205 of 2011 is represented by Shri. Arvind Kumar, learned Counsel. He adopts the arguments canvassed by Shri. T.R. Andhyarujina, learned Senior Counsel.

7. Shri Raval, learned ASG submits that this Court has once rejected the plea of petitioners for quashing the trial on the ground of delay in December, 1991. Therefore, the petitioners are not entitled for the same relief which was once negatived by this Court. He would then submit, that, the prosecution is not responsible in any manner for the delay caused in the trial from December 1991 till date. He would read out a detailed list of dates pertaining to the proceedings and orders of the trial Court. He would further submit that prosecution has sought for adjournments only on three or four occasions for good and valid reasons and there is no deliberate intention on the part of the prosecution to postpone the trial. The learned

ASG relies on the decision of this Court in *State v. Narayan Waman Nerukar (Dr),* (2002) 7 SCC 6. In the said case, the accused was charged with the offences punishable under Sections 3 and 5 of the Official Secret Act and Section 120-B of the IPC. The Magistrate had taken cognizance vide its order dated 16.08.1999 and issued process. The accused approached the High Court for quashing of the criminal proceedings on the ground of delay. The High Court quashed the proceedings on the ground of unnecessary delay of 12 years. The prosecution approached this Court against the order of the High Court. This Court while setting aside the order of the High Court remanded the matter to the High Court for fresh disposal after considering all the relevant factors including that criminal courts are not obliged to terminate trial of criminal proceedings merely on account of lapse of time. This Court has observed, that, while considering the issue of delay in trial there are some relevant factors which ought to be taken into consideration by the court such as, whether the prolongation was on account of any delaying tactics adopted by the accused and other relevant aspects which contributed to the delay, number of witnesses examined, volume of documents likely to be exhibited, nature and complexity of the offence which is under investigation or adjudication. There can be no empirical formula of universal application in such matters. Each case has to be judged in its own background and special features, if any. No generalization is possible and should be done.

8. He would further rely on the decision of this Court in *Vakil Prasad Singh v. State of Bihar* (2009) 3 SCC 355, wherein the charge sheet was filed after the completion of investigation and subsequently, the learned Magistrate took cognizance vide its orders dated 20.02.1982, but nothing substantial did happen till 1987. Thereafter, the accused approached the High Court for fresh investigation as the Investigating Officer had no jurisdiction to investigate. The High Court vide its order dated 07.12.1990 quashed the order of cognizance taken by the Magistrate and ordered fresh

investigation. Nothing was done till 1988. The accused again approached the High Court for quashing of entire criminal proceedings on the ground that re-investigation has not been initiated by the prosecuting agency. Subsequently, the re-investigation was ordered only in the year 2007 and fresh charge-sheet was filed. The High Court dismissed such petition filed by the accused. However, this Court found that there is inordinate delay and has quashed the proceeding. This Court has observed that the speedy trial in all criminal prosecutions is an inalienable right under Article 21 of the Constitution. This right is applicable not only to the actual proceedings in court but also includes within its sweep the preceding police investigations as well. In every case, where the right to speedy trial is alleged to have been infringed, the court has to perform the balancing act by taking into consideration all the attendant circumstances, and determine in each case as to whether the right to speedy trial has been actually denied in a given case.

9. Shri Raval further relied on the decision of this Court in *Japani Sahoo v. Chandra Sekhar Mohanty,* (2007) 7 SCC 394, in support of his argument that the general rule of criminal justice is that "a crime never dies". This Court noted that this principle is reflected in the well-known maxim nullum tempus aut locus occurrit regi (lapse of time is no bar to Crown in proceeding against offenders). This Court further observed that the Limitation Act, 1963 (for short the 'Act') does not apply to criminal proceedings unless there are express and specific provisions to that effect, for instance, Articles 114, 115, 131 and 132 of the Act. It is settled law that a criminal offence is considered as a wrong against the State and the society even though it has been committed against an individual. Normally, in serious offences, prosecution is launched by the State and a court of law has no power to throw away prosecution solely on the ground of delay. Mere delay in approaching a court of law would not by itself, afford a ground for dismissing the case, though it may be a relevant circumstance in reaching a final verdict.

10. Shri Raval also relied on the decision of this Court in P. Vijayan v. State of Kerala, (2010) 2 SCC 398, where one naxalite extremist was killed in a police encounter in 1970. However, in 1988, a newspaper article was published that the encounter in which the said naxalite was killed, was a fake one and some Senior Police Officers were responsible for it. On the basis of these reports, writ petitions were filed before the High Court of Kerala, wherein, one Constable filed a counter affidavit, making a confessional statement that he shot the said naxalite on the instructions of his Senior Officer. The High Court vide its order dated 27.01.1999, directed the CBI to register the F.I.R. for killing of the naxalite in a fake encounter. The accused preferred a petition under Section 227 of the Cr.P.C. before the trial court. The same was dismissed. Thereafter, the accused filed a Criminal Revision Petition before the High Court. The same was also dismissed. Being aggrieved, the accused approached this Court. This Court, while dismissing his appeal, has observed that at this stage, it cannot be claimed that there is no sufficient ground for proceeding against the appellant and discharge is the only course open. Further, whether the trial will end in conviction or acquittal is also immaterial. It is also observed that the question whether the materials at the hands of the prosecution are sufficient or not are matters for trial.

11. Shri Raval would conclude his submission by stating that the real purpose of the criminal proceedings is to find out the truth which can only be done after the conclusion of the trial.

12. We preface our decision by extracting certain observations made by this Court in *Abdul Rehman Antulay v. R.S. Nayak,* (1992) 1 SCC 225, *Kartar Singh v. State of Punjab,* (1994) 3 SCC 569 and *P. Ramachandra Rao v. State of Karnataka,* (2002) 4 SCC 578.

13. The Constitution Bench, in *Abdul Rehman Antulay v. R.S. Nayak,* (supra), has formulated certain propositions, 11 in number, meant to serve as guidelines. They are :

"86. In view of the above discussion, the following propositions emerge, meant to serve as guidelines. We must forewarn that these propositions are not exhaustive. It is difficult to foresee all situations. Nor is it possible to lay down any hard and fast rules. These propositions are:

(1) Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. Right to speedy trial is the right of the accused. The fact that a speedy trial is also in public interest or that it serves the social interest also, does not make it any the less the right of the accused. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstances.

(2) Right to speedy trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and re-trial. That is how, this Court has understood this right and there is no reason to take a restricted view.

(3) The concerns underlying the right to speedy trial from the point of view of the accused are:

(a) the period of remand and pre-conviction detention should be as short as possible. In other words, the accused should not be subjected to unnecessary or unduly long incarceration prior to his conviction;

(b) the worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal; and

(c) undue delay may well result in impairment of the ability of the accused to defend himself,

whether on account of death, disappearance or non-availability of witnesses or otherwise.

(4) At the same time, one cannot ignore the fact that it is usually the accused who is interested in delaying the proceedings. As is often pointed out, "delay is a known defence tactic". Since the burden of proving the guilt of the accused lies upon the prosecution, delay ordinarily prejudices the prosecution. Non-availability of witnesses, disappearance of evidence by lapse of time really work against the interest of the prosecution. Of course, there may be cases where the prosecution, for whatever reason, also delays the proceedings. Therefore, in every case, where the right to speedy trial is alleged to have been infringed, the first question to be put and answered is - who is responsible for the delay? Proceedings taken by either party in good faith, to vindicate their rights and interest, as perceived by them, cannot be treated as delaying tactics nor can the time taken in pursuing such proceedings be counted towards delay. It goes without saying that frivolous proceedings or proceedings taken merely for delaying the day of reckoning cannot be treated as proceedings taken in good faith. The mere fact that an application/petition is admitted and an order of stay granted by a superior court is by itself no proof that the proceeding is not frivolous. Very often these stays are obtained on ex parte representation.

(5) While determining whether undue delay has occurred (resulting in violation of Right to Speedy Trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the workload of the court concerned, prevailing local conditions and so on - what is called, the systemic delays. It is true that it is the obligation of the State to ensure a speedy trial and State includes judiciary as well, but a realistic and practical approach should be adopted in such matters instead of a pedantic one.

(6) Each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. As has been observed by Powell, J. in *Barker* "it cannot be said how long a delay is too long in a system where justice is supposed to be swift but deliberate". The same idea has been stated by White, J. in *U.S. v. Ewell* in the following words:

> '... the Sixth Amendment right to a speedy trial is necessarily relative, is consistent with delays, and has orderly expedition, rather than mere speed, as its essential ingredients; and whether delay in completing a prosecution amounts to an unconstitutional deprivation of rights depends upon all the circumstances.'
>
> However, inordinately long delay may be taken as presumptive proof of prejudice. In this context, the fact of incarceration of accused will also be a relevant fact. The prosecution should not be allowed to become a persecution. But when does the prosecution become persecution, again depends upon the facts of a given case.

(7) We cannot recognize or give effect to, what is called the 'demand' rule. An accused cannot try himself; he is tried by the court at the behest of the prosecution. Hence, an accused's plea of denial of speedy trial cannot be defeated by saying that the accused did at no time demand a speedy trial. If in a given case, he did make such a demand and yet he was not tried speedily, it would be a plus point in his favour, but the mere non-asking for a speedy trial cannot be put against the accused. Even in USA, the relevance of demand rule has been substantially watered down in Barker and other succeeding cases.

(8) Ultimately, the court has to balance and weigh the several relevant factors - 'balancing test' or 'balancing

process' - and determine in each case whether the right to speedy trial has been denied in a given case.

(9) Ordinarily speaking, where the court comes to the conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the court to make such other appropriate order - including an order to conclude the trial within a fixed time where the trial is not concluded or reducing the sentence where the trial has concluded - as may be deemed just and equitable in the circumstances of the case.

(10) It is neither advisable nor practicable to fix any time-limit for trial of offences. Any such rule is bound to be qualified one. Such rule cannot also be evolved merely to shift the burden of proving justification on to the shoulders of the prosecution. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the court to weigh all the circumstances of a given case before pronouncing upon the complaint. The Supreme Court of USA too has repeatedly refused to fix any such outer time-limit in spite of the Sixth Amendment. Nor do we think that not fixing any such outer limit ineffectuates the guarantee of right to speedy trial.

(11) An objection based on denial of right to speedy trial and for relief on that account, should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in High Court must, however, be disposed of on a priority basis."

14. In *Kartar Singh v. State of Punjab,* (supra), another Constitution Bench considered the right to speedy trial and opined that the delay is dependent on the circumstances of each case, because reasons for delay will vary. This Court held:

"84. The right to a speedy trial is a derivation from a provision of Magna Carta. This principle has also been incorporated into the Virginia Declaration of Rights of 1776 and from there into the Sixth Amendment of the Constitution of United States of America which reads, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...". It may be pointed out, in this connection, that there is a Federal Act of 1974 called 'Speedy Trial Act' establishing a set of time-limits for carrying out the major events, e.g., information, indictment, arraignment, in the prosecution of criminal cases. [See Black's Law Dictionary, 6th Edn. page 1400].

85. The right to a speedy trial is not only an important safeguard to prevent undue and oppressive incarceration, to minimise anxiety and concern accompanying the accusation and to limit the possibility of impairing the ability of an accused to defend himself but also there is a societal interest in providing a speedy trial. This right has been actuated in the recent past and the courts have laid down a series of decisions opening up new vistas of fundamental rights. In fact, lot of cases are coming before the courts for quashing of proceedings on the ground of inordinate and undue delay stating that the invocation of this right even need not await formal indictment or charge.

86. The concept of speedy trial is read into Article 21 as an essential part of the fundamental right to life and liberty guaranteed and preserved under our Constitution. The right to speedy trial begins with the actual restraint imposed by arrest and consequent incarceration and continues at all stages, namely, the stage of investigation, inquiry, trial, appeal and revision so that any possible

prejudice that may result from impermissible and avoidable delay from the time of the commission of the offence till it consummates into a finality, can be averted. In this context, it may be noted that the constitutional guarantee of speedy trial is properly reflected in Section 309 of the Code of Criminal Procedure.

87. This Court in Hussainara Khatoon (I) v. Home Secretary, State of Bihar while dealing with Article 21 of the Constitution of India has observed thus: (SCC p. 89, para 5)

"No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21. The question which would, however, arise is as to what would be the consequence if a person accused of an offence is denied speedy trial and is sought to be deprived of his liberty by imprisonment as a result of a long delayed trial in violation of his fundamental right under Article 21. Would he be entitled to be released unconditionally freed from the charge levelled against him on the ground that trying him after an unduly long period of time and convicting him after such trial would constitute violation of his fundamental right under Article 21."

See also (1) *Sunil Batra v. Delhi Administration (I),* (2) *Hussainara Khatoon (I) v. Home Secretary, State of Bihar,* (3) *Hussainara Khatoon (IV) v. Home Secretary, State of Bihar, Patna,* (4) *Hussainara Khatoon (VI) v. Home Secretary, State of Bihar, Govt. of Bihar, Patna,* (5) *Kadra Pahadia v. State of Bihar (II),* (6) *T.V. Vatheeswaran v. State of T.N.,* and (7) *Abdul Rehman Antulay v. R.S. Nayak*.

88. Thus this Court by a line of judicial pronouncements has emphasised and re-emphasised that speedy trial is one of the facets of the fundamental right to life and liberty enshrined in Article 21 and the law must ensure 'reasonable, just and fair' procedure which has a creative connotation after the decision of this Court in Maneka Gandhi."

The Court further observed :

"92. Of course, no length of time is per se too long to pass scrutiny under this principle nor the accused is called upon the show the actual prejudice by delay of disposal of cases. On the other hand, the court has to adopt a balancing approach by taking note of the possible prejudices and disadvantages to be suffered by the accused by avoidable delay and to determine whether the accused in a criminal proceeding has been deprived of his right of having speedy trial with unreasonable delay which could be identified by the factors - (1) length of delay, (2) the justification for the delay, (3) the accused's assertion of his right to speedy trial, and (4) prejudice caused to the accused by such delay. However, the fact of delay is dependent on the circumstances of each case because reasons for delay will vary, such as delay in investigation on account of the widespread ramification of crimes and its designed network either nationally or internationally, the deliberate absence of witness or witnesses, crowded dockets on the file of the court etc."

15. Seven learned Judges of this Court in the case of *P. Ramachandra Rao v. State of Karnataka,* (supra), after an exhaustive consideration of the authorities on the subject, has observed:-

"29. For all the foregoing reasons, we are of the opinion that in *Common Cause case (I)* [as modified in *Common Cause (II)*] and *Raj Deo Sharma (I)* and *(II)* the Court could

not have prescribed periods of limitation beyond which the trial of a criminal case or a criminal proceeding cannot continue and must mandatorily be closed followed by an order acquitting or discharging the accused. In conclusion we hold:

(1) The dictum in A.R. Antulay case is correct and still holds the field.

(2) The propositions emerging from Article 21 of the Constitution and expounding the right to speedy trial laid down as guidelines in A.R. Antulay case adequately take care of right to speedy trial. We uphold and reaffirm the said propositions.

(3) The guidelines laid down in A.R. Antulay case are not exhaustive but only illustrative. They are not intended to operate as hard-and-fast rules or to be applied like a straitjacket formula. Their applicability would depend on the fact situation of each case. It is difficult to foresee all situations and no generalization can be made.

(4) It is neither advisable, nor feasible, nor judicially permissible to draw or prescribe an outer limit for conclusion of all criminal proceedings. The time-limits or bars of limitation prescribed in the several directions made in Common Cause (I), Raj Deo Sharma (I) and Raj Deo Sharma (II) could not have been so prescribed or drawn and are not good law. The criminal courts are not obliged to terminate trial or criminal proceedings merely on account of lapse of time, as prescribed by the directions made in Common Cause case (I), Raj Deo Sharma case (I) and (II). At the most the periods of time prescribed in those decisions can be taken by the courts seized of the trial or proceedings to act as reminders when they may be persuaded to apply their judicial mind to the facts and circumstances of the case before them and determine by taking into consideration the several relevant factors as

pointed out in A.R. Antulay case and decide whether the trial or proceedings have become so inordinately delayed as to be called oppressive and unwarranted. Such time-limits cannot and will not by themselves be treated by any court as a bar to further continuance of the trial or proceedings and as mandatorily obliging the court to terminate the same and acquit or discharge the accused.

(5) The criminal courts should exercise their available powers, such as those under Sections 309, 311 and 258 of the Code of Criminal Procedure to effectuate the right to speedy trial. A watchful and diligent trial Judge can prove to be a better protector of such right than any guidelines. In appropriate cases, jurisdiction of the High Court under Section 482 CrPC and Articles 226 and 227 of the Constitution can be invoked seeking appropriate relief or suitable directions.

(6) This is an appropriate occasion to remind the Union of India and the State Governments of their constitutional obligation to strengthen the judiciary - quantitatively and qualitatively - by providing requisite funds, manpower and infrastructure. We hope and trust that the Governments shall act."

16. The criminal case involving assassination of L. N. Misra, the then Union Minister for Railways, on January 02, 1975 is still pending in 2012, i.e. even after a lapse of thirty seven years. As a result, two of the accused has moved these petitions for acquittal. We have given our consideration to the submissions made by learned Senior Counsel, Shri Andhyarujina, who repeatedly emphasised that this case is the unique case and this Court has not seen such a case earlier and may not see in future. We do not intend to comment on this statement. We can only observe, that, our legal system has made life too easy for criminals and too difficult for law abiding citizens.

17. Our Constitution does not expressly declare that right to speedy trial as a fundamental right. The right to a speedy trial was first recognised in the *Hussainara Khatoon's* case, AIR 1979 SC 1360, wherein, the court held that a speedy trial is implicit in the broad sweep and content of Article 21 of the Constitution. Subsequently, in a series of judgments, this Court has held that 'reasonably' expeditious trial is an integral and essential part of the Fundamental Right to Life and Liberty enshrined in Article 21 of the Constitution of India.

18. The guarantee of a speedy trial is intended to avoid oppression and prevent delay by imposing on the court and the prosecution an obligation to proceed with the trial with a reasonable dispatch. The guarantee serves a three fold purpose. Firstly, it protects the accused against oppressive pre-trial imprisonment; secondly, it relieves the accused of the anxiety and public suspicion due to unresolved criminal charges and lastly, it protects against the risk that evidence will be lost or memories dimmed by the passage of time, thus, impairing the ability of the accused to defend him or herself. Stated another way, the purpose of both the criminal procedure rules governing speedy trials and the constitutional provisions, in particular, Article 21, is to relieve an accused of the anxiety associated with a suspended prosecution and provide reasonably prompt administration of justice.

19. The reasons for the delay is one of the factors which courts would normally assess in determining as to whether a particular accused has been deprived of his or her right to speedy trial, including the party to whom the delay is attributable. Delay, which occasioned by action or inaction of the prosecution is one of the main factors which will be taken note by the courts while interjecting a criminal trial. A deliberate attempt to delay the trial, in order to hamper the accused, is weighed heavily against the prosecution. However, unintentional and unavoidable delays or administrative factors over which prosecution has no control, such as, over-crowded court

dockets, absence of the presiding officers, strike by the lawyers, delay by the superior forum in notifying the designated Judge, (in the present case only), the matter pending before the other forums, including High Courts and Supreme Courts and adjournment of the criminal trial at the instance of the accused, may be a good cause for the failure to complete the trail within a reasonable time. This is only illustrative and not exhaustive. Such delay or delays cannot be violative of accused's right to a speedy trial and needs to be excluded while deciding whether there is unreasonable and unexplained delay. The good cause exception to the speedy trial requirement focuses on only one factor i.e. the reason for the delay and the attending circumstances bear on the inquiry only to the extent to the sufficiency of the reason itself. Keeping this settled position in view, we have perused the note prepared by Shri Raval, learned ASG. Though, the note produced is not certified with copies of the order sheets maintained by the trial court, since they are not disputed by the other side, we have taken the information furnished therein as authentic. The note reveals that prosecution, apart from seeking 4-5 adjournments, right from 1991 till 2012, is not responsible for delay in any manner whatsoever. Therefore, in our opinion the delay in trial of the petitioners from 1991 to 2012 is solely attributable to petitioners and other accused persons.

20. Second limb of the argument of the learned Senior Counsel Shri Andhyarujina is that the of failure of completion of trial has not only caused great prejudice to the petitioners but also their family members. Presumptive prejudice is not an alone dispositive of speedy trial claim and must be balanced against other factors. The accused has the burden to make some showing of prejudice, although a showing of actual prejudice is not required. When the accused makes a prima-facie showing of prejudice, the burden shifts on the prosecution to show that the accused suffered no serious prejudice. The question of how great lapse it is, consistent with the guarantee of a speedy trial, will depend on the facts and circumstances

of each case. There is no basis for holding that the right to speedy trial can be quantified into specified number of days, months or years. The mere passage of time is not sufficient to establish denial of a right to a speedy trial, but a lengthy delay, which is presumptively prejudicial, triggers the examination of other factors to determine whether the rights have been violated.

21. The length of the delay is not sufficient in itself to warrant a finding that the accused was deprived of the right to a speedy trial. Rather, it is only one of the factors to be considered, and must be weighed against other factors. Moreover, among factors to be considered in determining whether the right to speedy trial of the accused is violated, the length of delay is least conclusive. While there is authority that even very lengthy delays do not give rise to a per se conclusion of violation of constitutional rights, there is also authority that long enough delay could constitute per se violation of right to speedy trial. In our considered view, the delay tolerated varies with the complexity of the case, the manner of proof as well as gravity of the alleged crime. This, again, depends on case to case basis. There cannot be universal rule in this regard. It is a balancing process while determining as to whether the accused's right to speedy trial has been violated or not. The length of delay in and itself, is not a weighty factor.

22. In the present case, the delay is occasional by exceptional circumstances. It may not be due to failure of the prosecution or by the systemic failure but we can only say that there is a good cause for the failure to complete the trial and in our view, such delay is not violative of the right of the accused for speedy trial.

23. Prescribing a time limit for the trial court to terminate the proceedings or, at the end thereof, to acquit or discharge the accused in all cases will amount to legislation, which cannot be done by judicial directives within the arena of judicial law making power available to constitutional courts; however, liberally the courts may interpret Articles 21, 32, 141 and 142.

(*Ramchandra Rao P. v. State of Karnataka,* (2002) 4 SCC 578). The Seven Judges Bench overruled four earlier decision of this Court on this point: *Raj Deo (II) v. State of Bihar,* (1999) 7 SCC 604, *Raj Deo Sharma v. State of Bihar,* (1998) 7 SCC 507; *Common Cause, A Registered Society v. Union of India,* (1996) 4 SCC 33. The time limit in these four cases was contrary to the observations of the Five Judges Bench in *A.R. Antulay* (Supra). The Seven Judges Bench in *Ramchandra Rao P. v. State of Karnataka,* (Supra) has been followed in *State through CBI v. Dr. Narayan Waman Nerukar,* (2002) 7 SCC 6 and *State of Rajasthan v. Ikbal Hussen,* (2004) 12 SCC 499. It was further observed that it is neither advisable, feasible nor judicially permissible to prescribe an outer limit for the conclusion of all criminal proceedings. It is for the criminal court to exercise powers under Sections 258, 309 and 311 of the Cr.P.C. to effectuate the right to a speedy trial. In an appropriate case, directions from the High Court under Section 482 Cr.P.C. and Article 226/227 can be invoked to seek appropriate relief.

24. In view of the settled position of law and particularly in the facts of the present case, we are not in agreement with the submissions made by learned Senior Counsel, Shri. T.R. Andhyarujina. Before we conclude, we intend to say, particularly, looking into long adjournments sought by the accused persons, who are seven in number, that accused cannot take advantage or the benefit of the right of speedy trial by causing the delay and then use that delay in order to assert their rights.

25. The learned Senior Counsel would tell us, please don't look who caused the delay in completing the trial but only look at whether there is delay in completion of the trial and if it is there, please put a big "full stop" for the trial. In our view, this submission of the learned Senior Counsel cannot be accepted by us, in view of the observations by this Court in *P. Ramachandra's* case (supra). Before parting with the case, we should certainly give credit to our judicial officers, who have

painstakingly suffered with all the dilatory tactics adopted by the accused in dragging on with the proceedings for nearly thirty seven years. They are not to be blamed at all. In fact, they do deserve appreciation while conducting such trials where one of the accused is not only Bachelor of Laws but also Bachelor of Literature. We certainly say that our system has not failed, but, accused was successful in dragging on the proceedings to a stage where, if it is drawn further, it may snap the Justice Delivery System. We are also conscious of the fact that more than thirty Judges had tried this case at one stage or the other, but, all of them have taken care to see that the trial is completed at the earliest. They are not to be blamed and certainly the system has not to be blamed, but, positively, somebody has succeeded in his or in their attempt. The system has done its best, but, has not achieved the expected result and certainly, will not fit into the category of cases where (late) N.A. Palkhiwala, one of the most outstanding Senior Advocates in the Country had said that "..... the law may or may not be an ass, but in India it is certainly a snail and our cases proceed at a pace which would be regarded as unduly slow in a community of snails". Therefore, we say, we will not buy this argument of the learned Senior Counsel that there is systemic failure. Therefore, in our view at this stage the one and the only direction that requires to be issued is to direct the learned trial judge to take up the case on day to day basis and conclude the proceedings as early as possible, without granting unnecessary and unwarranted adjournments.

26. Writ Petitions are, accordingly, dismissed with the aforesaid directions.

CHANDRAMAULI KR. PRASAD, J.

1. I agree.

2. However, I would like to add few words of my own.

3. The Union Minister for Railways lost his life in a bomb

explosion which took place at Samastipur Railway Station in the State of Bihar on 2nd of January, 1975.

4. Petitioners are facing trial in the said case. Their statements under Section 313 of the Code of Criminal Procedure have been recorded and the trial is at the stage of argument.

5. At this stage, petitioners have filed these writ petitions under Article 32 of the Constitution of India and their prayer is to quash the prosecution primarily on the ground of violation of their fundamental right of speedy trial guaranteed under Article 21 of the Constitution of India.

6. Mr. T.R. Andhyarujina, Senior Advocate appears in support of the writ petitions. He submits that delay of 37 years in conclusion of the trial, for whatever reason, is atrocious and a civilized society cannot permit continuance of the trial for such a long period. He appeals to us to rise to the occasion and make history by holding that the system which allows trial for such a long period is barbaric, oppressive and atrocious and, therefore, in the teeth of right of speedy trial guaranteed under Article 21 of the Constitution. Systemic delay cannot be a defence to deny the right of speedy trial, emphasizes Mr. Andhyarujina.

7. I have given my most anxious consideration to the submission advanced and, at one point of time, in deference to his passionate appeal I was inclined to consider this issue in detail and give a fresh look but, having been confronted with the Five-Judge Constitution Bench decision in the case of *Abdul Rehman Antulay v. R.S. Nayak,* (1992) 1 SCC 225 and Seven-Judge Constitution Bench judgment of this Court in the case of *P. Ramachandra Rao v. State of Karnataka,* (2002) 4 SCC 578, this course does not seem to be open to me. Judicial discipline expects us to follow the ratio and prohibits laying down any principle in derogation of the ratio laid down by the earlier decisions of the Constitution Benches of this Court.

8. In the case of *Abdul Rehman Antulay* (supra) this Court in paragraph 86 (5) has observed as follows:

> "While determining whether undue delay has occurred (resulting in violation of Right to Speedy Trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the workload of the court concerned, prevailing local conditions and so on - what is called, the systemic delays. It is true that it is the obligation of the State to ensure a speedy trial and State includes judiciary as well, but a realistic and practical approach should be adopted in such matters instead of a pedantic one."

9. The aforesaid decision came up for consideration before a Seven-Judge Constitution Bench of this Court in the case of *P. Ramachandra Rao* (supra) and while approving the ratio, the Court in Paragraph 29 (1) & (2) observed as follows:

> "(1) The dictum in *Abdul Rehman Antulay v. R.S. Nayak,* (1992) 1 SCC 225 is correct and still holds the field.
>
> (2) The propositions emerging from Article 21 of the Constitution and expounding the right to speedy trial laid down as guidelines in *Abdul Rehman Antulay v. R.S. Nayak,* (1992) 1 SCC 225 adequately take care of right to speedy trial. We uphold and reaffirm the said propositions."

10. Hence, in my opinion, the trial cannot be terminated merely on the ground of delay without considering the reasons thereof.

11. My learned and noble brother has gone into the reasons for delay and I agree with him that the facts of the present case do not justify quashing of the prosecution.

R.P. Writ Petitions dismissed.

STATE OF U.P.
v.
SANJAY KUMAR
(SLP (Crl.) No. 6467 of 2012)

AUGUST 21, 2012

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

PENAL CODE, 1860:

ss. 302 and 376 - Rape and murder of an eighteen year old girl - Death sentence - Commuted by High Court to life imprisonment - Held: High Court is correct to the extent that the facts of the case did not warrant death sentence.

SENTENCE/SENTENCING:

Sentencing policy - Principle of proportionality - Aggravating and mitigating circumstances - Commutation of death sentence to imprisonment for life or imprisonment for a specified term - Clemency power of Sovereign - Expression "life imprisonment" - Connotation of - Discussed - Constitution of India, 1950 - Arts. 142, 72 and 161 - Separation of powers - Code of Criminal Procedure, 1973 - s.433, 433-A.

Neel Kumar @ Anil Kumar v. State of Haryana, **(2012) 5 SCC 766; and** *Sandeep v. State of U.P.* **(2012) 6 SCC 107;** *Ramraj v. State of Chhattisgarh* **2009 (16) SCR 367 = AIR 2010 SC 420;** *Mulla & Anr. v. State of Uttar Pradesh,* **2010 (2) SCR 633 =AIR 2010 SC 942; and** *Rameshbhai Chandubhai Rathod v. State of Gujarat* **2011 (1) SCR 829 =AIR 2011 SC 803;** *Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka,* **2008 (11) SCR 93 =AIR 2008 SC 3040;** *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala & Anr.,* **1973 Suppl. SCR 1 = AIR 1973 SC 1461;** *Smt. Indira Nehru Gandhi v. Shri Raj*

Narain and Anr. **1976 SCR 347 =AIR 1975 SC 2299; and** *State of West Bengal & Ors. v. The Committee for Protection of Democratic Rights, West Bengal and Ors.* **2010 (2) SCR 979 = AIR 2010 SC 1476;** *Jayawant Dattatraya Suryarao v. State of Maharashtra* **2001 (5) Suppl. SCR 54 = (2001) 10 SCC 109;** *Manish Goel v. Rohini Goel,* **2010 (2) SCR 414 = AIR 2010 SC 1099;** *State of Haryana v. Jagdish* **2010 (3) SCR 716 = AIR 2010 SC 1690; Sevaka Perumal etc. v. State of Tamil Nadu 1991 (2) SCR 711 = AIR 1991 SC 1463; Ravji v. State of Rajasthan 1995 (6) Suppl. SCR 195 = AIR 1996 SC 787;** *State of Madhya Pradesh v. Ghanshyam Singh* **2003 (3) Suppl. SCR 618 = AIR 2003 SC 3191;** *Dhananjay Chatterjee alias Dhana v. State of W.B.* **AIR 2004 SC 3454;** *Rajendra Pralhadrao Wasnik v. The State of Maharashtra,* **AIR 2012 SC 1377; and** *Brajendra Singh v. State of Madhya Pradesh,* **AIR 2012 SC 1552 - referred to.**

Ex p. Grossman, **(1924) 69 L.ed. 527 - referred to.**

Case Law Reference:

(2012) 5 SCC 766	**referred to**	**para 5**
(2012) 6 SCC 107	**referred to**	**para 5**
2009 (16) SCR 367	**referred to**	**para 6**
2010 (2) SCR 633	**referred to**	**para 6**
2011 (1) SCR 829	**referred to**	**para 6**
2008 (11) SCR 93	**referred to**	**para 8**
1973 Suppl. SCR 1	**referred to**	**para 10**
1976 SCR 347	**referred to**	**para 10**
2010 (2) SCR 979	**referred to**	**para 10**
2001 (5) Suppl. SCR 54	**referred to**	**para 11**
2010 (2) SCR 414	**referred to**	**para 12**

(1924) 69 L.ed. 527	**referred to**	**para 13**
2010 (3) SCR 716	**referred to**	**para 14**
1991 (2) SCR 711	**referred to**	**para 15**
1995 (6) Suppl. SCR 195	**referred to**	**para 15**
2003 (3) Suppl. SCR 618	**referred to**	**para 15**
2004 AIR 3454	**referred to**	**para 15**
2012 AIR 1377	**referred to**	**para 15**
2012 AIR 1552	**referred to**	**para 15**

CRIMINAL APPELLATE JURISDICTION : Special Leave Petition (Crl.) No. 6467 of 2012.

From the Judgment & Order dated 22.02.2012 of the High Court of Allahabad in Criminal Appeal (Capital Case) No. 7760 of 2009.

Vivek Vishnoi, Gaurav Agarwal (for M.R. Shamshad) for the Petitioner.

The order of the Court was delivered

O R D E R

1. Delay condoned.

2. This petition has been filed against the impugned judgment and Order dated 8.2.2012 passed by the High Court of Judicature at Allahabad in Criminal Appeal (Capital Case) No. 7760 of 2009, by which the High Court has commuted the death sentence awarded to the respondent by the Sessions Court, in life imprisonment upon recording its conclusion that it was not among the `rarest of rare cases', in which death penalty could be awarded.

3. Facts and circumstances giving rise to this petition are as follows:

A. The respondent was engaged in the work of whitewash in the house of one Shyam Ji Sharma, resident of Tulsi Vihar Colony, Varanasi and his very close relative Divya Rani was staying with him, as she was appearing for her Intermediate examination. The complainant Shyam Ji Sharma alongwith his wife Rajni Sharma had gone to the market on 24.2.2007 to purchase goods while Divya Rani (deceased) was supervising the said work. When the complainant came back with his wife they found the door of the house open and saw that the respondent had killed Divya Rani and was now trying to conceal her body in a tin box after throwing out the clothes contained in it. There was blood on Divya's face. The complainant and his wife tried to catch hold of the respondent but he pushed them aside and ran away. They immediately lodged a First Information Report and Divya's body was henceforth sent for post-mortem examination.

B. In addition to several simple injuries on her body, a ligature mark measuring 29 cm in length, 1/2-1 cm in thickness at places all around the neck, with a pattern of pressure points 3 cm below the sternal notch and 3 cm below both the ears, was found. The doctor also found that there was laceration of the vagina and the vaginal vault, and rupturing of hymen was also observed. Asphyxia as a result of strangulation contributed to her death. The doctor also opined that the victim had been subjected to sexual assault.

C. On the basis of the post-mortem report, the charges under Sections 376 and 302 of Indian Penal Code, 1860 (hereinafter called 'IPC'), were framed against the respondent, to which he pleaded not guilty and claimed trial.

D. After conclusion of the trial and particularly placing reliance upon the confessional statement made by the respondent under Section 164 of the Code of Criminal

Procedure, 1973 (hereinafter called 'Cr.P.C.), the trial Court vide its judgment and order dated 5.12.2009 in Sessions Trial No. 245 of 2007 convicted the respondent of the said charges and awarded him death sentence. The reason for giving death sentence had been recorded stating that the deceased was 18 years of age and the offence committed by the respondent would have a very negative effect on society. The offence committed by the respondent was in fact rarest of the rare. The confessional statement recorded by the Judicial Magistrate was worth placing reliance upon, wherein the respondent had admitted his guilt and, therefore, taking into consideration all the facts and circumstances of the case, the Court reached the conclusion that it was a case under the category of 'rarest of rare cases'. Therefore, death penalty was awarded to the respondent alongwith a fine of Rs.10,000/- in default of which, he would have to suffer further RI for 4 months. For the charge of rape, he was awarded life imprisonment, with a fine of Rs.10,000/- and in default, he would have to suffer further RI for 4 years.

E. Being aggrieved, the respondent filed an appeal and while considering his appeal alongwith the Death Reference made to the High Court, the High Court after appreciating the entire evidence, came to the conclusion that upon consideration of the totality of circumstances, the charges stood fully proved against the respondent. However, the case did not fall within the category of 'rarest of rare cases' where the option of awarding a sentence of imprisonment for life was unquestionably foreclosed.

Hence, this petition.

4. Learned counsel for the State has submitted that the High Court committed an error in not accepting the capital reference and in the facts and circumstances of the case, particularly, where a girl of 18 years of age has been raped and murdered, in order to ensure some deterrent effect, the High Court ought to have affirmed the death sentence, particularly,

when the respondent himself has admitted his guilt on both charges, while making a confessional statement under Section 164 Cr.P.C. before the Judicial Magistrate.

5. It has been submitted at the bar that this Court has given different terms as minimum sentence to be served by convicts and, thus, the Court failed to ensure consistency in sentence and in laying down an effective and elaborate sentencing policy.

In *Neel Kumar @ Anil Kumar v. State of Haryana,* (2012) 5 SCC 766; and *Sandeep v. State of U.P.* (2012) 6 SCC 107 while commuting the awarded death sentence into a sentence of life imprisonment, it has been directed by this Court that convicts therein must serve a minimum of 30 years in jail without remissions before the consideration of their respective cases for premature release.

It has been further submitted that the aforesaid judgments reveal that there is no definite yardstick for the purpose of sentencing and that it varies from court to court to award the term of sentence. If the court awards a sentence of a particular term, subject to the clemency power of the sovereign or subject to premature release under Section 433-A Cr.P.C., then the period of sentence so fixed by the court remains meaningless.

Questions arise as to whether the direction of the court, that the convict has to serve a particular period of sentence before his case for premature release is considered, infringes upon the clemency or other statutory powers of the executive; whether such an order can be said to have been passed under Article 142 of the Constitution; and whether the court can issue such direction in exercise of the power vested in it under Article 142 of the Constitution. Whether this kind of sentence awarded by the court, if made subject to the clemency power and other statutory powers could be held merely to be a recommendation, as a result of which, while exercising such a power, the executive may bear in mind the opinion expressed by the court and take a decision, accordingly.

6. The High Court after placing reliance upon the judgments of this Court in *Ramraj v. State of Chhattisgarh,* AIR 2010 SC 420; *Mulla & Anr. v. State of Uttar Pradesh,* AIR 2010 SC 942; and *Rameshbhai Chandubhai Rathod v. State of Gujarat,* AIR 2011 SC 803; passed the order of sentence as under:

> "We think that in the present case the ends of justice would be met if the sentence of death awarded to the appellant be substituted with a sentence of imprisonment for the whole of the remaining natural life of the appellant, subject further, to the condition that the prisoner could be eligible to any commutation and remissions that may be granted by the President and the Governor under Articles 72 and 161 of the Constitution of India or of the State Government under Section 433-A of the Code of Criminal Procedure, 1973 for good and sufficient reasons".

7. We have gone through the impugned judgments and the evidence produced by the petitioner-State. We are of the view that the High Court is correct to the extent, that the facts of the case did not warrant death sentence.

8. Undoubtedly, a comprehensive sentencing policy is required to be laid down by the Court, however, the same would be a herculean task as it is impossible to foresee all possible circumstances which may take place in the future.

In *Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka,* AIR 2008 SC 3040, after considering various provisions of various statutes, a three-Judge Bench observed as under:

> "The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this court carrying a death sentence awarded by

> the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment that subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then the Court should do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the court, i.e., the vast hiatus between 14 years' imprisonment and death. It needs to be emphasized that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all.
>
> In light of the discussions made above we are clearly of the view that there is a good and strong basis for the Court to substitute a death sentence by life imprisonment *or by a term in excess of fourteen years and further to direct that the convict must not be released from the prison for the rest of his life or for the actual term as specified in the order, as the case may be.*
>
> …….We accordingly substitute the death sentence given to the appellant by the trial court and confirmed by the High Court by imprisonment for life and direct that he shall not be released from prison till the rest of his life."
>
> (Emphasis added)

The Court further clarified that while passing an order of punishment, the Court deals with the powers of the State under the provisions of the Cr.P.C., the Prisons Acts and the Rules framed by the States, and not with clemency power, that is, the power of the Sovereign in this respect.

9. Another three-Judge Bench of this Court in Rameshbhai Chandubhai Rathod (supra) passed a similar order, wherein, the Bench made it clear, that the sentence of natural life would be subject to the power of clemency and powers under Section 433-A Cr.P.C.

10. The concept of Separation of Powers is inherent in the polity of the Constitution. This doctrine creates a system of checks and balances by reason of which, powers are so distributed that none of the three organs set up can become so pre-dominant, so as to disable the others from exercising and discharging the powers and functions entrusted to them. The separation of powers between the legislature, the executive and the judiciary constitutes one of the basic features of the Constitution. There is distinct and rigid separation of powers under the Indian Constitution. The scrupulously discharged duties of all guardians of the Constitution include among them, the duty not to transgress the limitations of their own constitutionally circumscribed powers by trespassing into what falls properly within the domain of other constitutional organs. (Vide: *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala & Anr.,* AIR 1973 SC 1461; *Smt. Indira Nehru Gandhi v. Shri Raj Narain and Anr.,* AIR 1975 SC 2299; and *State of West Bengal & Ors. v. The Committee for Protection of Democratic Rights, West Bengal and Ors.,* AIR 2010 SC 1476).

11. In *Jayawant Dattatraya Suryarao v. State of Maharashtra,* (2001) 10 SCC 109, this Court after considering a large number of judgments, having conjoint reading of Sections 433 and 433-A Cr.P.C., and taking into account the facts of the case particularly that the appellant therein had

committed a heinous act of terrorism and brutal murder of two police constables who were on duty to guard the person to whom they wanted to kill held that they could not be awarded death sentence and thus, commuted the same to imprisonment for life but directed that the accused therein would not be entitled to any commutation or premature release under Section 433-A Cr.P.C., Prisons Act, Jail Manual or any other Statute and the Rules made for the purpose of commutation and remissions.

12. In *Manish Goel v. Rohini Goel,* AIR 2010 SC 1099, after placing reliance on a very large number of Constitution Bench judgments of this Court, the Court came to the conclusion that the Court cannot exercise its power under Article 142 of the Constitution for passing an order or granting a relief, which is totally inconsistent with, or which goes against the substantive or statutory provisions pertaining to the case.

13. The purpose of conferring the power of clemency has been explained by Chief Justice Taft in Ex p. Grossman, (1924) 69 L.ed. 527 observing as under:

> "The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments as well as monarchies, to vest in some other authority than the courts power to avoid particular judgments. It is a check entrusted to the Executive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to pervert it; but whoever is to make it useful must have full discretion to exercise it."

14. In *State of Haryana v. Jagdish,* AIR 2010 SC 1690, this Court dealt with the issue of clemency power elaborately and held that such powers are unfettered and absolute. Where the State authority frame rules under Article 161 of the Constitution, the case of the convict is required to be

considered under the said rules. Even if the life convict does not satisfy the requirements of the remission rules or of the short sentencing scheme, there can be no prohibition for the President or the Governor of the State, as the case may be, to exercise the power of clemency vested in them, under the provisions of Articles 72 and 161 of the Constitution. Therefore, this Court while passing such orders never meant that clemency power could not be exercised by the President/Governor. The order of the Court in such an eventuality always remains subject to the said clemency powers.

15. Sentencing Policy is a way to guide judicial discretion in accomplishing particular sentencing. Generally, two criteria, that is, the seriousness of the crime and the criminal history of the accused, are used to prescribe punishment. By introducing more uniformity and consistency into the sentencing process, the objective of the policy, is to make it easier to predict sentencing outcomes. Sentencing policies are needed to address concerns in relation to unfettered judicial discretion and lack of uniform and equal treatment of similarly situated convicts. The principle of proportionality, as followed in various judgements of this Court, prescribes that, the punishments should reflect the gravity of the offence and also the criminal background of the convict. Thus the graver the offence and the longer the criminal record, the more severe is the punishment to be awarded. By laying emphasis on individualised justice, and shaping the result of the crime to the circumstances of the offender and the needs of the victim and community, restorative justice eschews uniformity of sentencing. Undue sympathy to impose inadequate sentence would do more harm to the public system to undermine the public confidence in the efficacy of law and society could not long endure under serious threats.

Ultimately, it becomes the duty of the Courts to award proper sentence, having regard to the nature of the offence and the manner in which it was executed or committed etc. The Courts should impose a punishment befitting the crime so that

the Courts are able to accurately reflect public abhorrence of the crime. It is the nature and gravity of the crime, and not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. Imposition of sentence without considering its effect on social order in many cases may be in reality, a futile exercise. The survival of an orderly society demands the extinction of the life of a person who is proved to be a menace to social order and security. Thus, the Courts for the purpose of deciding just and appropriate sentence to be awarded for an offence, have to delicately balance the aggravating and mitigating factors and circumstances in which a crime has been committed, in a dispassionate manner. In the absence of any foolproof formula which may provide a basis for reasonable criteria to correctly assess various circumstances germane for the consideration of gravity of crime, discretionary judgment, in relation to the facts of each case, is the only way in which such judgment may be equitably distinguished. The Court has primarily dissected the principles into two different compartments - one being, the 'aggravating circumstances' and the other being, the 'mitigating circumstance'. To balance the two is the primary duty of the Court. The principle of proportionality between the crime and the punishment is the principle of 'just deserts' that serves as the foundation of every criminal sentence that is justifiable. In other words, the 'doctrine of proportionality' has valuable application to the sentencing policy under Indian criminal jurisprudence. While determining the quantum of punishment the court always records sufficient reasons. (Vide: *Sevaka Perumal etc. v. State of Tamil Nadu* AIR 1991 SC 1463; *Ravji v. State of Rajasthan,* AIR 1996 SC 787; *State of Madhya Pradesh v. Ghanshyam Singh* AIR 2003 SC 3191; *Dhananjay Chatterjee alias Dhana v. State of W.B.* AIR 2004 SC 3454; *Rajendra Pralhadrao Wasnik v. The State of Maharashtra,* AIR 2012 SC 1377; and *Brajendra Singh v. State of Madhya Pradesh,* AIR 2012 SC 1552).

16. In view of the above, we reach the inescapable

conclusion that the submissions advanced by learned counsel for the State are unfounded. The aforesaid judgments make it crystal clear that this Court has merely found out the via media, where considering the facts and circumstances of a particular case, by way of which it has come to the conclusion that it was not the `rarest of rare cases', warranting death penalty, but a sentence of 14 years or 20 years, as referred to in the guidelines laid down by the States would be totally inadequate. Life imprisonment cannot be equivalent to imprisonment for 14 years or 20 years, rather it always meant as the whole natural life. This Court has always clarified that the punishment so awarded would be subject to any order passed in exercise of the clemency powers of the President of India or Governor of State, as the case may be. Pardons, reprieves and remissions are granted in exercise of prerogative power. There is no scope of judicial review of such orders except on very limited grounds for example non-application of mind while passing the order; non-consideration of relevant material; or if the order suffers from arbitrariness. The power to grant pardons and to commute sentences is coupled with a duty to exercise the same fairly and reasonably. Administration of justice cannot be perverted by executive or political pressure. Of course, adoption of uniform standards may not be possible while exercising the power of pardon. Thus, such orders do not interfere with the sovereign power of the State. More so, not being in contravention of any statutory or constitutional provision, the orders, even if treated to have been passed under Article 142 of the Constitution do not deserve to be labelled as unwarranted. The aforesaid orders have been passed considering the gravity of the offences in those cases that the accused would not be entitled to be considered for premature release under the guidelines issued for that purpose i.e. under Jail Manual etc. or even under Section 433-A Cr.P.C.

With these observations, the Petition is dismissed.

R.P. SLP dismissed.

DEVINDER SINGH NARULA
v.
MEENAKSHI NANGIA
(Civil Appeal No. 5946 of 2012)

AUGUST 22, 2012

[ALTAMAS KABIR AND J. CHELAMESWAR, JJ.]

CONSTITUTION OF INDIA, 1950:

Art. 142 read with Art. 136 - Exercise of jurisdiction to dissolve the marriage before the cooling off period, on a petition for divorce by mutual consent u/s 13-B of Hindu Marriage Act, 1955 - Held: It is no doubt true that the Legislature had in its wisdom stipulated a cooling off period of six months from the date of filing of a petition for mutual divorce till such divorce is actually granted, with the intention that it would save the institution of marriage and the intention of the Legislature cannot be faulted with, but there may be occasions when in order to do complete justice to the parties it becomes necessary for Supreme Court to invoke its powers under Art. 142 in an irreconcilable situation - It is quite clear from the materials on record that within 3 months of the marriage the petitioner filed a petition u/s 12 of the Act - Thereafter, they have not been able to live together - In effect, there appear to be no marital ties between the parties at all - The condition indicated in s.13-B for grant of a decree of dissolution of marriage by the mutual consent is present in the instant case - The marriage is subsisting by a tenuous thread on account of the statutory cooling off period, out of which four months have already expired - In the circumstances, this is one of those cases where the Court may invoke and exercise the powers vested in it under Art. 142 - Accordingly, the petition u/s 12 is converted to one u/s 13-B and invoking the powers under Art.142, a decree of

divorce by mutual consent is granted - Hindu Marriage Act, 1955 - s.13-B read with s.12.

The appellant-husband filed a petition u/s12 of the Hindu Marriage Act on 1.6.2011 on the ground that the marriage solemnized on 26.3.2011, was a nullity; that the parties had been living separately since their marriage and in future also they could never live together under one roof. The respondent-wife was working overseas in Canada. On 15.12.2011, an application was filed by the parties indicating that they had settled the matter through the Mediation Centre and that they would be filing a petition for divorce by mutual consent. Consequently, the HMA proceedings were disposed of as withdrawn, and the parties filed a joint petition u/s 13-B of the Act. The Additional District Judge, by order dated 13.4.2012, posted the matter on 15.10.2012 for the purpose of second motion as contemplated u/s 13-B. In the instant appeal it was submitted on behalf of both the parties that the period that had elapsed since the original petition u/s 12 of the Act could be counted towards the cooling off period of six months stipulated u/s 13-B of the Act.

Allowing the appeal, the Court

HELD: 1. Section 13-B of the Hindu Marriage Act, 1955 itself provides for a cooling off period of six months on the first motion being moved, in the event the parties changed their minds during the said period. It is no doubt true that the Legislature had in its wisdom stipulated a cooling off period of six months from the date of filing of a petition for mutual divorce till such divorce is actually granted, with the intention that it would save the institution of marriage. It is also true that the intention of the Legislature cannot be faulted with, but there may be occasions when in order to do complete justice to the parties it becomes necessary for this Court to invoke its powers under Art. 142 of the Constitution of India in an

irreconcilable situation. In appropriate cases invocation of such power would not be unjustified and may even prove to be necessary. [para 3, 9-10] [375-H; 376-A; 377-D-F; 378-A-B]

1.2 It is quite clear from the materials on record that although the marriage between the parties was solemnized on 26.3.2011, within 3 months of the marriage the petitioner filed a petition u/s 12 of the Act for a decree of nullity of the marriage. Thereafter, they have not been able to live together and lived separately for more than 1 year. In effect, there appear to be no marital ties between the parties at all. It is only the provisions of s.13-B(2) of the Act which is keeping the formal ties of marriage between the parties subsisting in name only. At least the condition indicated in s.13-B for grant of a decree of dissolution of marriage by the mutual consent is present in the instant case. This is one of those cases where this Court may invoke and exercise the powers vested in it under Art. 142 of the Constitution. The marriage is subsisting by a tenuous thread on account of the statutory cooling off period, out of which four months have already expired. There is no reason to continue the agony of the parties for another two months. [para 12-13] [379-B-F]

1.3 The pending petition u/s 12 of the Hindu Marriage Act before the Additional District Judge is converted into one u/s 13-B of the Act; and by invoking the powers under Art. 142 of the Constitution, a decree of mutual divorce is granted to the parties and it is directed that the marriage between the parties shall stand dissolved by mutual consent. [para 14] [379-G-H; 380-A]

Anil Kumar Jain vs. Maya Jain **2009 (14) SCR 90 = (2009) 10 SCC 415;** *Kiran vs. Sharad Dutt* **(2000) 10 SCC 243 - relied on**

Case Law Reference:

2009 (14) SCR 90	**relied on**	**para 4**
(2000) 10 SCC 243	**relied on**	**para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5946 of 2012.

From the Judgment & Order dated 13.04.2012 of the ADJ (West)/Delhi, in H.M.A. Petition No. 204 of 2012.

Lalit Kumar for the Appellant.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. This appeal arises out of an order passed by the Additional District Judge-01, West Delhi, on 13.4.2012 in HMA No.204/2012, while entertaining a joint petition filed by the parties under Section 13-B of the Hindu Marriage Act, 1955. On such petition being presented, the learned Court below posted the matter on 15.10.2012 for the purpose of second motion, as contemplated under Section 13-B of the aforesaid Act, which is extracted hereinbelow for reference:-

> "13-B.Divorce by mutual consent - (1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district Court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment)Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

3. The Section itself provides for a cooling period of six months on the first motion being moved, in the event the parties

changed their minds during the said period. Accordingly, after the initial motion and the presentation of the petition for mutual divorce, the parties are required to wait for a period of six months before the second motion can be moved, and at that point of time, if the parties have made up their minds that they would be unable to live together, the Court, after making such inquiry as it may consider fit, grant a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

4. Aggrieved by the said order of the learned Additional District Judge, fixing the date of the 2nd motion after six months, the petitioner has moved this Court by way of this appeal, relying on a decision of this Court in *Anil Kumar Jain vs. Maya Jain* [(2009) 10 SCC 415], whereby after arriving at a conclusion that the marriage between the parties had broken down irretrievably, this Court felt justified to invoke its powers under Article 142 of the Constitution.

5. On behalf of both the parties it was urged that since more than 18 months had elapsed since the original petition under Section 13 of the Hindu Marriage Act, 1955, have been filed, the said period could be counted towards the cooling period of six months stipulated under Section 13-B of the above Act. It was urged that by such reckoning the parties have already completed the waiting period of six months, as envisaged under Section 13-B of the Act.

6. It was also urged that the other conditions contained in Section 13-B(1) of the Act had also been satisfied as the parties had been living separately for more than a year and had mutually agreed that the marriage should be dissolved. It was urged that except for the formality of not having made an application under Section 13-B, the other criteria had been duly fulfilled and having regard to the language of Section 13-B, a decree of dissolution of the marriage by way of mutual divorce should not be denied to the parties, since four months out of

waiting period of six months contemplated under Section 13-B had already been completed.

7. It was contended that as was done in the case of *Anil Kumar Jain* (supra), this Court could invoke its powers under Article 142 of the Constitution in the best interest of the parties. It was urged that technicality should be tampered by pragmatism, if substantive justice was to be done to the parties.

8. On behalf of the State it was submitted that in view of the statutory provisions, the prayer being made on behalf of the petitioner and the respondent wife should not be entertained as that would lead to confusion in the minds of the public and would be against the public interest.

9. We have carefully considered the submissions made on behalf of the parties and have also considered our decision in *Anil Kumar Jain's* case (supra). It is no doubt true that the Legislature had in its wisdom stipulated a cooling period of six months from the date of filing of a petition for mutual divorce till such divorce is actually granted, with the intention that it would save the institution of marriage. It is also true that the intention of the Legislature cannot be faulted with, but there may be occasions when in order to do complete justice to the parties it becomes necessary for this Court to invoke its powers under Article 142 in an irreconcilable situation. In fact, in the case of *Kiran vs. Sharad Dutt* [(2000) 10 SCC 243], which was considered in Anil Kumar Jain's case, after living separately for many years and 11 years after initiating proceedings under Section 13 of the Hindu Marriage Act, the parties filed a joint application before this Court for leave to amend the divorce petition and to convert the same into a proceeding under Section 13-B of the Act. Treating the petition as one under Section 13-B of the aforesaid Act, this Court by invoking its powers under Article 142 of the Constitution, granted a decree of mutual divorce at the stage of the SLP itself. In different cases in different situations, this Court had invoked its powers

under Article 142 of the Constitution in order to do complete justice between the parties.

10. Though we are not inclined to accept the proposition that in every case of dissolution of marriage under Section 13-B of the Act the Court has to exercise its powers under Article 142 of the Constitution, we are of the opinion that in appropriate cases invocation of such power would not be unjustified and may even prove to be necessary. The question with which we are faced is whether this is one of such cases?

11. As will appear in the averments made in this appeal, the appellant filed a petition under Section 12 of the Hindu Marriage Act on 1.6.2011 on the ground that the marriage contracted on 26.3.2011, was a nullity; that the parties had been living separately since their marriage and have not cohabitated with each other since 1.6.2011 and in future also they could never live together under one roof. According to the parties, they are residing separately from each other for the last one year and the respondent was presently working overseas in Canada. It is with such object in mind that during the pendency of the proceedings under Section 12 of the Act the parties agreed to mediation and during mediation the parties agreed to dissolve their marriage by filing a petition under Section 13-B of the above Act for grant of divorce by mutual consent. In the proceedings before the Mediator, the parties agreed to move appropriate petitions under Section 13-B(1) and 13-B(2) of the Act. A report was submitted by the Mediator of the Mediation Centre of the Tis Hazari Courts to the Court in the pending HMA No.239 of 2011. It is pursuant to such agreement during the mediation proceedings that an application was filed by the parties in the aforesaid pending HMA on 15.12.2011 indicating that they had settled the matter through the mediation centre and that they would be filing a petition for divorce by mutual consent on or before 15.4.2012. On the strength of the said petition, the HMA proceedings were disposed of as withdrawn. Subsequently, on 13.4.2012 the parties filed a joint

petition under Section 13-B of the Act on which the order came to be passed by the learned Additional District Judge -01, West Delhi, fixing the date for the second motion on 15.10.2012.

12. It is quite clear from the materials on record that although the marriage between the parties was solemnized on 26.3.2011, within 3 months of the marriage the petitioner filed a petition under Section 12 of the Hindu Marriage Act, 1955, for a decree of nullity of the marriage. Thereafter, they have not been able to live together and lived separately for more than 1 year. In effect, there appears to be no marital ties between the parties at all. It is only the provisions of Section 13-B(2) of the aforesaid Act which is keeping the formal ties of marriage between the parties subsisting in name only. At least the condition indicated in Section 13-B for grant of a decree of dissolution of marriage by the mutual consent is present in the instant case. It is only on account of the statutory cooling period of six months that the parties have to wait for a decree of dissolution of marriage to be passed.

13. In the above circumstances, in our view, this is one of those cases where we may invoke and exercise the powers vested in the Supreme Court under Article 142 of the Constitution. The marriage is subsisting by a tenuous thread on account of the statutory cooling off period, out of which four months have already expired. When it has not been possible for the parties to live together and to discharge their marital obligations towards each other for more than one year, we see no reason to continue the agony of the parties for another two months.

14. We, accordingly, allow the appeal and also convert the pending proceedings under Section 12 of the Hindu Marriage Act, 1955, before the Additional District Judge-01, West Delhi, into one under Section 13-B of the aforesaid Act and by invoking our powers under Article 142 of the Constitution, we grant a decree of mutual divorce to the parties and direct that

the marriage between the parties shall stand dissolved by mutual consent. The proceedings before the Additional District Judge-01, West Delhi, being HMA No.204 of 2012, is withdrawn to this Court on consent of the parties and disposed of by this order.

15. In the facts of the case, the parties shall bear their own costs.

R.P. Appeal allowed.

REBEKA MINZ AND ORS.
v.
DIVISIONAL MANAGER, UNITED INDIA INSURANCE CO. LTD. AND ANR.
(Civil Appeal Nos. 5399-5400 of 2012)

AUGUST 23, 2012

[G.S. SINGHVI AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Motor Vehicles Act, 1988 - Accidental death - Quantum of compensation - Appropriate multiplier - Rate of interest payable - Held: Since the deceased was stated to be 35 years old at the time of his death, the multiplier would be 16 which has to be applied for calculating the compensation - The Tribunal had found that after deducting 1/3rd of personal expenses, the monthly income of the deceased was Rs.7,000/- and the net contribution to the family was ascertained at Rs. 84,000/- p.a - Applying the multiplier of 16, the compensation works out to Rs. 13,44,000/- - Said sum of Rs. 13,44,000/-to carry interest @ 7% p.a. from the date of application till the date of realization.

One person while riding on a scooter met with an accident due to rash and negligent driving of the driver of a truck and consequently died. The appellants being the wife and children of the deceased preferred claim before the Motor Accidents Tribunal. The Tribunal awarded a sum of Rs.10,08,000/- as compensation alongwith interest @ 7% for specified period. While appellants were aggrieved insofar as the Tribunal applied the multiplier 12 instead of 17, having regard to the fact that the deceased at the time of his death was 35 years old as well as non-grant of interest for certain period, the first respondent-insurance company was aggrieved of the

very award of compensation itself. In appeal, the High Court reduced the amount of compensation to Rs.5,00,000/- and also the rate of interest to 6% (payable from the date of the claim application till deposit of the amount). Hence the present appeals.

Allowing the appeals, the Court

HELD: 1. The impugned order of the High Court being a non-speaking order calls for interference. [Para 3] [385-A]

2.1. Since the deceased was stated to be 35 years old at the time of his death, the multiplier would be 16 which has to be applied for calculating the compensation. The Tribunal after examining the materials before it, found that after deducting 1/3rd of personal expenses, the monthly income of the deceased was Rs.7,000/- and the net contribution to the family was ascertained at Rs. 84,000/- per annum. Applying the multiplier of 16, the compensation works out to Rs. 13,44,000/-. Therefore, while setting aside the order of the High Court insofar as it reduced the quantum of compensation, the compensation payable to the appellants is modified to a sum of Rs. 13,44,000/- [84,000/- x 16]. The said sum of Rs. 13,44,000/-should carry interest at the rate of 7% per annum from the date of application till the date of realization. [Para 5] [386-A-C]

2.2. The first respondent is, therefore, directed to pay to the appellants the total amount of compensation in the sum of Rs. 13,44,000/- after giving credit to whatever payment already made by calculating the rate of interest from the date of application till realization. Such payment should be made in the proportion as set out by the Tribunal in the last para of its order dated 10.07.2007. With the above modification in the quantum of compensation and the rate of interest payable right from the date of

application, the compensation shall be made within a period of three months from the date of this order. [Para 6] [386-D-F]

Santosh Devi v. National Insurance Company Ltd. & Ors. **2012 (6) SCC 421;** *Sarla Verma & Ors. v. Delhi Transport Corporation & Anr.* **2009 (6) SCC 121: 2009 (5) SCR 1098 - relied on.**

Case Law Reference:

2012 (6) SCC 421	**relied on**	**Para 4, 5**
2009 (5) SCR 1098	**relied on**	**Para 4**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 5399-5400 of 2012.

From the Judgment & Order dated 05.03.2009 of the High Court of Orissa, Cuttack in M.A.C.A. No. 953 of 2007 and M.A.C.A. No. 821 of 2007.

P.M. Misra, K.N. Tripathy for the Appellants.

Devabrata for the Respondents.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. These appeals at the instance of the claimants before the Motor Accidents claims Tribunals challenge the common order of the High Court of Orissa, Cuttack dated 05.03.2009 passed in MACA No.821 of 2007 and MACA No.953 of 2007. MACA No. 821 of 2007 was preferred by the appellants while MACA No.953 of 2007 was preferred by the first respondent-Insurance company in the High Court. The husband of the first appellant died in an accident on 04.01.1995 when he was returning from the plant site on a scooter bearing registration No. OR-06-7703 around 6.30 a.m. near NALCO Nagar on NH-42 at a place called Smelter Chhak, due to rash and negligent driving of the

driver of the truck bearing registration No. ORA-4241.

2. The appellants being the wife and children of the deceased preferred the claim before the Motor Accidents Tribunal in MAC case No.21 of 1995. The Tribunal, after analyzing the entire evidence placed before it, awarded a sum of Rs. 10,08,000/- as compensation along with interest at the rate of 7% per annum with effect from 03.02.1995 to 22.08.1995 and again from 16.01.2007 till the payment within one month. While the appellants were aggrieved insofar as the Tribunal applied the multiplier 12 instead of 17, having regard to the fact that the deceased at the time of his death was 35 years old as well as non-grant of interest for certain period, the first respondent was aggrieved of the very award of compensation itself. The High Court while disposing of the appeal reduced the compensation awarded by the Tribunal and also the rate of interest by holding as under:-

> "Considering the submissions of the learned counsel for the parties and keeping in view findings of the learned Tribunal with regard to the quantum of compensation amount awarded and the basis on which the same has been arrived at, I feel, the interest of justice would be best served if the awarded compensation amount of Rs.10,08,000/- is modified and reduced to Rs. 5,00,000/- which is payable to the claimants. The claimants are also entitled to interest @ 6% per annum from the date of the claim application, till deposit of the amount. The impugned award is modified to the said extent.
>
> The appellant insurance company (in MACA No.953 of 2007) is directed to deposit the modified compensation amount of Rs, 5,00,000/- along with interest @6% per annum from the date of filling of claim application with the learned Tribunal within six weeks from today. On deposit of the amount, the same shall be disbursed to the claimants proportionately as per the direction of the learned tribunal given in the impugned award."

3. At the very outset, it is needless to state that the High Court while reducing the quantum of compensation as well as the rate of interest failed to assign any reason. The impugned order of the High Court being a non-speaking order calls for interference in these appeals.

4. As stated by us, the appellants, namely, the claimants alone have come forward with these appeals. Therefore, the only question to be examined is as to what is the multiplier to be applied, which ground was though raised before the High Court, we find that the High Court has not ventured to answer the said question. This question has time and again been considered by this Court. In a recent decision of this Court, namely, *Santosh Devi v. National Insurance Company Ltd. & Ors.* - 2012 (6) SCC 421-to which one of us (Hon. G.S. Singhvi. J.) was a party, after referring to the decision in *Sarla Verma & Ors. v. Delhi Transport Corporation & Anr.* - 2009 (6) SCC 121 wherein the formula under different headings including the one relating to selection of multiplier was quoted with approval. The said formula has been set out in *Sarla Verma* (supra) in para 42 which reads as under:-

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

5. The said part of the formula was applied in the said reported decision *Santosh Devi v. National Insurance Company Ltd. & Ors.*(supra) referred to above while working out the compensation payable to the claimants therein. We, therefore, follow the above referred to decisions and when the said formula is applied since the deceased was stated to be 35 years old at the time of his death, the multiplier would be 16 which has to be applied for calculating the compensation. The Tribunal after examining the materials before it, found that after deducting 1/3rd of personal expenses, the monthly income of the deceased was Rs.7,000/- and the net contribution to the family was ascertained at Rs. 84,000/- per annum. Applying the multiplier of 16, the compensation works out to Rs. 13,44,000/-. Therefore, while setting aside the order of the High Court insofar as it reduced the quantum of compensation, we modify the compensation payable to the appellants in a sum of Rs. 13,44,000/- [84,000/- x 16]. The said sum of Rs. 13,44,000/- should carry interest at the rate of 7% per annum from the date of application till the date of realization.

6. The first respondent is, therefore, directed to pay to the appellants the total amount of compensation in the sum of Rs. 13,44,000/- after giving credit to whatever payment already made by calculating the rate of interest from the date of application till realization. Such payment should be made in the proportion as set out by the Tribunal in the last para of its order dated 10.07.2007. With the above modification in the quantum of compensation and the rate of interest payable right from the date of application, the compensation shall be made within a period of three months from the date of this order. The appeals stand allowed as above.

B.B.B. Appeals allowed.

PATASI DEVI
v.
STATE OF HARYANA & ORS.
(Civil Appeal No. 6183 of 2012)

AUGUST 29, 2012

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

Land Acquisition Act, 1894 - ss.4 and 6 - Acquisition of land - Award passed on 9.12.2009 - Acquired land included land of the appellant - Writ petition by appellant challenging the acquisition of her land on the ground that in the garb of acquiring land for a public purpose, the State Government misused its power u/ss.4 and 6 for benefit of a private colonizer (respondent no.6) who was constructing a residential colony; that her land should have been exempted/released in terms of the policy framed by the State Government since she had constructed a house on the land prior to issuance of s.4 notification; and that she was discriminated inasmuch as land belonging to one firm M/s 'SFH' was released while her land was not released and that acquisition proceedings were vitiated due to non-application of mind by functionaries of State Government and violation of rules of natural justice - High Court dismissed the writ petition - On appeal, held: The High Court was not right in holding that the writ petition of the appellant was not maintainable because the same was filed after passing of the award - Respondent Nos.1 to 3 failed to discharge the onus to prove that after passing of the award, possession of the acquired land had been taken and delivered to the Estate Officer, HUDA - No evidence was produced by the official respondents before the High Court to show that possession of the appellant's land and the house constructed over it had been taken by the competent authority between 9.12.2009, i.e., the date on which the award was passed and

20.1.2010, i.e., the date on which the writ petition was filed before the High Court - Acquisition of the appellant's land was vitiated due to colourable exercise of power by the State Government - The State Government misused the provisions of ss.4 and 6 of the Act - The real object of the acquisition was to benefit a private colonizer i.e. respondent No.6 - The official respondents are guilty of practising discrimination in the matter of release of land - Before Supreme Court it was pleaded that on the date of issuance of preliminary notification the appellant's land was vacant, but, this statement cannot be relied upon for denying relief to her because no such averment was made in the counter affidavit filed before the High Court - The policy framed by the Government of Haryana clearly stipulates release of land on which construction had been raised prior to s.4 notification - The appellant's case is covered by that policy - Therefore, her land ought to have been released as was done in the case of M/s. SFH - Acquisition of appellant's land is declared illegal and is quashed - Haryana Urban Development Authority, 1977.

Municipal Corporation of Greater Bombay v. Industrial Development and Investment Company (P) Limited **(1996) 11 SCC 501: 1996 (5) Suppl. SCR 551;** *Municipal Council, Ahmednagar, v. Shah Hyder Beig* **(2002) 2 SCC 48;** *C. Padma v. Deputy Secretary to the Government of Tamil Nadu* **(1997) 2 SCC 627: 1996 (9) Suppl. SCR 158;** *Star Wire (India) Ltd. v. State of Haryana* **(1996) 11 SCC 698: 1996 (7) Suppl. SCR 6;** *M/s. Swaika Properties Pvt. Ltd. v. State of Rajasthan* **JT 2008 (2) SC 280;** *Banda Development Authority, Banda v. Moti Lal Agarwal* **(2011) 5 SCC 394: 2011 (7) SCR 435;** *Balwant Narayan Bhagde v. M.D. Bhagwat* **(1976) 1 SCC 700: 1975 Suppl. SCR 250;** *Balmokand Khatri Educational and Industrial Trust v. State of Punjab* **(1996) 4 SCC 212: 1996 (2) SCR 643;** *P.K. Kalburqi v. State of Karnataka* **(2005) 12 SCC 489;** *NTPC Ltd. v. Mahesh Dutta* **(2009) 8 SCC 339: 2009 (10) SCR 1084;** *Sita Ram Bhandar Society v. Govt. of NCT of Delhi* **(2009) 10 SCC 501: 2009**

(14) SCR 507; *Brij Pal Bhargava v. State of UP.* **(2011)5 SCC 413;** *Prahlad Singh v. Union of India* **(2011) 5 SCC 386: 2011 (5) SCR 1002 and** *Raghbir Singh Sehrawat v. State of Haryana* **(2012) 1 SCC 792: 2011 (14) SCR 1113 - referred to.**

Case Law Reference:

1996 (5) Suppl. SCR 551	**referred to**	**Paras 5, 13**
(2002) 2 SCC 48	**referred to**	**Paras 5, 13**
1996 (9) Suppl. SCR 158	**referred to**	**Paras 5, 13**
1996 (7) Suppl. SCR 6	**referred to**	**Paras 5, 13**
JT 2008 (2) SC 280	**referred to**	**Paras 5, 13**
2011 (7) SCR 435	**referred to**	**Para 9**
1975 Suppl. SCR 250	**referred to**	**Para 9**
1996 (2) SCR 643	**referred to**	**Para 9**
(2005) 12 SCC 489	**referred to**	**Para 9**
2009 (10) SCR 1084	**referred to**	**Para 9**
2009 (14) SCR 507	**referred to**	**Para 9**
(2011) 5 SCC 413	**referred to**	**Para 9**
2011 (5) SCR 1002	**referred to**	**Para 10**
2011 (14) SCR 1113	**referred to**	**Para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6183 of 2012.

From the Judgment and Order dated 05.04.2010 of the High Court of Punjab and Haryana at Chandigarh in CWP No. 2494 of 2010.

Satinder S. Gulati, Anubha Agarwal, Tarjit Singh, Sushil Kr.

Jain, Puneet Jain, D.K. Gupta, Anurag Gohil, Sachar Anand for the appearing parties.

The Order of the Court was delivered

O R D E R

1. Leave granted.

2. By notification dated 15.12.2006 issued under Section 4(1) of the Land Acquisition Act, 1894 (for short, 'the Act'), the Government of Haryana proposed the acquisition of land measuring 231.04 acres (48.23 acres of village Bahayapur, 139.25 acres of village Para and 43.56 acres of village Bohar, Tehsil and District Rohtak) for the development of Residential Sector 36, Rohtak under the Haryana Urban Development Authority Act, 1977 by the Haryana Urban Development Authority (HUDA). After considering the report of the Land Acquisition Collector, who is supposed to have heard the objections filed by the landowners and other interested persons under Section 5A(1), the State Government issued declaration dated 14.12.2007 under Section 6 of the Act. The award was passed by the Land Acquisition Collector on 9.12.2009.

3. The appellant, who owned 14 kanals 8 marlas land situated in the revenue estate of Mouza Para, challenged the acquisition of her land in Writ Petition No. 2494/2010. She pleaded that in the garb of acquiring land for a public purpose, the State Government misused its power under Sections 4 and 6 of the Act for the benefit of respondent No.6 M/s. Ujjawal Coloniser Pvt. Ltd. of Delhi, who was constructing residential colony known as 'Sun City'; that her land should have been exempted/released in terms of the policy framed by the State Government because she had constructed a house prior to the issuance of notification under Section 4(1) of the Act; that she has been discriminated inasmuch as land belonging to M/s. Sharad Farm and Holdings Pvt. Ltd. had been released vide letter dated 4.9.2008, but her land was not released and that

the acquisition proceedings are vitiated due to non-application of mind by the functionaries of the State Government and violation of the rules of natural justice.

4. In the counter affidavit filed by respondent Nos. 1 and 3, an objection was raised to the maintainability of the writ petition on the ground that the same was filed after passing of the award. On merits, respondent Nos.1 and 3 did not dispute that the appellant's land was surrounded by the land of respondent No.6, who was developing residential colony but pleaded that the acquisition was for a public purpose i.e. development of Sector 36, Rohtak. The plea of discrimination raised by the appellant was contested by respondent Nos. 1 and 3 by asserting that the appellant had not filed objections under Section 5A(1).

5. The High Court did not decide the appellant's challenge to the acquisition of her land and dismissed the writ petition solely on the ground that it was filed after passing of the award. For arriving at this conclusion, the High Court relied upon the judgments of this Court in *Municipal Corporation of Greater Bombay v. Industrial Development and Investment Company (P) Limited* (1996) 11 SCC 501, *Municipal Council, Ahmednagar, v. Shah Hyder Beig* (2002) 2 SCC 48, *C.Padma v. Deputy Secretary to the Government of Tamil Nadu* (1997) 2 SCC 627, *Star Wire (India) Ltd. v. State of Haryana* (1996) 11 SCC 698 and *M/s. Swaika Properties Pvt. Ltd. v. State of Rajasthan* JT 2008 (2) SC 280.

6. We have heard learned counsel for the parties and scanned the record. We shall first consider the question whether the High Court was right in non-suiting the appellant without examining the merits of her challenge to the acquisition proceedings. For this purpose, it will be apposite to note that in the counter affidavit filed on behalf of respondent Nos.1 and 3 before the High Court it was nowhere pleaded that possession of the appellant's land and house was taken by the particular official / officer on a particular date and was handed

over to the Estate Officer, HUDA, Rohtak. Not only this, no document was produced evidencing dispossession of the appellant. This is the reason why the High Court did not record a finding that possession of the appellant's land had been taken after passing of the award.

7. In the counter affidavit filed before this Court, respondent Nos. 1 and 3 have, for the first time, averred that possession of the acquired land was handed over to Estate Officer, HUDA, Rohtak on the date of award and as per official assessment report the construction had been raised after the issue of notification under Section 4. This statement is contained in para 6 of the counter affidavit, which is reproduced below:

> "6. That the award related to the abovesaid notification was announced on 9.12.2009 and the possession was handed over to Estate Officer, HUDA, Rohtak on the same day. It is relevant to mention here that as per the official assessment report of the constructed area regarding the above said notification the land of the petitioner was vacant at the time of u/s-4 and the construction has been raised after the survey and issuance of the notification u/s-4. However since it is also subsequent to declaration of the area as controlled area and the same is without permission and unauthorized one."

8. In the separate counter affidavit filed by Estate Officer, HUDA, Rohatak (respondent No.2) before this Court, a similar averment has been made albeit without disclosing the name of the person who is said to have delivered possession of the acquired land to him on the date of the award. Not only this, while making that averment in para 5(v) of the counter affidavit, the officer has used white fluid to score out something recorded after the words "handed over to the answering respondent". By doing so the concerned officer has tried to hide the truth from this Court. That apart, what is most surprising is that neither before the High Court nor before this Court the official respondents have produced any document to show that actual

or even symbolic possession of the acquired land was taken by the particular officer/official and the same was handed over to the particular officer of HUDA. Therefore, there is no escape from the conclusion that respondent Nos.1 to 3 have failed to discharge the onus to prove that after passing of the award, possession of the acquired land had been taken and delivered to the Estate Officer, HUDA.

9. In *Banda Development Authority, Banda v. Moti Lal Agarwal* (2011) 5 SCC 394, this Court considered as to what should be the mode of taking possession of the land acquired under the Act, referred to the judgments in *Balwant Narayan Bhagde v. M.D. Bhagwat* (1976) 1 SCC 700, *Balmokand Khatri Educational and Industrial Trust v. State of Punjab* (1996) 4 SCC 212 , *P.K. Kalburqi v. State of Karnataka* (2005) 12 SCC 489, *NTPC Ltd. v. Mahesh Dutta* (2009) 8 SCC 339, *Sita Ram Bhandar Society v. Govt. of NCT of Delhi* (2009) 10 SCC 501, *Brij Pal Bhargava v. State of UP* (2011)5 SCC 413 and culled out the following principles:

> "i) No hard and fast rule can be laid down as to what act would constitute taking of possession of the acquired land.
>
> ii) If the acquired land is vacant, the act of the concerned State authority to go to the spot and prepare a panchnama will ordinarily be treated as sufficient to constitute taking of possession.
>
> iii) If crop is standing on the acquired land or building/ structure exists, mere going on the spot by the concerned authority will, by itself, be not sufficient for taking possession. Ordinarily, in such cases, the concerned authority will have to give notice to the occupier of the building/structure or the person who has cultivated the land and take possession in the presence of independent witnesses and get their signatures on the panchnama. Of course, refusal of the owner of the land or building/structure

> may not lead to an inference that the possession of the acquired land has not been taken.
>
> iv) If the acquisition is of a large tract of land, it may not be possible for the acquiring/designated authority to take physical possession of each and every parcel of the land and it will be sufficient that symbolic possession is taken by preparing appropriate document in the presence of independent witnesses and getting their signatures on such document.
>
> v) If beneficiary of the acquisition is an agency/ instrumentality of the State and 80% of the total compensation is deposited in terms of Section 17(3A) and substantial portion of the acquired land has been utilised in furtherance of the particular public purpose, then the Court may reasonably presume that possession of the acquired land has been taken."

10. In *Prahlad Singh v. Union of India* (2011) 5 SCC 386, the Court considered as to when the acquired land can be treated to have vested in the State, referred to various judgments on the issue of taking of possession including the judgment in *Banda Development Authority, Banda* (supra) and observed:

> "If the present case is examined in the light of the facts which have been brought on record and the principles laid down in the judgment in Banda Development Authority case it is not possible to sustain the finding and conclusion recorded by the High Court that the acquired land had vested in the State Government because the actual and physical possession of the acquired land always remained with the appellants and no evidence has been produced by the respondents to show that possession was taken by preparing a panchnama in the presence of independent witnesses and their signatures were obtained on the panchnama."

11. At the cost of repetition, we consider it necessary to observe that in the present case no evidence was produced by the official respondents before the High Court to show that possession of the appellant's land and the house constructed over it had been taken by the competent authority between 9.12.2009, i.e., the date on which the award was passed and 20.1.2010, i.e., the date on which the writ petition was filed before the High Court. Indeed, it was not even the pleaded case of the official respondents that the house constructed by the appellant was lying vacant on the date of award and some official had put lock over it evidencing the taking over of possession.

12. A somewhat similar question was considered by this Court in *Raghbir Singh Sehrawat v. State of Haryana* (2012) 1 SCC 792. In that case also, the High Court had non-suited the writ petitioner on the ground that possession of the acquired land had been taken by the concerned officers and the same will be deemed to have vested in the State Government free from all encumbrances. This Court took cognizance of the entries recorded in khasra girdawari revealed existence of crops on the acquired land and observed:

> "The respondents have not produced any other evidence to show that actual possession of the land, on which crop was standing, had been taken after giving notice to the appellant or that he was present at the site when possession of the acquired land was delivered to the Senior Manager of HSIIDC. Indeed, it is not even the case of the respondents that any independent witness was present at the time of taking possession of the acquired land.
>
> The Land Acquisition Collector and his subordinates may claim credit of having acted swiftly inasmuch as immediately after the pronouncement of the award, possession of the acquired land of Village Jatheri is said to have been taken from the landowners and handed over

> to the officer of HSIIDC but keeping in view the fact that crop was standing on the land, the exercise undertaken by the respondents showing delivery of possession cannot but be treated as farce and inconsequential. We have no doubt that if the High Court had summoned the relevant records and scrutinised the same, it would not have summarily dismissed the writ petition on the premise that possession of the acquired land had been taken and the same vested in the State Government."

13. The Court then referred to the judgments in *Municipal Corporation of Greater Bombay v. Industrial Development and Investment Company (P) Limited* (supra), *Star Wire (India) Ltd. v. State of Haryana* (supra), *C.Padma v. Deputy Secretary to the Government of Tamil Nadu* (supra), *Municipal Council, Ahmednagar, v. Shah Hyder Beig* (supra) and *M/s Swaika Properties Pvt. Ltd. v. State of Rajasthan* (supra), on which reliance has been placed by the High Court and observed:

> "In all the cases, challenge to the acquisition proceedings was negatived primarily on the ground of delay. An additional factor which influenced this Court was that physical possession of the acquired land had been taken by the authorities concerned. In none of these cases, the landowners appear to have questioned the legality of the mode adopted by the authorities concerned for taking possession of the acquired land. Therefore, these judgments cannot be relied upon for sustaining the High Court's negation of the appellant's challenge to the acquisition of his land."

14. In view of the above discussion, we hold that the High Court was not right in holding that the writ petition of the appellant was not maintainable because the same was filed after passing of the award.

15. As a sequel to the aforementioned conclusion, we may

have set aside the impugned order and remitted the matter to the High Court for disposal of the writ petition on merits but having carefully gone through the pleadings of the parties and the material produced before this Court, we are satisfied that the acquisition of the appellant's land is vitiated due to colourable exercise of power by the State Government. No doubt, the notifications issued under Sections 4 and 6 of the Act recite that the land was acquired for a public purpose, namely, development of Sector 36, Rohtak, but the real object of the acquisition was to benefit a colonizer i.e. respondent No.6, who had undertaken to develop the area into a residential colony. In para 5 and 6(iv) of the writ petition, the appellant had made the following averments:

> "5. That it would be worthwhile to point out here that the land which has been sought to be acquired vide the impugned notification is surrounded by the land of Ujjawal Coloniser - respondent No. 6 from all sides and the residential colony named Sun City is being developed by the respondent No. 6 and land situated in the Sun City was also acquired by the State Government and then it was handed over to respondent No. 6 who is a well known colonizer and the respondent No. 6 also approached the petitioner for selling her land to him and the petitioner refused to accept the said proposal of the respondent No. 6 and now the land which the respondent No. 6 failed to purchased from its owners has been got acquired for extension of Section 36, Rohtak with clear understanding that same would be further handed over to respondent No. 6 after completion of its acquisition and there is a secret agreement between the State authorities and respondent No. 6.
>
> 6(iv) That the acquisition of land for public purpose is just an eyewash. In fact, the land is being acquired for semi-public, commercial purpose etc. It is also so reflected from the lay out plan of Section 36 and marked in red. The semi

> public purpose is for giving the land to the private developers cannot be termed as a public purpose in the real sense and earlier also the land was acquired for development of Sector 36 in a similar fashion and after acquisition the same was handed over to the respondent No. 6 and the land of the petitioner is surrounded by the land of Sun City by three sides and cannot be choose for any purpose except to acquire the same and hand over it to the respondent No. 6 and the acquisition proceedings are not meant for public purpose in true sense and the authorities are bent upon to help the respondent No. 6 in an illegal and arbitrary manner."

16. In the counter affidavit filed by Land Acquisition Collector, Urban Estates, Haryana, Rohtak on behalf of respondent Nos.1 and 3, it was claimed that the procedural requirement contained in Sections 4 and 6 of the Act had been fully satisfied and reference to Section 17(1) in the declaration issued under Section 6 was a mistake and further that no discrimination had been practised in acquiring the land. However, it was not denied that the appellant's land is surrounded by the land of respondent No.6, who was developing residential colony under the name and style 'Sun City' and earlier also the land acquired for the development of Sector 36, Rohtak was transferred to respondent No.6. This shows that in the guise of acquiring land for a public purpose, the State Government had acquired the land for being handed over to the private coloniser. In other words, the State Government had misused the provisions of Sections 4 and 6 of the Act for making land available to a private developer. We may hasten to add that if the land was to be acquired for a company, then the official respondents were bound to comply with the provisions contained in Chapter 7 of the Act, which was admittedly not done in the instant case.

17. We also find merit in the appellant's plea that the official respondents are guilty of practising discrimination in the matter

of release of land. In paragraphs 6(v) and 6(vi) of the writ petition the appellant had made the following averments:

"6(v) That the petitioner who is having only small piece of land/ residential house would be deprived of the roof and the construction made by the petitioner is of A Class and has been raised prior to the issuance of Notification u/s 4 of the Act i.e. 15.12.2006. Photographs showing construction of the House of A Class, is annexed herewith as Annexure P/5. As per the policy of the State Government dated 30.9.2007, copy of which is annexed as Annexure P/6, the structure which have been constructed prior to the issuance of the notification u/s 4 and is inhabited could be released u/s 48(1) of the Act ibid but the respondents have ignored its own instructions and for releasing the land the pick and choose policy has been adopted by the authorities and the land of M/s Sharad Farm and Holdings Pvt. Ltd. has also been released arbitrarily after notification u/s 6 of the Act as is reflected from letter dated 4.9.2008, copy of which is annexed as Annexure P/7 and furthermore the constructed house of the petitioner has been acquired but the vacant land of some influential person have been left out and the State Government is not justified in acquiring the land in question for further handing over the same to the private developers for commercial gains at the cost of the life/livelihood of the petitioner and the impugned notification has not been issued for a bonafide purpose and is a result of connivance of the authorities with the respondent No. 4 to 6 and it is not permissible under law. The release of land of the petitioner would not create any hurdle in the scheme of the respondents.

6(vi) That the construction of the house of the petitioner is prior to the notification u/s 4 of the Land Acquisition Act. The Land Acquisition Collector in similar circumstances also recommended the release of the land and the same

was not included while issuing the notification u/s 6 of the Land Acquisition Act and it has been incorporated while issuing notices u/s 9 of the Act ibid, copy of recommendations of the L.A.C is attached herewith as Annexure P/8. There is, thus, a total non-application of mind. According to the notification u/s 6 ibid Killa No. 23(7-12) is stated to have been acquired but while in the notice under Section 9 of the Act ibid whole of the area has been shown to have been acquired. Even the recommendations of the L.A.C. for release of the constructed area has also been ignored without any basis."

18. In the counter affidavit filed on behalf of respondent Nos.1 and 3, the above reproduced averments were not denied. This is evinced from paragraphs 6(v) and 6(vi) of the counter affidavit, which are extracted below:

"6(v). That the contents of Para no. 6(v) of the civil writ Petition are wrong and denied. However, the state Govt, has absolute right to acquire the land for public purpose and the disputed land is also being acquired for serving public purpose i.e. Sector-36 Rohtak. However petitioner has never filed the objection regarding his house.

6(vi). That the contents of para no. 6(vi) of the civil writ petition are wrong and denied. However, it is submitted that there exists a public purpose for which the land has been acquired and there is no illegality or infirmity in the decision of the state. No discrimination has been done with any of the land owners."

19. Before this Court it has been pleaded that on the date of issuance of preliminary notification the appellant's land was vacant, but, this statement cannot be relied upon for denying relief to her because no such averment was made in the counter affidavit filed before the High Court. The policy framed by the Government of Haryana clearly stipulates release of land on which construction had been raised prior to Section 4

notification. The appellant's case is covered by that policy. Therefore, her land ought to have been released as was done in the case of M/s. Sharad Farm and Holdings Pvt. Ltd.

20. In the result, the appeal is allowed and the impugned order is set aside. The acquisition of the appellant's land is declared illegal and is quashed. The parties are left to bear their own costs.

B.B.B. Appeal allowed.

SALAUDDIN AHMED & ANR.

v.

SAMTA ANDOLAN

(Civil Appeal Nos. 2504-2505 of 2012)

AUGUST 29, 2012

[ALTAMAS KABIR AND J. CHELAMESWAR, JJ.]

CONTEMPT OF COURT:

Contempt of court - Ingredients - Explained.

Contempt petition - High Court holding the State authorities guilty of contempt of court for non-compliance of order of Division Bench of the High Court - Held: The explanation given on behalf of the State and its authorities cannot be discounted, since in order to act in terms of the observations made in the judgment, the State appointed the Bhatnagar Committee for obtaining quantifiable data in respect of Scheduled Castes and Scheduled Tribes candidates so that the provisions of the amended Clause (4-A) of Art. 16 of the Constitution could be given effect to - Therefore, despite the fact that there has been delay on the part of the State and its authorities in giving effect to the observations made in the judgments of High Court and Supreme Court, there was no willful or deliberate intention on their part to defy the orders of the High Court - Accordingly, the impugned judgment and order of the Division Bench of the High Court holding the appellants guilty of contempt of court for purported violation of the order passed by the Division Bench of the High Court on 5.2.2010 is set aside - Constitution of India, 1950 - Art. 16(4-A).

Writ petitions, including D.B.C.W.P.No.8104 of 2008, were filed by the candidates belonging to the general category in the State of Rajasthan, challenging the

Notifications dated 28.12.2002 and 25.4.2008 issued by the State Government. The Division Bench of the High Court by its judgment dated 5.2.2010 quashed both the Notifications on the ground that the conditions precedent laid down in *M. Nagraj's*[1] case had not been followed. It was also held that the right vested in the candidates by virtue of Notification dated 1.4.1997 and protected by Notification dated 28.12.2002 was illegally taken away by Notification dated 25.4.2008. On 16.11.2010 the general category candidates filed D.B. Civil Contempt Petition No. 914 of 2010 in D.B. W.P. No. 8104 of 2009 alleging non-compliance of the judgment dated 5.2.2010. Subsequently, Contempt Petition No. 359 of 2011 was also filed. It was mainly contended that after the Notifications dated 28.12.2002 and 25.4.2008 were quashed by the judgment dated 5.2.2010 which became final on dismissal of the SLP of the State Government on 7.12.2010[2], the State authorities had, by their inaction in complying with the requirements set out in *M. Nagaraj's* case, committed contempt of court. The Division Bench of the High Court accepted the same and held the appellants guilty of contempt of court for deliberate and willful violation of the order dated 5.2.2010.

Allowing the appeals, the Court

HELD: 1.1. In order to establish that a person had deliberately and willfully committed contempt of court, two essential ingredients have to be proved: Firstly, it has to be established that an order has been passed by the court which either directs certain things to be done by a person or to restrain such person or persons from doing certain acts and that the person or persons had knowledge of the said order. Secondly, it has to be

1. *M. Nagaraj & Ors. vs. Union of India & Ors.* 2006 (7) Suppl. SCR 336.
2. *Suraj Bhan Meena and Anr. vs. State of Rajasthan and Ors.* (2010) 14 SCR 532

established that despite having knowledge of such order, the person concerned deliberately and willfully violated the same with the intention of lowering the dignity and image of the court. [para 36] [422-E-F]

Dinesh Kumar Gupta Vs. United India Insurance Co. Ltd. **2010 (13) SCR 599 = (2010) 12 SCC 770 - referred to.**

Maninderjit Singh Bitta Vs. Union of India & Ors. **(2012) 1 SCC 273;** *Kunhayammed & Ors. Vs. State of Kerala & Anr.* **2000 (1) Suppl. SCR 538 = (2000) 6 SCC 359 - cited**

1.2 Admittedly, Civil Writ Petition No.8104 of 2008, along with several other writ petitions, were disposed of by the Division Bench by its judgment and order dated 5.2.2010, by quashing the Notifications dated 25.4.2008 and 28.12.2002, which had been issued by the State Government without following the exercise indicated in M. Nagaraj's case. While quashing the said Notifications, the Division Bench took note of the observations made in M. Nagaraj's case that Clause (4-A) of Art. 16 was only an enabling provision and the State was not bound to make reservations of Scheduled Castes and Scheduled Tribes in the matter of promotion, but if they did wish to exercise their discretion in that regard, the State had to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment, in addition to compliance with Art. 335. The same not having been done, the said Notifications were quashed. [para 37] [422-G-H; 423-E-G]

1.3 It has been pointed out that the judgment and order dated 5.2.2010 passed by the Division Bench of the High Court was in two parts. While one part dealt with the quashing of the two Notifications, the other was with regard to the directions given in M. Nagaraj's case for

collection of the quantifiable data before giving effect to the provisions of Art. 16(4-A) of the Constitution. It has been emphasized on behalf of the State Government that in order to give effect to the second part of the judgment and order of the Division Bench of the High Court and the directions given in Suraj Bhan Meena's case, the Government of Rajasthan had appointed the Bhatnagar Committee to obtain the quantifiable data to comply with the directions given in the said judgments. It has also been brought to the notice of the Court that directions were given to all the different departments on 14.2.2011 to ensure compliance with the directions contained in Suraj Bhan Meena's case. [para 40] [424-D-G]

1.4 The explanation given on behalf of the State and its authorities cannot be discounted, since in order to act in terms of the sentiments expressed by the High Court and this Court, it was necessary to collect the quantifiable data in respect of Scheduled Castes and Scheduled Tribes candidates. The State appointed the Bhatnagar Committee which was entrusted with the work of obtaining such quantifiable data so that the provisions of the amended Clause (4-A) of Art. 16 of the Constitution could be given effect to in terms of the directions given in M. Nagaraj's case subsequently reiterated in Suraj Bhan Meena's case. [para 42] [425-C-D]

M. Nagaraj & Ors. Vs. Union of India & Ors. **2006 (7) Suppl. SCR 336= (2006) 8 SCC 212; and** *Suraj Bhan Meena and Anr. vs. State of Rajasthan and Ors.* **(2010) 14 SCR 532 - referred to.**

1.5 Therefore, this Court is of the view that despite the fact that there has been delay on the part of the State and its authorities in giving effect to the observations made in M. Nagraj's case and Suraj Bhan Mina's case, there was no willful or deliberate intention on their part

to defy the orders of the Court. The very fact that the Bhatnagar Committee was appointed indicates that the State and its authorities had every intention to implement the said observations, though the progress of such implementation has been tardy. Accordingly, the impugned judgment and order of the Division Bench of the High Court holding the appellants guilty of contempt of court for purported violation of the order passed by the Division Bench of the High Court on 5.2.2010 while disposing of Civil Writ Petition No.8410 of 2008, is set aside. However, it is directed that the State and its authorities would act in terms of the Report of the Bhatnagar Committee, in accordance with the decision rendered in M. Nagaraj's case and Suraj Bhan Meena's case, within the time stipulated in the instant judgment. [para 44-45] [425-G-H; 426-A-E]

Indira Sawhney Vs. Union of India & Ors. **1992 (2) Suppl. SCR 454 = (1992) Supp.3 SCC 217;** *Ajit Singh Januja & Ors. Vs. State of Punjab & Ors.* **1996 (3) SCR 125 = (1996) 2 SCC 715;** *Union of India & Ors. Vs. Virpal Singh Chauhan* **1995 (4) Suppl. SCR 158 = (1995) 6 SCC 684;** *M. Nagaraj & Ors. Vs. Union of India & Ors.* **2006 (7) Suppl. SCR 336 = (2006) 8 SCC 212;** *State of U.P. vs. Hirendra Pal Singh* **2010 (15) SCR 854 = (2011) 5 SCC 305- referred to.**

Constitution (Eighty Second Amendment) Act and the Constitution **(Eighty Fifth Amendment) Act of 2001- referred to.**

Halsbury's Laws of England **- referred to.**

Case Law Reference:

1992 (2) Suppl. SCR 454	**referred to**	**para 2**
1996 (3) SCR 125	**referred to**	**para 3**

1995 (4) Suppl. SCR 158	**referred to**	**para 4**
2006 (7) Suppl. SCR 336	**referred to**	**para 5**
(2010) 14 SCR 532	**referred to**	**para 23**
2010 (15) SCR 854	**referred to**	**para 27**
2010 (13) SCR 599	**referred to**	**para 29**
(2012) 1 SCC 273	**cited**	**para 33**
2000 (1) Suppl. SCR 538	**cited**	**para 34**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2504-05 of 2012.

From the Judgment and Order dated 23.02.2012 of the Hon'ble High Court of Rajasthan in D.B. Civil Contempt Petition Nos. 941/2010 and 359/2011.

Manish Singhvi, AAG, Irsahd Ahmad for the Appellants.

M.L. Lahoty, Shobit Tiwari, Lal Pratap Singh, Ram Niwas, Ruchi Kohli for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. These appeals arise out of the common judgment and order dated 23rd February, 2012, passed by the Division Bench of the Rajasthan High Court in D.B. Civil Contempt Petition No.941 of 2010 and D.B. Civil Contempt Petition No.359 of 2011, whereby the alleged contemnors were held to be guilty of contempt of court for having violated the order passed by the Division Bench of the Jaipur Bench of the Rajasthan High Court on 5th February, 2010, in D.B. Civil Writ Petition No.8104 of 2008.

2. From the materials on record it transpires that on 27th November, 1972, the State of Rajasthan issued a Notification

providing for reservation for Scheduled Castes/Scheduled Tribes candidates to the extent of 15% for Scheduled Castes and 7.5% for Scheduled Tribes. Subsequently, on and from 3rd October, 1973, such reservation was increased to 16% and 12% for Scheduled Castes and Scheduled Tribes candidates, respectively. On 29th January, 1981, the Rules for promotion based on the criteria of seniority-cum-merit were introduced. In 1992, in the case of *Indira Sawhney Vs. Union of India & Ors.* [(1992) Supp.3 SCC 217], this Court had held that reservation in promotional posts for Scheduled Castes and Scheduled Tribes candidates was not permissible. The effect of the said decision was neutralized by the Constitution (Seventy Seventh Amendment) Act, enacted on 17th June, 1995, whereby Article 16(4-A) was inserted in the Constitution to provide for reservation in respect of Scheduled Castes and Scheduled Tribes candidates in promotional posts.

3. The aforesaid amendment led to a spurt of litigation. In 1996, while considering the said issue in the case of *Ajit Singh Januja & Ors. Vs. State of Punjab & Ors.* [(1996) 2 SCC 715] (Ajit Singh-I), this Court held that even if the person in reserved category is promoted earlier than a general category candidate due to operation of roster, and subsequently, the general category candidate was also promoted, the candidates in the general category would regain their seniority as existing in the cadre prior to promotion. This method of allowing a subsequent promotee to regain seniority came to be known as the "catch-up" principle. On 30th January, 1997, the Union of India issued a memorandum to all the various departments asking them to implement the decision rendered by this Court regarding regaining of seniority pursuant to the said direction. Thereafter, on 1st April, 1997, the State of Rajasthan followed suit and introduced the "catch-up" principle. A provisional seniority list of candidates belonging to the Rajasthan Administrative Services was issued on 26th June, 2000, on the basis of the Notification dated 1st April, 1997. However, it was never given effect to and was ultimately quashed by the Rajasthan High

Court in Writ Petition (Civil) Nos.2968 of 2000, 2176 of 2000, 3373 of 2000 and 3385 of 2000.

4. In 2001, the Parliament passed the Constitution (Eighty Fifth Amendment) Act inserting the words "consequential seniority" for members of reserved category. Thus the said amendment removed the basis of the judgment rendered by this Court in Union of India & Ors. Vs. Virpal Singh Chauhan [(1995) 6 SCC 684] and in *Ajit Singh-I's* case (supra). The provisions of the said amendment were given retrospective effect from 17.6.1995, in order to remove the provision relating to the "catch-up" principle with retrospective effect.

5. In 2002, a writ petition was filed before this Court by the All India Equality Forum against the State of Rajasthan, seeking to strike down the Constitution (Eighty Second Amendment) Act and the Constitution (Eighty Fifth Amendment) Act of 2001. The writ petitioner claimed similar reliefs as in *M. Nagaraj & Ors. Vs. Union of India & Ors.* [(2006) 8 SCC 212]. Thereafter, on 11th November, 2002, the interim order regarding implementation of Article 16(4-A) of the Constitution was clarified and it was indicated that if certain candidates from reserved category were entitled to promotion in terms of the provisions of Article 16(4-A), they would be promoted. It was, therefore, the stand of the Union of India that the interim order could not be construed to be a bar to implementation of the amendment to Article 16(4-A). The order also provided that no person was to be reverted from their existing placement or standing in the seniority list.

6. After having introduced the same, the State of Rajasthan by its Notification dated 28th December, 2002, withdrew the "catch-up" principle after the introduction of the Constitution (Eighty Fifth Amendment) Act. From the Notification dated 28th December, 2002, it would be seen that an attempt was made to preserve the rights of general category candidates, who had already been promoted vide Notification dated 1st April, 1997. It was also indicated that persons who had already been

promoted vide Notification dated 1st April, 1997, were not to be reverted.

7. The vires of Article 16(4-A), 16(4-B) and Article 335 of the Constitution was challenged and in M. Nagaraj's case (supra) it was considered by a Constitution Bench of this Court, which upheld the validity of Articles 16(4-A), 16(4-B) and the amendment to Article 335 of the Constitution, but imposed certain conditions regarding reservation in promotion and accelerated promotions. This Court directed that the State should collect quantifiable data, after which the Committee should also examine the requirements relating to backwardness, inadequacy in representation and efficiency for the purpose of grant of reservation in promotion and accelerated promotions. One of the areas of dispute between the parties is that the State Government also withdrew the "catch-up" principle in favour of general category candidates with retrospective effect, but without following the principles enunciated in M. Nagaraj's case (supra). On 24th June, 2008, a seniority list was drawn up without considering the "catch-up" principle, which also gave effect to the Notification dated 25th April, 2008.

8. On 22nd August, 2008, D.B. Civil Writ Petition No.8104 of 2008 was filed by Bajrang Lal Sharma and others, challenging the said Notification dated 25th April, 2008, and the seniority list drawn up consequent thereto. While entertaining the writ petition, the Division Bench of the High Court stayed the said Notification dated 25th April, 2008.

9. On 4th March, 2009, a seniority list was prepared, but the same was quashed by the learned Single Judge. The Notifications dated 28th December, 2002 and 23rd April, 2008, were challenged before the High Court by several candidates belonging to the general category and the same were ultimately quashed by the High Court on 5th February, 2010, on the ground that the conditions precedent laid down in *M. Nagaraj's* case (supra), had not been followed. The High Court was also

of the view that the right which had vested to the candidates by virtue of the Notification dated 1st April, 1997, and had been protected by Notification dated 28th December, 2002, had been illegally taken away vide Notification dated 25th April, 2008.

10. On 16th November, 2010, the general category employees filed a contempt petition against the Chief Secretary for not implementing the order passed by the High Court on 5th February, 2010, which was registered as D.B. Civil Contempt Petition No.914 of 2010 in D.B. Civil Contempt Petition No.8104 of 2009, titled as *Samta Andolan Vs. Salauddin Ahmad & Anr.* On an application filed before this Court, this Court vide its order dated 16th November, 2010, stayed the contempt proceedings pending before the High Court.

11. The case made out in the Contempt Petition was that despite the judgment dated 5th February, 2010, and the dismissal of the various Special Leave Petitions filed by the State of Rajasthan and others on 7th December, 2010, the State authorities were not complying with the said judgment. According to the Petitioners in the Contempt Petitions, the judgment of the High Court passed on 5th February, 2010, became final after the dismissal of the Special Leave Petitions, but despite the same, they were not being complied with by the concerned authorities of the State. The authorities were deferring compliance of the judgment dated 5th February, 2010, on the ground that they were undertaking the exercise of collecting quantifiable data required to enable the State of Rajasthan to exercise its powers under Article 16(4-A) of the Constitution. It was the further grievance of the Contempt Petitioners that the letter issued by the State on 14th February, 2011, was in purported compliance of the judgment dated 7th December, 2010, passed in SLP(C) No.6385 of 2010, asking all the Departments to give information with regard to the SC/ ST employees from 1.4.1997 onwards on year-wise basis, which was not contemplated in the M. Nagaraj judgment. It was

also the case of the Contempt Petitioners that Article 16(4-A) is an enabling provision based on the Government's information with regard to the backwardness and inadequate representation of SC/ST employees, which could not be given retrospective effect.

12. On account of the inaction of the alleged contemnors on the said ground, the Contempt Petitioners not only prayed for taking severe action against the Contemnors, but to also give suitable directions to the said Respondents/ Contemnors to implement the judgment dated 5th February, 2010, passed in D.B. Civil Writ Petition No.8104 of 2008 and that the Petitioners be allowed to regain their accrued and vested seniority.

13. As indicated hereinabove, the Division Bench of the High Court found the Appellants herein to be guilty of having committed contempt of Court for deliberate and willful violation of the order passed by the Division Bench of the Jaipur Bench of the Rajasthan High Court on 5th February, 2010.

14. Thereafter, on 7th December, 2010, the State of Rajasthan filed a Special Leave Petition against the order passed by the High Court on 5th February, 2010, by which the Notifications dated 28th December, 2002 and 25th April, 2008, had been quashed. While upholding the judgment of the High Court, this Court also observed that the claims of the reserved category candidates could be considered after following the principles laid down in M. Nagaraj's case (supra). On 22nd December, 2010, a substantive writ petition was filed by Captain Gurvinder Singh & Ors. etc. challenging the vires of the Rajasthan Scheduled Castes, Scheduled Tribes, Backward Classes, Special Backward Classes & Economically Backward Classes (Reservation of Seats in Educational Institutions in the State and of Appointments & Posts in Services under the State) Act of 2008, hereinafter referred to as "2008 Act". The main ground of challenge was with regard to the reservation exceeding the 50% ceiling due to extension of reservation to

Special Backward Classes & Economically Backward classes. The High Court by its order dated 22nd December, 2010, restrained the State from giving effect to Sections 3 and 4 of the 2008 Act. It is the case of the Appellants that the said order was directed against the reservation in respect of Special Backward Classes & Economically Backward Classes and had nothing to do with reservation in respect of promotion for Scheduled Castes and Scheduled Tribes candidates.

15. On 31st March, 2011, the State Government constituted the Bhatnagar Committee to look into the different aspects relating to reservation in promotion and consequential seniority in terms of the judgment rendered in *M. Nagaraj's* case (supra). Immediately, thereafter, on 13th April, 2011, a further contempt petition was filed by Shri Bajrang Lal Sharma. The Bhatnagar Committee Report was submitted to the State Government on 19th August, 2011 and on 11th September, 2011, the State Government, in exercise of its powers under the proviso to Article 309 of the Constitution of India and on the basis of the Bhatnagar Committee Report, framed a Rule with retrospective effect from 1st April, 1997, so that the vacuum which had been created could be filled up. The Rule also provided for roster-based promotion based on the posts available and also preserved the rights of the general category candidates who had earned promotions between the period 1st April, 1997 to 28th December, 2002, or the promotions which had actually been given effect to in terms of the repealed Notification dated 1st April, 1997.

16. Appearing for the Appellants, the learned Attorney General pointed out that the Notification issued by the State Government on 11th September, 2011, had been declared void by the High Court by holding that the same did not amount to valid compliance and the Notification dated 1st April, 1997, should be given effect to. The learned Attorney General submitted that since by the Notification dated 11th September, 2011, the earlier Notification dated 1st April, 1997 had been

withdrawn, the same could not be given effect to without first declaring the Notification dated 11th September, 2011, to be ultra vires.

17. The learned Attorney General submitted that the Notification dated 11th September, 2011, could not have been declared ultra vires in the absence of a substantive writ petition challenging the same, and, in any event, it could not be questioned in a contempt proceeding or be declared ultra vires therein, particularly, when the Bhatnagar Committee had been appointed in terms of the order passed by this Court in *M. Nagaraj's* case (supra) and the Notification dated 11th September, 2011, was issued in pursuance of the Report of the said Committee.

18. The learned Attorney General urged that by the order passed by the Division Bench of the High Court in D.B. Civil Writ Petition No.8104 of 2008, the Notifications dated 28th December, 2002, and 25th April, 2008, were declared to be ultra vires the Constitution. As a result, the consequential orders passed by the State, including preparation of the seniority list of the Super-time Scale Officers and the Selection Scale of the Rajasthan Administrative Service Officers, passed on the basis of the aforesaid Notifications, were quashed. Aggrieved by the said order, the State of Rajasthan and Shri Suraj Bhan Meena filed separate Special Leave Petitions before this Court which were disposed of on 7th December, 2010. This Court allowed the claim of Suraj Bhan Meena (SC/ST candidates), subject to the conditions laid down in *M. Nagaraj's* case (supra).

19. While the various above-mentioned proceedings were being pursued, Writ Petition No.13491 of 2009 was filed challenging the vires of the 2008 Act. A prayer was also made to review the ceiling limit in favour of SC, ST and OBC candidates of 16%, 12% and 21%, respectively. The Notification dated 25th August, 2009, was also questioned. The subject matter of the Writ Petition was focussed on reservation to special backward classes and economically backward

classes. By an order dated 22nd December, 2010, passed in the said Writ Petition, a Division Bench of the Rajasthan High Court stayed the operation of Sections 3 and 4 of the Act along with Notification dated 25th August, 2009, and the matter was referred to the Rajasthan State Backward Classes Commission, before whom the State Government was directed to place the quantifiable data within a period of one year. The stay granted was directed to continue till the matter was decided afresh.

20. Subsequently, contempt proceedings were taken, being No.359 of 2011, challenging the letter dated 14th February, 2011, issued by the State of Rajasthan to the Heads of all Departments asking for information regarding representation of SC/ST employees. Ultimately, by the order impugned in these appeals, the High Court held the Appellants herein to be guilty of contempt of Court, inasmuch as, despite sufficient time having been given to the Respondents to comply with the order dated 5th February, 2010, the Appellants failed to do so even after a lapse of 14 months after their Special Leave Petitions were dismissed by this Court. The High Court also took note of the fact that the Appellant No.1 herein, Shri Salauddin Ahmed, did not even reply to the show-cause notice issued to him, which the High Court interpreted to mean that the said Appellant had nothing to say in his defence regarding the allegation of contempt of Court made against him. The High Court further noted that on several occasions time was sought for by the State to comply with the order passed on 5th February, 2010, but nothing was done in the matter. Giving the Appellants 3 days' time to purge themselves of the contempt and to comply with the orders passed by the Court, the Court further directed the Appellants to be present in person before the Court for the purpose of sentencing in case of non-compliance.

21. Aggrieved by the order of the Division Bench of the Rajasthan High Court, the State Government filed Civil Appeal

No.2504-2505 of 2011 and on 27th February, 2012, this Court issued notice and stayed further proceedings before the High Court.

22. The learned Attorney General submitted that the order dated 5th February, 2010, was in two parts. While one part dealt with quashing of the Notifications dated 28th December, 2002 and 25th April, 2008, the other part was with regard to the directions given in *M. Nagaraj's* case (supra) for the collection of quantifiable data. It was further submitted that the State of Rajasthan had consistently acted as per the directions given in paragraph 68 of the judgment rendered in Suraj Bhan Meena's case (supra), whereby it was directed that the claim of the Petitioners, Suraj Bhan Meena and Sriram Chordia, in SLP (C) No.6385 of 2010, would be subject to the conditions laid down in *M. Nagaraj's* case (supra).

23. The learned Attorney General submitted that pursuant to the directions given in *Suraj Bhan Meena's* case (supra), the State of Rajasthan issued a letter to all the Departments on 14th February, 2011, to ensure compliance of the judgment dated 7th December, 2010. In addition, the State Government sought information with regard to representation of SC/ST employees in public employment from 1.4.1997 to 1.4.2010 on a year-wise basis. The learned Attorney General contended that on 8th March, 2011, one more contempt petition was filed, viz., Contempt Petition No.359 of 2011, in relation to the letter dated 14th February, 2011, referred to hereinabove. It was submitted that the State cannot collect data with retrospective effect in pursuance of the decision in *M. Nagaraj's* case (supra) and the judgment dated 7th December, 2010. It was also submitted that the State of Rajasthan was not required to collect the quantifiable data to comply with the judgment dated 5th February, 2010.

24. It was also contended that the contempt petitioner had misunderstood the import of the judgment dated 5th February, 2010, passed by the Division Bench of the High Court in

relation to the judgment of this Court dated 7th December, 2010. The learned Attorney General submitted that it was on account of the confusion in the mind of the Petitioner that a prayer had been made in the Contempt Petition for suitable directions upon the contemnors to implement the judgment dated 5th February, 2010, passed in D.B. Civil Writ Petition No.8104 of 2008 and to allow the Petitioners to regain their accrued and vested seniority given to them in pursuance of the seniority list of 26.6.2000. It was submitted that the seniority list of 26.6.2000 had already been quashed by the High Court in a dispute between direct recruits and promotees and the said matter is pending in this Court by way of a Special Leave Petition.

25. The learned Attorney General submitted that the constitution of the Bhatnagar Committee in pursuance of the order passed by this Court on 7th December, 2010, was challenged by filing of interlocutory applications, both before this Court and also before the High Court. All the interlocutory applications were taken up for consideration and disposed of by this Court on 20th July, 2011. The learned Attorney General submitted that in the said order, this Court had recorded the fact that Mr. M.L. Lahoti, learned counsel appearing for the Respondents, did not challenge the formation of the Committee, but contended that its findings should have prospective operation and could not affect the case of the writ petitioners, Suraj Bhan Meena and others. It was also emphasized that this Court took cognizance of the constitution of the Bhatnagar Committee, but did not pass any restraint orders with regard to its functioning. On the other hand, while disposing of the several interlocutory applications, this Court also observed that the parties would be free to make their submissions with regard to the action taken by the State Government in the matter pending before the High Court. The learned Attorney General urged that the High Court had noticed the order passed by this Court on 7th December, 2010, but had not considered the directions contained therein.

26. The learned Attorney General submitted that the Bhatnagar Committee Report had been submitted on 19th August, 2011, and after due consideration of the Report, a Notification was issued on 11th September, 2011. However, it was also noticed by the High Court that the constitution of the Bhatnagar Committee, as also the Notification issued on 11th September, 2011, was not in conformity with the judgment rendered by the High Court on 5th February, 2010, without noticing that the same was in compliance of the directions contained in paragraph 68 of the judgment delivered by this Court on 7th December, 2010. The learned Attorney General submitted that the directions contained in the aforesaid judgment dated 7th December, 2010, recognizing the rights of the reserved category (Petitioners therein) and directing the determination of such rights, be undertaken after completion of the exercise laid down in *M. Nagaraj's* case (supra).

27. On maintainability, it was contended that it was beyond the powers of this Court to declare a law ultra vires in the contempt jurisdiction. It was also contended that in view of the decision of this Court in *State of U.P. vs. Hirendra Pal Singh* [(2011) 5 SCC 305], a judicial order could not be passed to give effect to a repealed law or a law which was no longer in existence, as has been done in the instant case. The learned Attorney General reiterated that the High Court had erroneously declared the Notification dated 11th September, 2011, to be ultra vires without any challenge being made to such Notification.

28. The learned Attorney General submitted that the Bhatnagar Committee had been formed pursuant to the directions given by this Court in *Suraj Bhan Meena's* case (supra) and this Court while disposing of the Special Leave Petitions filed by Suraj Bhan Meena and others categorically indicated that the impugned order of the High Court was, in fact, based on the decision in *M. Nagaraj's* case (supra) as no exercise had been undertaken in terms of Article 16(4-A) to

acquire quantifiable data regarding the inadequacy of representation of the Scheduled Castes and Scheduled Tribes communities in public service and that the Rajasthan High Court had rightly quashed the notifications dated 28th December, 2002 and 25th April, 2008, issued by the State of Rajasthan providing for consequential seniority and promotion to the members of the Scheduled Castes and Scheduled Tribes communities. The Special Leave Petitions were, therefore, disposed of by observing that the claim of the Petitioners, Suraj Bhan Meena and Sriram Chordia in SLP (C) No.6385 of 2010, would be subject to the conditions laid down in *M. Nagaraj's* case (supra). The Special Leave Petitions filed by the State of Rajasthan were consequently dismissed. The learned Attorney General urged that this Court had, in fact, directed that the parties would be free to make their submissions with regard to the action taken by the State Government in the matter pending before the High Court.

29. The learned Attorney General concluded on the note that as recently observed by this Court in *Dinesh Kumar Gupta Vs. United India Insurance Co. Ltd.* [(2010) 12 SCC 770], in order to establish that a civil contempt had been committed, it would have to be shown that the concerned authority had willfully and deliberately disobeyed the orders passed by the High Court without any reasonable or rational interpretation of the order. It was also observed that it would not also be correct to hold that a contempt had been committed when the disobedience was neither deliberate nor willful, but the steps taken were on account of the ignorance of the correct legal position and the action taken was in good faith without any malafide motive to defeat or defy the Court's order.

30. The learned Attorney General submitted that in this case, in compliance with the decision in *Suraj Bhan Meena's* case (supra) and the directions given both in *M. Nagaraj's* case (supra)and in *Suraj Bhan Meena's* case (supra), the concerned authorities had appointed the Bhatnagar Committee to enter

into a fact finding exercise in accordance with the provisions of Article 16(4-A) of the Constitution. It could not be said that there was any willful or deliberate intention or malafide motive on the part of the concerned authorities in not complying with the directions contained in the judgment of the High Court dated 5th February, 2010. The Contempt Petition was, therefore, liable to be dismissed.

31. Mr. C.S. Vaidyanathan, learned Senior Advocate, who had appeared for the second contemnor, Khemraj Chaudhary, while adopting the submissions made by the learned Attorney General, submitted that the steps taken by the Respondents were in keeping with the directions given both in *M. Nagaraj's* case (supra)and in *Suraj Bhan Meena's* case (supra), for identifying such members of the SC/ST communities who would be entitled to the benefits provided under Article 16(4-A) of the Constitution. Mr. Vaidyanathan reiterated the submissions made before the High Court that the Contempt Petitions were, in fact, not maintainable as the orders out of which the same had arisen had merged in the order of this Court when the Special Leave Petitions were dismissed by a reasoned judgment. Accordingly, by virtue of the doctrine of merger, the said orders do not exist and, if any contempt is alleged, it would be with regard to the orders passed by this Court and the High Court had no jurisdiction to entertain the matter.

32. Mr. Vaidyanathan further submitted that on account of non-compliance with the three requirements indicated in *M. Nagaraj's* case (supra), the notification dated 28th December, 2002, stood vitiated. However, with the quashing of the said notification dated 28th December, 2002, the notification dated 1st April, 1997, which stood deleted by notification dated 28th December, 2002, stood revived and continued to be in operation.

33. Mr. Harish Salve, learned Senior Advocate, who also appeared for the Respondents, contended that Civil Appeal No.171 of 2002, filed by the State of Rajasthan against

Hanuman Singh Bhati & Ors., was pending before this Court, but this Court had not stayed the operation of the orders either of the Single Bench or the Division Bench. As a result, even by sheer inaction in carrying out the directions contained in the judgment of this Court dated 7th December, 2010, the contemnors had violated the orders of this Court, as there was no justification for the contemnors not to give effect to the directions contained in the said order. Mr. Salve submitted that in *Maninderjit Singh Bitta Vs. Union of India & Ors.* [(2012) 1 SCC 273], this Court had held that even inaction to implement the orders of the Court amounts to disobedience within the meaning of civil contempt. Mr. Salve urged that in the absence of any stay, the contemnors ought not to have sat over the matter, but should have taken steps to implement the directions contained in the said order. Mr. Salve submitted that so long as the catch up principle in terms of the Notification dated 1st April, 1997, continued to be in existence, no change could be made in matters of promotion, unless the requirements set out in M. Nagaraj's case were fully satisfied. Mr. Salve urged that in the facts and circumstances of this case, contempt was writ large on account of inaction of the contemnors in giving effect to the directions contained in the judgment dated 5th February, 2010.

34. Dr. Rajeev Dhawan, learned Senior Advocate, who also appeared for the Respondents, approached the matter from a slightly different angle. Arguing that the doctrine of merger could not be applied to a contempt proceeding, *Dr. Dhawan referred to Kunhayammed & Ors. Vs. State of Kerala & Anr.* [(2000) 6 SCC 359]. Dr. Dhawan urged that the doctrine of merger depends on the facts of each case. Dr. Dhawan submitted that even in *Suraj Bhan Meena's* case (supra), this Court upheld the judgment of the High Court dated 5th February, 2010, without making any changes, which could have altered the purport of the said judgment. Dr. Dhawan also contended that so long as the "catch-up" doctrine continued to be in force under the Notification dated 1st April, 1997, which stood

revived on account of the quashing of the Notifications dated 28th December, 2002 and 25th February, 2008, it could not be contended that by appointing the Bhatnagar Committee, the alleged contemnors had not willfully violated the directions given by this Court in *Suraj Bhan Meena's* case (supra).

35. Dr. Dhawan fairly conceded that an order may be violated without any willful intent to disobey the same. Referring to paragraph 459 of Halsbury's Laws of England, dealing with "unintentional disabilities", Dr. Dhawan pointed out that sometimes it may so happen that an order of Court is breached without any intention on the part of the offender to do so. Dr. Dhawan submitted that this could be such a case and, accordingly, the contemnors could be directed to purge themselves of the contempt by withdrawing all the Notifications, including the Notification dated 11th September, 2011, and implementing the order dated 5th February, 2010, and also to punish the contemnors without sentence.

36. In order to establish that a person had deliberately and willfully committed contempt of Court, two essential ingredients have to be proved. Firstly, it has to be established that an order has been passed by the Court which either directs certain things to be done by a person or to restrain such person or persons from doing certain acts and that the person or persons had knowledge of the said order. Secondly, it has to be established that despite having knowledge of such order, the person concerned deliberately and willfully violated the same with the intention of lowering the dignity and image of the Court. We have to see whether in the facts of this case the said two tests are satisfied.

37. Admittedly, Civil Writ Petition No.8104 of 2008, along with several other writ petitions, were disposed of by the Division Bench by its judgment and order dated 5th February, 2010, by quashing the Notifications dated 25th April, 2008 and 28th December, 2002, issued by the State Government without following the exercise indicated in *M. Nagaraj's* case (supra).

As has been mentioned hereinbefore, by its Notification dated 25th April, 2008, the Government of Rajasthan in exercise of its powers conferred by the proviso to Article 309 of the Constitution of India, amended the Rajasthan Various Service Rules, as mentioned in the Schedule appended therewith, with effect from 28th December 2002. By such amendment, the existing proviso to the Rule providing that a candidate, who had got the benefit of the proviso inserted vide Notification dated 1st April, 1997, on promotion to an immediate higher post, would not be reverted and his seniority would remain unaffected, subject to the final decision of this Court in Writ Petition (C) No.234/2002, was deleted. For the sake of record, it may be indicated that before the Division Bench of the High Court it had been conceded by the learned Advocate General that the exercise as contemplated in *M. Nagaraj's* case (supra), had not been undertaken by the State before issuing the Notifications dated 25th April, 2008 and 28th December, 2002. It is on that basis that the said two Notifications and all consequential orders or actions taken by the Respondent State, including preparation of seniority list of Super Time Scale and Selection Scale Officers of the Rajasthan Administrative Service, on the basis thereof, were also quashed and set aside. While quashing the said Notifications, the Division Bench took note of the observations made in *M. Nagaraj's* case (supra) that Clause (4-A) of Article 16 was only an enabling provision and the State was not bound to make reservations of Scheduled Castes and Scheduled Tribes in the matter of promotion, but if they did wish to exercise their discretion in that regard, the State had to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment, in addition to compliance with Article 335. The same not having been done, the said Notifications were quashed.

38. Inasmuch as, no further action was taken by the State and its authorities after the said Notifications were quashed, the contempt petition was filed mainly on the ground that the

State and its authorities had by their inaction in complying with the requirements set out in *M. Nagaraj's* case (supra), committed contempt of Court and the same was accepted and the Appellants herein were found guilty of having committed contempt of Court by such inaction.

39. The next thing that we are required to consider is whether such inaction was on account of any circumstances which prevented the State Government and its authorities from taking action in terms of the observations made by the Division Bench of the High Court in its judgment dated 5th February, 2010, or whether such inaction was on account of the deliberate intention of the State and its authorities not to give effect to the same.

40. The learned Attorney General, who had appeared for the State of Rajasthan and its authorities, had submitted that the Order dated 5th February, 2010, was in two parts. While one part dealt with the quashing of the two Notifications, the other was with regard to the observations made in the said order with regard to the directions given in *M. Nagaraj's* case (supra) for collection of the quantifiable data before giving effect to the provisions of Article 16(4-A) of the Constitution. The learned Attorney General has also emphasized that in order to give effect to the second part of the judgment and order of the Division Bench of the Rajasthan High Court and the directions given in paragraph 68 of the judgment in *Suraj Bhan Meena's* case (supra), the Government of Rajasthan had appointed the Bhatnagar Committee to obtain the quantifiable data to comply with the directions given in the two aforesaid judgments. The learned Attorney General has also pointed out that directions have been given to all the different departments on 14th February, 2011, to ensure compliance with the directions contained in *Suraj Bhan Meena's* case (supra).

41. Although, it has been urged on behalf of the Respondents that there was a restraint order on the State and

its authorities from giving effect to the observations made in the order passed by the Division Bench of the High Court on dated 5th February, 2010, or even in the order passed in *Suraj Bhan Meena's* case (supra), the State and its authorities remained inactive on the plea that it had appointed the Bhatnagar Committee to collect the data necessary in terms of the judgment and order passed in *M. Nagaraj's* case, which had been reiterated by this Court in *Suraj Bhan Meena's* case (supra).

42. The explanation given on behalf of the State and its authorities cannot be discounted, since in order to act in terms of the sentiments expressed by the High Court and this Court, it was necessary to collect the quantifiable data in respect of Scheduled Castes and Scheduled Tribes candidates. For collection of such data, the State appointed the Bhatnagar Committee which was entrusted with the work of obtaining such quantifiable data so that the provisions of the amended Clause (4-A) included in Article 16 of the Constitution could be given effect to in terms of the directions given in *M. Nagaraj's* case subsequently reiterated in *Suraj Bhan Meena's* case.

43. The various submissions advanced by Mr. Salve, Dr. Dhawan and Mr. Sanjeev Prakash Sharma in support of the decision of the Division Bench of the High Court, holding the Appellants guilty of contempt of Court and, in particular, the alleged inaction to implement the judgment and orders in *M. Nagaraj's* case and *Suraj Bhan Meena's* case are not very convincing, since in order to comply with the findings in *M. Nagaraj's* case and *Suraj Bhan Meena's* case, necessary data was required to be collected, in the absence of which it was not possible for the State and its authorities to act in terms of the observations made in *M. Nagaraj's* case and in *Suraj Bhan Meena's* case (supra).

44. Accordingly, we are of the view that despite the fact that there has been delay on the part of the State and its

authorities in giving effect to the observations made in the two aforesaid cases, there was no willful or deliberate intention on their part to defy the orders of this Court. The very fact that the Bhatnagar Committee was appointed indicates that the State and its authorities had every intention to implement the aforesaid observations, though the progress of such implementation has been tardy. Accordingly, we are unable to sustain the impugned judgment and order of the Division Bench of the High Court holding the Appellants guilty of contempt of Court for purported violation of the order passed by the Division Bench of the Jaipur Bench of the Rajasthan High Court on 5th February, 2010, while disposing of the Civil Writ Petition No.8410 of 2008. Consequently, the judgment and order under appeal has to be set aside.

45. We, accordingly, allow the appeals and set aside the aforesaid judgment, but with the further direction that the State and its authorities act in terms of the Report of the Bhatnagar Committee, in accordance with the decision rendered in M. Nagaraj's case and in *Suraj Bhan Meena's* case (supra), within two months from the date of communication of this judgment and order.

46. There will be no order as to costs.

R.P. Appeals allowed.

STATE OF M.P.
v.
AYUB KHAN
(Criminal Appeal No. 1324 of 2012)

AUGUST 29 , 2012

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

ARMS ACT, 1959:

s.25(1)(a) - Unauthorised possession of arms - Punishment - Held: Proliferation of arms and ammunition, whether licensed or not, in the country disrupts the social order and development, vitiates law and order situation, directly contributes towards lethality of violent acts which needs to be curbed - Taking into consideration all these aspects, including the national interest and safety of the citizens, the Legislature in its wisdom has prescribed a minimum mandatory sentence (imprisonment for a term 'not less than three years' - Once the accused was found guilty of the offence, he has necessarily to undergo the minimum mandatory sentence, prescribed under the Statute - Law enforcing agencies and courts should not treat such crimes lightly - High Court and the courts below have committed a serious error in not awarding the minimum mandatory sentence prescribed - Orders of sentence passed by High Court as well as the courts below are set aside - Respondent-accused has to undergo a minimum period of three years sentence as prescribed u/s 25(1)(a) and also with a fine of Rs.5000/-.

The instant appeal was filed by the State against the judgment and order of the High Court by which it upheld the conviction of the respondent u/s 25(1)(a) of the Arms Act, 1959 for being in possession of a country made gun with 2 round bullets and 50 gms explosive, without

licence, but reduced the sentence of one year's RI and a fine of Rs.100/- imposed by the trial court and upheld by the appellate court, to the period already undergone (i.e. 7 days) with a fine of Rs.5000/-.

Allowing the appeal, the Court

HELD: 1. Proliferation of arms and ammunition, whether licensed or not, in the country disrupts the social order and development, vitiates law and order situation, directly contributes towards lethality of violent acts which needs to be curbed. Legislature, in its wisdom, has fixed a mandatory minimum sentence for certain offences - keeping, possessing arms and ammunition is a serious offence - which shall not be less than three years. A person who is found to be in possession of country made barrel gun with two round bullets and 50 grams explosive without licence, must in the absence of proof to the contrary be presumed to be carrying it with the intention of using it when an opportunity arises which would be detrimental to the people at large. Once the accused was found guilty of the offence u/s 25(1)(a) of the Arms Act, he has necessarily to undergo the minimum mandatory sentence, prescribed under the Statute. Keeping in view the safety of the citizens, the national security, and integrity and unity of the country, the law enforcing agencies and the courts should not treat such crimes lightly. [para 2 and 10] [429-E-F; 433-A-D]

1.2 The High Court and the courts below have committed a serious error in not awarding the minimum mandatory sentence prescribed under the Statute. Error is apparent on the face of the High Court's order. The High Court has confined the sentence to the period the accused was in custody stating that he had already served substantive period of jail sentence. The accused was in custody only for seven days i.e. from 14.9.05 to 20.9.05. Thus, the High Court could not have reached a

finding that the accused had served the substantive period of jail sentence. The orders of sentence passed by the High Court as well as the courts below are set aside and it is ordered that the respondent-accused has to undergo a minimum period of three years sentence as prescribed u/s 25(1)(a) of the Arms Act and also with a fine of Rs.5000/-. [para 8-9 and 12] [431-G-H; 432-A-B; 433-F-G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1324 of 2012.

From the Judgment & Order dated 15.01.2009 of the High Court of Madya Pradesh, Bench at Gwalior in Criminal Revision No. 472 of 2008.

Sunny Chaudhary, C.D. Singh for the Appellant.

Yogesh Tiwari, Vikrant Singh Bais for the Respondent.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Leave granted.

2. Proliferation of arms and ammunition, whether licensed or not, in the country disrupts the social order and development, vitiates law and order situation, directly contributes towards lethality of violent acts which needs to be curbed. We are sorry to note the law enforcing agencies and to certain extent the courts in the country always treat the crimes lightly without noticing the havoc they can create to the ordinary peace loving citizens of this country and to the national security and the integrity and the unity of this nation. We may indicate, the case in hand shows, how casually and lightly, these types of cases are being dealt with by the courts.

3. ASI S.S. Gaur and P.P. Mrigwas while on patrol duty apprehended that the accused on 13.09.2005 at 8.30 pm while they were coming from Bakaniya to Mrigwas Road, Guna, M.P. The accused was found to be in possession of country made

barrel gun with two round bullets and 50 grams of explosives, without any licence. The accused was charge-sheeted for the offence punishable under Section 25(1)(a) of the Arms Act, 1959 (for short 'the Arms Act') and was tried before the Court of the Judicial Magistrate First Class, Chachoda. From the side of the prosecution seven witnesses were examined. After considering the oral and documentary evidence, the court came to the conclusion that the accused was guilty of the offence under Section 25(1)(a) of the Arms Act and on sentence, the court passed the following order:

> "There is no previous crime in the name of the accused and certainly the accused is the first time offender but from the possession of the accused a rifle was found illegally in his possession, therefore, it is not proper to adopt a lenient approach towards the accused. Only in view of the time taken by the trial and the time already spent by the accused in custody, the accused is not punished with the maximum punishment and, therefore, the accused Ayub Khan is sentenced to one year of R.I. and a fine of Rs.100/- for the offence punishable u/w 25(1)(a) of the Arms Act."

4. The Court then noticed that the accused was in custody from 14.9.05 to 20.9.05 and the said period was deducted from the original sentence applying Section 428 of the Code of Criminal Procedure.

5. Aggrieved by the said order the accused filed Criminal Appeal No.170 of 2008 before the Additional Sessions Judge, Chachoda on the ground that the conviction of the accused under Section 25(1)(a) of the Arms Act was illegal and that the accused had not committed any offence. The Additional Sessions Judge, however, vide his order dated 9.7.2008 confirmed the conviction and the sentence awarded by the Chief Judicial Magistrate. The accused then filed Criminal Revision No.472 of 2008 before the Hon'ble High Court of Madhya Pradesh, Bench at Gwalior. The High Court confirmed the order of conviction passed by the trial court but so far as

the sentence is concerned, the High Court passed the following order on 15.01.2009:

> "so far as the period of sentence is concerned, looking to the limited prayer made by the counsel for the petitioner and the nature of offence and the fact that *the petitioner has already served substantive period of jail sentence* the purpose would be served in case the jail sentence awarded to the petitioner is reduced to the period already undergone, subject to depositing fine of Rs.5,000/- within a period of two months, in default the petitioner shall suffer jail sentence awarded by the Learned Court below."

6. Aggrieved by the said order, the State of Madhya Pradesh has approached this Court.

7. Learned counsel appearing for the State submitted that the High Court and the courts below have committed an error in not awarding the minimum statutory sentence to the accused, even after, convicting him for an offence committed under Section 25(1)(a) of the Arms Act. Learned counsel submitted that as per the said Section the minimum statutory sentence is three years but the same can be extended to seven years and the accused shall also be liable to fine. Learned counsel appearing for the respondent-accused submitted that on the peculiar facts and circumstances of the case on hand, the High Court was justified in confining the sentence of the accused to the period already undergone subject to depositing the fine of Rs.5,000/-.

8. We are of the view that the Chief Judicial Magistrate as well as the Sessions Court have committed an error in the manner in which sentence has been awarded and the High Court has committed a grievous error in not awarding the proper sentence after having found the accused guilty under Section 25(1)(a) of the Arms Act. Error is apparent on the face of the High Court's order. The High Court has confined the sentence to the period the accused was in custody stating that

he had already served substantive period of jail sentence. We are sorry to note that the High Court has not taken pains to examine what was the period he had served by way of substantive sentence. The accused was in custody only for seven days i.e. from 14.9.05 to 20.9.05. We fail to see how the High Court has reached a finding that the accused had served the substantive period of jail sentence.

9. We are of the view, that the High Court and the courts below have committed a serious error in not awarding the minimum mandatory sentence prescribed under the Statute. Chapter V of the Arms Act deals with the offences and penalties. The accused was charge-sheeted for the offence under Section 25(1)(a) of the Arms Act for which minimum mandatory sentence was not less than three years. For reference sake, the said provision, in its entirety, is extracted hereunder:

> "25.Punishment for certain offences --(1) Whoever
>
> (a) manufactures, sells, transfers, converts, repairs, tests or proves, or exposes or offers for sale or transfer, or has in his possession for sale, transfer, conversion, repair, test or proof, any arms or ammunition in contravention of section 5; or
>
> (b) shortens the barrel of a firearm or converts an imitation firearm into a firearm in contravention of section 6; or
>
> (c) * * * * *
>
> (d) brings into, or takes out of, India, any arms or ammunition of any class or description in contravention of section 11
>
> shall be punishable with imprisonment *for a term which shall not be less than three years* but which may extend to seven years and shall also be liable to fine."

10. Legislature, in its wisdom, has fixed a mandatory minimum sentence for certain offences - keeping, possessing arms and ammunition is a serious offence which shall not be less than three years. Legislature, in its wisdom, felt that there should be a mandatory minimum sentence for such offences having felt the increased need to provide for more stringent punishment to curb unauthorised access to arms and ammunition, especially in a situation where we are facing with menace of terrorism and other anti national activities. A person who is found to be in possession of country made barrel gun with two round bullets and 50 grams explosive without licence, must in the absence of proof to the contrary be presumed to be carrying it with the intention of using it when an opportunity arise which would be detrimental to the people at large. Possibly, taking into consideration all those aspects, including the national interest and safety of the fellow citizens, the Legislature in its wisdom has prescribed a minimum mandatory sentence. Once the accused was found guilty for the offence committed under Section 25(1)(a) of the Arms Act, he has necessarily to undergo the minimum mandatory sentence, prescribed under the Statute.

11. The Chief Judicial Magistrate has overlooked this vital fact and awarded only one year's R.I. and a fine of Rs.100/-, which was confirmed by the Sessions Court. The High Court has made it worst by reducing the sentence to the period already undergone, which was only seven days, in a case where the accused should have undergone a minimum sentence of three years and fine under Section 25(1)(a) of the Arms Act.

12. We, therefore, allow this appeal, set aside the order of sentence passed by the High Court as well as the courts below and order that the respondent-accused has to undergo a minimum period of three years sentence as prescribed under Section 25(1)(a) of the Arms Act and also with a fine of Rs.5000/-, in default, another three months simple imprisonment.

R.P. Appeal allowed.

VIJAY SINGH
v.
STATE OF DELHI
(Criminal Appeal No.1322 of 2012)

AUGUST 29, 2012

[T.S. THAKUR AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Juvenile Justice (Care & Protection of Children) Act, 2000 [as amended] - ss. 2(k), 2(l), 7A, 20 and 49 - Juvenile Justice (Care and Protection of Children) Rules, 2007 - rr.12 and 98 - Appellant allegedly gave knife blows on the person of PW-4 - Trial court convicted appellant u/s.307 IPC and sentenced him to rigorous imprisonment for five years - Conviction and sentence confirmed by High Court - Before Supreme Court, for the first time the appellant took the plea of juvenility - Placing reliance upon his school leaving certificate, the appellant pleaded that that he was a juvenile on the date of the occurrence - Held: On facts, order of conviction imposed on the appellant not liable to be interfered with - However, as per the school leaving certificate, the date of birth of appellant recorded in the school admission register was 1-12-1981 - Principal/Head Master of the School verified the admission register - Report submitted by the District Judge also disclosed that the certificate was genuine, and that the date of birth recorded therein was correct - Thus, on the date of offence i.e. 11-3-1998, the appellant was 16 years 3 months and 10 days old - Since appellant was below 18 years of age on the date of commission of the offence, the provisions of the Juvenile Justice Act would apply in full force in his case - However, since the offence was alleged to have been committed more than 10 years ago and the appellant would have now crossed the age of 30 years, no point in remitting the matter back to the Juvenile Justice Court and instead,

appropriate orders can be passed by the Supreme Court itself - Consequently, conviction of appellant sustained, but the sentence imposed on him set aside - Penal Code, 1860 - s.307.

The offence alleged against the appellant was that on 11-3-1998, he gave knife blows on the person of PW-4 who demanded repayment of the money (Rs.3,000/-) lent to the appellant. The trial court convicted the appellant under Section 307 IPC and sentenced him to rigorous imprisonment for five years. The conviction and sentence was confirmed by the High Court.

In the instant appeal before this Court, for the first time the appellant took the plea of juvenility. Placing reliance upon the date of birth recorded in his School Leaving Certificate (wherein the date of birth of the appellant was recorded as 1-12-1981), the appellant contended that he was less than 18 years of age on the date of the incident i.e. 11-3-1998. This Court directed an enquiry by the District Judge as to whether the appellant was a juvenile on 11-3-1998 and to submit a detailed report. The District Judge returned a finding that on the date of the incident, namely, 11-3-1998, the age of the appellant was less than 18 years of age, and therefore he was a juvenile on that date.

Partly allowing the appeal, the Court

HELD: 1. Having regard to the overwhelming evidence led before the trial Court and on being convinced of the proof of guilt against the appellant, the appellant was convicted for the offence under Section 307, IPC alongwith a sentence of five years' rigorous imprisonment. The High Court, on a detailed analysis of the evidence available on record and the injuries sustained by the vicitim-PW-4, which was supported by

medical evidence, dismissed the appeal. In the circumstances, this Court does not find any scope to interfere with the order of conviction imposed on the appellant. [Para 7] [442-C-D]

2. The plea of juvenility taken by the appellant is to be considered in the light of the provisions of the Juvenile Justice Act, 1986 (the Act) as repealed by the Juvenile Justice (Care & Protection of Children) Act, 2000, as well as, the subsequent amendment of 2006 read along with the Juvenile Justice (Care and Protection of Children) Rules, 2007.The relevant provision which is required to be noted is Section 7A of the Act in the present form which came to be inserted by the amendment Act of 33/2006 w.e.f. 22.08.2006. The other provisions are Section 2 (l) the definition of 'juvenile in conflict with law', Section 20 of the Act and Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 which prescribe the procedure to be followed in the matter of determination of age. The application of the above provisions in the light of the subsequent amendment to the Act introduced in the year 2006 and the Rules introduced in the year 2007 came to be considered in detail by this Court in Hari Ram's case wherein it was held that all persons who were below the age of 18 years on the date of commission of the offence even prior to 1.4.2001, would be treated as juveniles, even if the claim of juvenility was raised after they had attained the age of 18 years on or before the date of commencement of the Act and were undergoing sentence upon being convicted. [Paras 8, 9, 10 and 12] [442-E-H; 443-A-B; 444-G-H; 445-A]

3.1. Going by Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007, in particular, sub-Rule (3), the age determination inquiry should be

conducted by the Court or by the Board or the Committee by seeking evidence by obtaining (a) (i) the matriculation or equivalent certificate, if it is available; and in the absence whereof; ii) the date of birth certificate from the School (other than a play school) first attended; and in the absence whereof; iii) the birth certificate given by a corporation or municipal authority or a panchayat; b) and in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year. [Para 14] [445-B-E]

3.2. Going by sub-rule 3(a)(ii) of aforesaid Rule 12, the date of birth certificate from the school (other than a play school) first attended, comes at the second stage in the order of priority for consideration to ascertain the age of accused claiming to be a juvenile. In the case on hand, the appellant does not claim to be a matriculate. Therefore, the question of matriculation or equivalent certificate and its availability does not arise. The present claim as a juvenile is based on the School Leaving Certificate issued by the school in which the appellant stated to have studied up to 5th class. As per the said certificate, the date of birth recorded in the school admission register and the corresponding entry in the School Leaving Certificate was 01.12.1981. The appellant stated to have joined the school on 01.08.1989 and left the school after subsequently completing his 5th standard on 01.07.1992. The correctness of the said certificate as examined by the District Judge (as directed by this Court) has to be seen from the report dated

26.03.2012. The Principal/Head Master of the School also verified the admission register. The counterfoil of the said School Leaving Certificate is placed before this Court. A perusal of the report also discloses that the certificate was genuine, that the date of birth record therein has been found to be correct and once the said position could be ascertained based on the above report, applying Rule 12 (3) as well as sub-rules (4) and (5) the said Rule read along with Section 7A of the Act the appellant on 11.03.1998 was 16 years 3 months and 10 days old. The appellant, therefore, is covered by the decision of this Court in Hari Ram case. Since the appellant was below 18 years of age on the date of commission of the offence, the provisions of the Act would apply in full force in his case. [Para 15] [445-F-H; 446-A-D]

Hari Ram v. State of Rajasthan and Anr. **2009 (13) SCC 211: 2009 (7) SCR 623 - relied on.**

4. Having regard to the above conclusion, in the normal course this Court would have remitted the matter to the Juvenile Justice Court for disposal in accordance with law. However, since the offence was alleged to have been committed more than 10 years ago and the appellant would have now crossed the age of 30 years, there is no point in remitting the matter back to the Juvenile Justice Court. Instead, appropriate orders can be passed by this Court itself. It is clear that the appellant was below 18 years of age on the date of commission of offence and the Juvenile Justice Act would apply in full force in his case. While upholding the conviction imposed on the appellant, the sentence imposed on him is set aside and it is directed that he be released forthwith, if not required in any other case. [Paras 16, 23] [446-D-E; G-H; 447-A; 454-A-B]

Jayendra & Anr. v. State of Uttar Pradesh **1981 (4) SCC**

149; *Bhoop Ram v. State of U.P.* **1989 (3) SCC 1;** *Bhola Bhagat v. State of Bihar* **1997 (8) SCC 720: 1997 (4) Suppl. SCR 711;** *Pradeep Kumar v. State of U.P.* **1995 Suppl.(4) SCC 419;** *Upendra Kumar v. State of Bihar* **2005 (3) SCC 592 and** *Vaneet Kumar Gupta alias Dharminder v. State of Punjab* **2009 (17) SCC 587 - relied on.**

Case Law Reference:

2009 (7) SCR 623	**relied on**	**Para 10, 15**
1981 (4) SCC 149	**relied on**	**Paras 16,17, 18, 19**
1989 (3) SCC 1	**relied on**	**Paras 16,18, 19, 21**
1997 (4) Suppl. SCR 711	**relied on**	**Paras 16,19, 20, 21**
1995 Suppl.(4) SCC 419	**relied on**	**Paras 16, 19**
2005 (3) SCC 592	**relied on**	**Paras 16, 21**
2009 (17) SCC 587	**relied on**	**Paras 16, 22**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1322 of 2012.

From the Judgment & Order dated 07.01.2011 of the High Court of Delhi at New Delhi in Crl. Appeal No. 669/99.

V.K. Shukla, A.K. Tripathi, N.K. Neeraj, Varinder Kumar Sharma for the Appellant.

B. Chahar, Anjani Aiyagari, Priyanka Mathur, B.V. Balramdas,. Anil Katiyar for the Respondent.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. Leave granted.

The sole accused is the appellant herein. The challenge is to the judgment of the High Court of Delhi in Crl.A.669/1999 dated 07.01.2011 by which the conviction and sentence of rigorous imprisonment for a period of five years imposed on the appellant for an offence punishable under Section 307, IPC and a fine of Rs.200/- with a default sentence of further rigorous imprisonment for 15 days came to be confirmed.

2. At the time of filing of the Special Leave Petition in this matter, the point raised was that the petitioner (appellant) was a juvenile on the date of commission of the offence and reliance was placed upon the School Leaving Certificate issued by the Principal/Head Master of Primary School, Chitayan, Distt. Mainpuri, Uttar Pradesh. The date of birth of the petitioner was noted as 01.12.1981. The alleged offence was stated to have been committed on 11.03.1998 and if the date of birth noted in the certificate is found to be true, the petitioner would have been 16 years 3 months and 10 days on the date of incident, namely, 11.03.1998.

3. On hearing the learned counsel for the appellant, by an order dated 01.08.2011, while taking the said certificate on record, since for the first time such a claim was raised, the District and Sessions Judge, Itawa, Uttar Pradesh was directed to summon the Principal along with the original admission/ School Leaving Registers and was directed to submit a report. Thereafter a report was received from the District and Sessions Judge, Itawa stating that prima facie the date of birth of the appellant appeared to be 01.12.1981. However, after examining the original records forwarded by the learned District Judge, Itawa, it was noticed that the report was not a full-fledged one.

4. The learned District Judge was, therefore, directed to examine the issue as to whether the appellant was a juvenile

on 11.03.1998, by summoning the parties before it and also examine any other document, to adduce and submit a report within a period of six weeks to the Court. The said order was passed on 30.01.2012. Pursuant to the said directions, the learned District Judge has now filed a detailed report dated 26.03.2012. A perusal of the report discloses that the Principal/ Head Master of Primary School, Chitayan, Distt. Mainpuri, Uttar Pradesh was examined as CW-1 on 05.03.2012, who is stated to have produced the counter foil of the School Leaving Certificate relating to the appellant marked as Exhibit CW-1/A according to which the date of birth of the appellant was 01.12.1981. The document also disclosed that the appellant was admitted to the school on 01.08.1989 and relieved from the school on 01.07.1992 after passing 5th standard. According to him, the Admission Register also disclosed that the date of birth of the appellant was noted as 01.12.1981.

5. The learned District Judge, apart from ascertaining the said facts from the records, stated to have referred the appellant for examination by the Medical Board consisting of Dr. Sunil Kakkar (CW-2), Dr. Akansha (CW-3), Dr. Sameer Dhari (CW-4) and Dr. Kumar Narender Mohan (CW-5). Dr. Sunil Kakkar (CW-2), HOD Radiology, Chairman, Standing Committee Age Determination Record stated before the learned District Judge that the appellant was examined by the Board on 01.03.2012 by the members of the Board consisting of a Physician, Dentist and another radiologist. On such examination, as per the bone age report (Exhibit CW2/A), the Board opined that the age of the appellant was above 22 years and below 25 years as on the date of his examination, namely, on 01.03.2012. The other members of the Medical Board also confirmed the said view of the Medical Board.

6. Based on the above factors, the District Judge has returned a finding that as on the date of the incident, namely, 11.03.1998, the age of the appellant was less than 18 years and, therefore, he was a 'juvenile' on that date. The offence

alleged against the appellant was that on 11.03.1998, he gave knife blows on the person of Shiv Shankar (PW-4) who demanded repayment of the money (Rs.3,000/-) lent to the appellant; that immediately after the occurrence since the injured was not fit for giving any statement, based on the statement of Subhash (PW-2), the FIR was registered and after the completion of investigation, the charge sheet was filed.

7. Having regard to the overwhelming evidence led before the trial Court and on being convinced of the proof of guilt against the appellant, the appellant was convicted for the offence under Section 307, IPC imposing a sentence of five years' rigorous imprisonment with a fine of Rs.200/- with a default sentence of 15 days' rigorous imprisonment. The High Court, on a detailed analysis of the evidence available on record and the injuries sustained by the vicitim-PW-4, which was supported by medical evidence, dismissed the appeal. In such circumstances, we do not find any scope to interfere with the order of conviction imposed on the appellant.

8. In fact, as stated earlier this Special Leave Petition was entertained on 30.09.2011 since it was for the first time argued before this Court that the appellant was a juvenile on the date of occurrence as per the date of birth recorded in the School Leaving Certificate. When we consider the said submission in the light of the provisions of the Juvenile Justice Act, 1986 (hereinafter called the Act) as repealed by the Juvenile Justice (Care & Protection of Children) Act, 2000, as well as, the subsequent amendment of 2006 read along with the Juvenile Justice (Care and Protection of Children) Rules, 2007, it has now become incumbent upon this Court to consider the said contention raised on behalf of the appellant in order to find out the correctness of the benefit claimed as a 'juvenile'.

9. The relevant provision which is required to be noted is Section 7A of the Act in the present form which came to be inserted by the amendment Act of 33/2006 w.e.f. 22.08.2006. The other provisions are Section 2 (l) the definition of 'juvenile

in conflict with law', Section 20 of the Act and Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 which prescribe the procedure to be followed in the matter of determination of age.

10. The application of the above provisions in the light of the subsequent amendment to the Act introduced in the year 2006 and the Rules introduced in the year 2007 came to be considered in detail by this Court in the reported decision in *Hari Ram v. State of Rajasthan and Anr.*- 2009 (13) SCC 211. While dealing with Section 7-A, this Court has held as under in paragraph 23:

> "23. Section 7-A makes provision for a claim of juvenility to be raised before any court at any stage, even after final disposal of a case and sets out the procedure which the court is required to adopt, when such claim of juvenility is raised. It provides for an inquiry, taking of evidence as may be necessary (but not affidavit) so as to determine the age of a person and to record a finding whether the person in question is a juvenile or not."

11. By making a reference to Rule 12 vis-à-vis Section 7-A of the Act, Sub-rules(4) and (5) of Rule 12 were examined and the position has been set out as under in paragraph 27 of the judgment:

> "27.Sub-rules (4) and (5) of Rule 12 are of special significance in that they provide that once the age of a juvenile or child in conflict with law is found to be less than 18 years on the date of offence on the basis of any proof specified in sub-rule (3) the court or the Board or as the case may be the Child Welfare Committee appointed under Chapter IV of the Act, has to pass a written order stating the age of the juvenile or stating the status of the juvenile, and no further inquiry is to be conducted by the Court or Board after examining and obtaining any other documentary proof referred to in sub-rule (3) of Rule 12.

> Rule 12, therefore, indicates the procedure to be followed to give effect to the provisions of Section 7-A when a claim of juvenility is raised."

12. Again in paragraph 39 by making reference to the explanation to Section 20 which was introduced by Amendment Act 33/2006, the applicability of the benefit of amended definition of Section 2 (l) was considered and the position was clarified as under in the said paragraph:

> "39. The Explanation which was added in 2006, makes it very clear that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, the determination of juvenility of a juvenile would be in terms of clause (l) of Section 2, even if the juvenile ceased to be a juvenile on or before 1-4-2001, when the Juvenile Justice Act, 2000, came into force, and the provisions of the Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed. In fact, Section 20 enables the court to consider and determine the juvenility of a person even after conviction by the regular court and also empowers the court, while maintaining the conviction, to set aside the sentence imposed and forward the case to the Juvenile Justice Board concerned for passing sentence in accordance with the provisions of the Juvenile Justice Act, 2000."

Ultimately in para 59, the position was set at rest to the following effect.

> "59. The law as now crystallized on a conjoint reading of Section 2(k), 2(l), 7-A, 20 and 49 read with Rules 12 and 98, places beyond all doubt that all persons who were below the age of 18 years on the date of commission of the offence even prior to 1.4.2001, would be treated as juveniles, even if the claim of juvenility was raised after they had attained the age of 18 years on or

before the date of commencement of the Act and were undergoing sentence upon being convicted."

13. In the light of the said legal position, the claim of the appellant had to be necessarily considered and ascertain whether he had been a 'juvenile', as claimed by him, on the date of occurrence, namely, 11.03.1998.

14. Going by Rule 12 of the Rules, in particular, sub-Rule (3), the age determination inquiry should be conducted by the Court or by the Board or the Committee by seeking evidence by obtaining (a) (i) the matriculation or equivalent certificate, if it is available; and in the absence whereof; ii) the date of birth certificate from the School (other than a play school) first attended; and in the absence whereof; iii) the birth certificate given by a corporation or municipal authority or a panchayat; b) and in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

15. Going by sub-rule 3(a)(ii) of aforesaid Rule 12, the date of birth certificate from the school (other than a play school) first attended, comes at the second stage in the order of priority for consideration to ascertain the age of accused claiming to be a juvenile. In the case on hand, the appellant does not claim to be a matriculate. Therefore, the question of matriculation or equivalent certificate and its availability does not arise. The present claim as a juvenile is based on the School Leaving Certificate issued by the school in which the appellant stated to have studied up to 5th class, namely, Primary School, Chitayan, Distt. Mainpuri, Uttar Pradesh. As per the said certificate, the date of birth recorded in the school admission register and the corresponding entry in the School Leaving

Certificate was 01.12.1981. The appellant stated to have joined the school on 01.08.1989 and left the school after subsequently completing his 5th standard on 01.07.1992. The correctness of the said certificate was examined by the learned District Judge, Itawa as directed by this Court as to be seen from the report dated 26.03.2012. The Principal/Head Master of the School also verified the admission register. The counterfoil of the said School Leaving Certificate is placed before this Court. A perusal of the report also discloses that the certificate was genuine, that the date of birth record therein has been found to be correct and once the said position could be ascertained based on the above report, applying Rule 12 (3) as well as sub-rules (4) and (5) the said Rule read along with Section 7A of the Act the appellant on 11.03.1998 was 16 years 3 months and 10 days old. The appellant, therefore, is covered by the decision of this Court in *Hari Ram* (supra). Since the appellant was below 18 years of age on the date of commission of the offence, the provisions of the Act would apply in full force in his case.

16. Having regard to the above conclusion, in the normal course we would have remitted the matter to the Juvenile Justice Court, Itawa for disposal in accordance with law. However, since the offence was alleged to have been committed more than 10 years ago and having regard to the course adopted by this Court in certain other cases reported in *Jayendra & Anr. v. State of Uttar Pradesh* - 1981 (4) SCC 149, *Bhoop Ram v. State of U.P.* - 1989 (3) SCC 1 which were subsequently followed in *Bhola Bhagat v. State of Bihar* - 1997 (8) SCC 720, *Pradeep Kumar v. State of U.P.*- 1995 Suppl.(4) SCC 419, *Upendra Kumar v. State of Bihar* - 2005 (3) SCC 592 and *Vaneet Kumar Gupta alias Dharminder v. State of Punjab* - 2009 (17) SCC 587, we are of the view that at this stage when the appellant would have now crossed the age of 30 years, there is no point in remitting the matter back to the Juvenile Justice Court. Instead, following the above referred to

decisions, appropriate orders can be passed by this Court itself.

17. In *Jayendra* (supra) the challenge arose under Uttar Pradesh Children Act, 1951 which contained Section 27 which mandated that no child shall be sentenced to any term of imprisonment and if a child had been found to have committed an offence punishable with imprisonment then he could be sent to an approved school. However, it had been determined by the Supreme Court through the reports of medical officers taking into account the general appearance, physical examination and radiological findings of the appellant Jayendra, that he had been a 'child' under the definition in the Act at the time of commission of the offence. However, at the time of hearing of the SLP by the Supreme Court, he had already attained the age of 23. In the light of that, the Court upheld the conviction of the appellant Jayendra, but quashed the sentence imposed on him and directed that he be released forthwith. The Court observed as under:-

> "3. Section 2(4) of the Uttar Pradesh Children Act, 1951 (U.P. Act 1 of 1952) defines a child to mean a person under the age of 16 years. Taking into account the various circumstances on the record of the case we are of the opinion that the appellant Jayendra was a child within the meaning of this provision on the date of the offence. Section 27 of the aforesaid Act says that notwithstanding anything to the contrary in any law, no court shall sentence a child to imprisonment for life or to any term of imprisonment. Section 2 provides, insofar as it is material, that if a child is found to have committed an offence punishable with imprisonment, the court may order him to be sent to an approved school for such period of stay as will not exceed the attainment by the child of the age of 18 years. In the normal course, we would have directed that the appellant Jayendra should be sent to an approved school but in view of the fact that he is now nearly 23 years of age, we cannot do so.

> 4. For these reasons, though the conviction of the appellant Jayendra has to be upheld, we quash the sentence imposed upon him and direct that he shall be released forthwith."

18. In *Bhoop Ram* (supra) also the case arose under the Uttar Pradesh Children Act, 1951. The controversy there was surrounding the question whether the appellant had actually been a juvenile/child under the definition of the Act at the time of commission of the offence. Although such a plea had been taken before both the trial Court as also the Sessions Court, the trial Court had merely taken into account such a plea for the purpose of awarding a reduced sentence of life imprisonment instead of death penalty for the offences he had been charged with and convicted for. When the appeal reached the Supreme Court, this Court directed an enquiry by the Sessions Judge to determine if the appellant had been actually been a child at the time of the incident. The Sessions Judge conducted an enquiry, taking into account the opinion of the Chief Medical Officer and the school certificate that had been produced by the appellant, and concluded that the appellant had not been a 'child' at the concerned time. However, the Supreme Court rejected the finding of the Sessions Judge being based on surmises and essentially relying upon the school certificate produced by the appellant to conclude that he indeed had been a 'child' at the time when the offence had been committed. On the question of sentencing, this Court followed the precedent in *Jayendra* (supra) and quashed the sentence, observing:-

> "8. Since the appellant is now aged more than 28 years of age, there is no question of the appellant now being sent to an approved school under the U.P. Children Act for being detained there. In a somewhat similar situation, this Court held in Jayendra v. State of U.P. that where an accused had been wrongly sentenced to imprisonment instead of being treated as a "child" under Section 2(4) of the U.P. Children Act and sent to an approved school

and the accused had crossed the maximum age of detention in an approved school viz. 18 years, the course to be followed is to sustain the conviction but however quash the sentence imposed on the accused and direct his release forthwith. Accordingly, in this case also, we sustain the conviction of the appellant under all the charges framed against him but however quash the sentence awarded to him and direct his release forthwith. The appeal is therefore partly allowed insofar as the sentence imposed upon the appellant are quashed."

19. In *Bhola Bhagat* (supra) this Court had discussed the present issue at hand at quite some length. Three of the appellants had taken the plea of juvenility in assailing the order of the High Court sentencing them to imprisonment for life for offences under Section 302/149, IPC. The Supreme Court agreed with the findings of the lower Courts as regards the involvement of the appellants in the commission of the offence and held that the same had been established beyond reasonable doubt. However, on the question of sentencing, the Court looked into the plea of juvenility as had been claimed by the appellants. The Court had noted the interplay of the two Acts in question viz. The Bihar Children Act, 1982 and the Juvenile Justice Act, 1986 and that the Bihar Act had already been in force at the time of the commission of the offence. It took note of the decisions of this Court in *Bhoop Ram* (supra) and *Jayendra* (supra) and emphasized that in these cases although the conviction was sustained the sentence had been quashed taking into account the fact that the appellants had crossed the age of juvenility and could not be sent to an 'approved school' as had been contemplated under the relevant Children's Act. The Court proceeded to discuss the three Judge Bench decision of this Court in *Pradeep Kumar* (supra) and quoted the following from that case:-

"12……..

"At the time of the occurrence Pradeep Kumar

appellant, aged about 15 years, was resident of Railway Colony, Naini, Krishan Kant and Jagdish appellants, aged about 15 years and 14 years, respectively, were residents of Village Chaka, P.S. Naini."

At the time of granting special leave, two appellants therein produced school-leaving certificate and horoscope respectively showing their ages as 15 years and 13 years at the time of the commission of the offence and so far as the third appellant is concerned, this Court asked for his medical examination and on the basis thereof concluded that he was also a child at the relevant time. The Court then held: (SCC p. 420, paras 3 and 4)

"It is, thus, proved to the satisfaction of the Court that on the date of occurrence, the appellants had not completed 16 years of age and as such they should have been dealt with under the U.P. Children Act instead of being sentenced to imprisonment on conviction under Sections 302/34 of the Act.

Since the appellants are now aged more than 30 years, there is no question of sending them to an approved school under the U.P. Children Act for detention. Accordingly, while sustaining the conviction of the appellants under all the charges framed against them, *we quash the sentences awarded to them and direct their release forthwith.* The appeals are partly allowed in the above terms."

(Emphasis supplied)

20. The Court in its final conclusion in *Bhola Bhagat* (supra), adopted the same course as had been done in the aforementioned cases and observed:-

"15. The correctness of the estimate of age as given by the trial court was neither doubted nor questioned by the State either in the High Court or in this Court. The parties

have, therefore, accepted the correctness of the estimate of age of the three appellants as given by the trial court. Therefore, these three appellants should not be denied the benefit of the provisions of a socially progressive statute. In our considered opinion, since the plea had been raised in the High Court and because the correctness of the estimate of their age has not been assailed, it would be fair to assume that on the date of the offence, each one of the appellants squarely fell within the definition of the expression "child". We are under these circumstances reluctant to ignore and overlook the beneficial provisions of the Acts on the technical ground that there is no other supporting material to support the estimate of ages of the appellants as given by the trial court, though the correctness of that estimate has not been put in issue before any forum. Following the course adopted in Gopinath Ghosh, Bhoop Ram and Pradeep Kumar cases while sustaining the conviction of the appellants under all the charges we quash the sentences awarded to them.

16. The appellants Chandra Sen Prasad, Mansen Prasad and Bhola Bhagat, shall, therefore, be released from custody forthwith, if not required in any other case. Their appeals succeed to the extent indicated above and are partly allowed."

21. In *Upendra Kumar* (supra), this Court reiterated the position that has been adopted in the aforementioned cases. The appellant had been handed down a life imprisonment for his conviction under Section 302 of the IPC. He had been a juvenile, as under the Juvenile Justice (Care & Protection of Children) Act, 2000, on the day of the commission of the offence but, however, the protection of the Act had not been afforded to him. Through the report of the Medical Board, it had been fully established that the appellant was between the age of 17 and 18 years on the date of the report which was dated some three months after the day of incident in question. Even

the order of sentence recorded the age of the appellant as 17 years. The Court thus concluded that the appellant was liable to be granted the protection of the Juvenile Justice Act, 2000. As regards the course to be adopted as a sequel to such conclusion, this Court referred to the earlier decisions such as in the case of *Bhola Bhagat* (supra), *Bhoop Ram* (supra) etc. The Court observed in this regard:-

"4. Mr Sharan has cited various decisions but reference may be made only to the case of *Bhola Bhagat v. State of Bihar* since earlier decisions on the issue in question have been noticed therein. In Bhola Bhagat case referring to the decisions in the case of *Gopinath Ghosh v. State of W.B., Bhoop Ram v. State of U.P.* and *Pradeep Kumar v. State of U.P.* this Court came to the conclusion that the accused who were juvenile could not be denied the benefit of the provisions of the Act then in force, namely, the Juvenile Justice Act, 1986.

5. The course this Court adopted in Gopinath Ghosh case as also in *Bhola Bhagat* case was to sustain the conviction but, at the same time, quash the sentence awarded to the convict. In the present case, at this distant time, the question of referring the appellant to the Juvenile Board does not arise. Following the aforesaid decisions, we would sustain the conviction of the appellant for the offences for which he has been found guilty by the Court of Session, as affirmed by the High Court, at the same time, however, the sentence awarded to the appellant is quashed and the appeal is allowed to this extent. Resultantly, the appellant is directed to be released forthwith if not required in any other case."

22. Similar course of action was taken in a recent decision of this Court in *Vaneet Kumar Gupta alias Dharminder* (supra). Challenge in that appeal was mainly on the award of sentence of life imprisonment to the appellant and to determine whether adequate material had been available on record to hold that

the appellant had not attained the age of 18 years on the date of commission of the offence. Upon an affidavit filed by the Deputy Superintendent of Police pursuant to inquiries made by him, it was reported that the age of the appellant as on the date of occurrence had been about 15 years. The inquiry report inspired confidence of the Court and the Court held that the appellant cannot be denied the benefits of the Juvenile Justice (Care & Protection of Children) Act, 2000. As regards the question of sentence, this Court observed:-

> "12. The inquiry report, which inspires confidence, unquestionably establishes that as on the date of occurrence, the appellant was below the age of eighteen years; was thus, a "juvenile" in terms of the Juvenile Justice Act and cannot be denied the benefit of the provisions of the said Act. Therefore, having been found to have committed the aforementioned offence, for the purpose of sentencing, he has to be dealt with in accordance with the provisions contained in Section 15 thereof. As per clause (g) of sub-section (1) of Section 15 of the Juvenile Justice Act, the maximum period for which the appellant could be sent to a special home is a period of three years.
>
> 13. Under the given circumstances, the question is what relief should be granted to the appellant at this juncture. Indisputably, the appellant has been in prison for the last many years and, therefore, at this distant time, it will neither be desirable nor proper to refer him to the Juvenile Justice Board. Accordingly, we follow the course adopted in Bhola Bhagat v. State of Bihar; sustain the conviction of the appellant for the offence for which he has been found guilty by the Sessions Court, as affirmed by the High Court and at the same time quash the sentence awarded to him.
>
> 14. Resultantly, the appeal is partly allowed to the extent indicated above. We direct that the appellant shall be released forthwith, if not required in any other case."

23. Having regard to such a course adopted by this Court in the above reported decisions, and in the case on hand based on the report of the District and Sessions Judge, we are also convinced that the appellant was below 18 years of age on the date of commission of offence and the Juvenile Justice Act would apply in full force in his case also. While upholding the conviction imposed on the appellant, we set aside the sentence imposed on him and direct that he be released forthwith, if not required in any other case. The appeal is partly allowed to the extent indicated above.

B.B.B. Appeal partly allowed.

M.C. GUPTA

v.

CENTRAL BUREAU OF INVESTIGATION, DEHRADUN

(Criminal Appeal No. 1332 of 2012 etc.)

AUGUST 31, 2012

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

PREVENTION OF CORRUPTION ACT, 1988:

s. 30(2) of 1988 Act read with s.6 of General Clauses Act, 1897 - Saving of investigation under the repealed Act - Offence committed while 1947 Act was in force - FIR registered for offences punishable under the 1947 Act, after coming into force of the 1988 Act - Conviction and sentence upheld by High Court - Held: By virtue of s.30(2) of the 1988 Act, read with ss.6(c) and 6(e) of the General Clauses Act,1897, the right of C.B.I. to investigate the crime, institute the proceedings and prosecute the accused is saved and not affected by the repeal of the 1947 Act. - Thus, the right to investigate and the corresponding liability incurred are saved - Prevention of Corruption Act, 1947 - ss.5(1) and 5(2) - Penal Code, 1860 - ss.120-B and 409-Constitution of India, 1950- Art.20.

PREVENTION OF CORRUPTION ACT, 1947:

ss.5(2) read with 5(1)(e) of 1947 Act and ss.120-B and 409 IPC - Conviction and sentence - Held: The guilt of the accused is clearly established and, therefore, no interference with the order of conviction is necessary - However, keeping in view the old age and ailments A-1 is suffering from, his sentence of 2 years' RI u/s 409 IPC is reduced to one year's RI - Rest of the sentences awarded to him and the other accused are maintained-Sentence/sentencing.

The appellant in Crl. Appeal No. 1332 of 2012 (A-1), while working as Assistant Divisional Manager, New India Assurance Company Ltd., got a bank draft of Rs.1,00,000/- prepared on 9.7.1988 from the Company's account in favour of a Dal Mill owned by his relative, namely, the appellant in Crl. Appeal No. 1333 of 2012(A-2). A-1 then collected the said bank draft and sent it to A-2 who deposited the same in the account of his Dal Mill on 14.7.1988. An FIR for offence u/s 5(2) read with s.5(1)(c) of the Prevention of Corrupt Act, 1947 was registered on 19.2.1990 against both the accused. The trial court convicted and sentenced A-1 to 2 years RI u/s 409 IPC and to pay a fine of Rs.2,000/-. He was further convicted u/s 120-B, IPC as also u/s 5(2) read with s. 5(1)(c) of the 1947 Act and sentenced to one year's RI and a fine of Rs.1,000/- under each of the two counts. A-2 was convicted u/s 120-B IPC, s. 409 IPC and s. 5(2) read with s.5(1)(c) of the 1947 Act and s. 120-B IPC and was sentenced to one year's RI and a fine of Rs.1,000/- under each of the three counts.

In the instant appeal filed by the accused, it was primarily contended for the appellants that the 1947 Act stood repealed by the Prevention of Corruption Act, 1988 and, therefore, the FIR under the 1947 Act could not have been lodged on 19.2.1990.

Disposing of the appeals, the Court

HELD: 1.1. Sub-s. (2) of s. 30 of the Prevention of Corruption Act, 1988 (New Act) says that anything done or any action taken or purported to have been done or taken under or in pursuance of the repealed Acts in so far as it is not inconsistent with the New Act, shall be deemed to have been done or taken in pursuance of the New Act. Thus, a deeming fiction is introduced so far as action taken under the repealed Act is concerned. [para 9] [464-A-B]

Bansidhar & Ors. V. State of Rajasthan & Ors. **1989 (2) SCR 152 = (1989) 2 SCC 557; and I.T.** *Commissioner v. Shah Sadiq & Sons* **1987 (2) SCR 942 = (1987) 3 SCC 516 - relied on**

1.2 Sub-s. (2) of s.30, further, keeps the application of s.6 of the GC Act intact and if a situation is not covered by s.30, resort to s.6 of the GC Act is open. Assuming that the proceedings under the Act of 1947 initiated against the appellants cannot be saved by s.30(2) of the New Act because no action was taken pursuant to the Act of 1947, prior to coming into force of the New Act, saving clause contained in s.30 is not exhaustive. Section 6 of the GC Act can still save the proceedings. Therefore, clauses (c) and (e) of s.6 of the GC Act become relevant for the instant case. [para 10, 12-13] [464-C; 466-B-C]

1.3 Clause (c) of s.6 of the GC Act says that if any Central Act repeals any enactment, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed. In the instant case, the right which had accrued to the investigating agency to investigate the crime which took place prior to the coming into force of the New Act and which was covered by the Act of 1947, remained unaffected by reason of clause (c) of s. 6. Clause (e) says that the repeal shall not affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment and s. 6 further states that any such investigation, legal proceeding or remedy may be instituted, continued or enforced and such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed. Therefore, the right of C.B.I. to investigate the crime, institute proceedings and prosecute the appellants is saved and not affected

by the repeal of Act of 1947. Thus, the right to investigate and the corresponding liability incurred are saved. [para 13] [466-C-G]

1.4 Further, s. 6 of the GC Act qualifies the effect of repeal stated in sub-clauses (a) to (e) by the words 'unless a different intention appears'. No different intention is disclosed in the provisions of the New Act to hold that repeal of the Act of 1947 affects the right of the investigating agency to investigate offences which are covered by the Act of 1947 or that it prevents the investigating agency from proceeding with the investigation and prosecuting the accused for offences under the Act of 1947. Therefore, the repeal of the Act of 1947 does not vitiate or invalidate the criminal case instituted against the appellants and the consequent conviction of the appellants for offences under the provisions of the Act of 1947. [para 13] [466-G-H; 467-A-B]

1.5 It cannot be said that the appellants could not have been charged under the provisions of the Act of 1947 after its repeal. The offence is alleged to have been committed prior to the coming into force of the New Act. When the offence was committed, the Act of 1947 was in force. It is elementary that no person shall be convicted of any offence except for violation of a law in force at the time of commission of the act charged as an offence nor can he be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. Art. 20(1) of the Constitution of India is clear on this point. The appellants were, therefore, rightly charged, tried and convicted under the provisions of the Act of 1947. [para 14] [467-C-E]

2.1 So far as the merits of the case are concerned,

the guilt of the appellants is clearly established and, therefore, no interference is necessary with the impugned judgment of the High Court which has confirmed the conviction and sentence of the appellants. [para 15] [467-F-G]

2.2 As regards the quantum of sentence, so far as appellant A-1 is concerned, he is about 70 years old and is stated to be suffering from various ailments. The crime in question took place about 24 years ago. In the circumstances, his sentence of two years' RI u/s 409 IPC is reduced to one year's RI. Rest of the sentences awarded to him and the other appellant, who was the beneficiary of the dishonest and fraudulent misappropriation of the company's money, shall remain intact. [para 16 and 18] [467-G; 468-D-E]

Satpal Kapoor etc. v. State of Punjab etc. **1996 (11) SCC 769; and** *Shiv Nandan Dixit v. State of U.P.* **2003 (12) SCC 636 - referred to.**

Case Law Reference:

1996 (11) SCC 769	**referred to**	**para 8**
2003 (12) SCC 636	**referred to**	**para 8**
1989 (2) SCR 152	**relied on**	**para 11**
1987 (2) SCR 942	**relied on**	**para 11**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1332 of 2012.

From the Judgment & Order dated 27.03.2012 of the High Court of Uttarakhand at Nainital in Criminal Appeal No. 133/ 2006 (old No. CRLA. No. 2770/1999)

WITH

SLP (Crl.) No. 5908 of 2012.

Amarendra Sharan, S.K. Agrawal, S.K. Dubey, Apoorva Agrawal, Mushtaq Ahmad, Abhay Gupta, Yogesh Tiwari, Rahul Kaushik for the Appellant.

A.S. Chandhiok, ASG, Rajiv Nanda, Baldev Atreya, Arvind Kumar Sharma for the Respondent.

The Judgment of the Court was delivered by

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

2. These appeals, by special leave, are directed against the judgment and order dated 27/03/2012 delivered by the Uttarakhand High Court confirming the judgment and order of conviction and sentence dated 08/10/1999 / 25/10/1999 passed by the Special Judge, Anti Corruption, U.P. (East), Dehradun in C.B.I. Case No.3/90, whereby the Special Judge convicted the appellants, inter alia, under the provisions of the Prevention of Corruption Act, 1947 (for short, "Act of 1947").

3. It is necessary to narrate the facts of the case. Appellant M.C. Gupta was posted as Assistant Divisional Manager, New India Assurance Company Limited (for short, "the Company"). He was authorized by the Company to operate its Account No.314 held with the Punjab National Bank, Civil Lines, Moradabad. Appellant Mohan Lal Gupta was the proprietor of M/s. Mohan Dal Mill. Account No.SSI/53 was held in the name of M/s. Mohan Dal Mill with State Bank of India, Orai, District Jalaun, Uttar Pradesh.

4. On 09/07/1988, appellant M.C. Gupta issued cheque No.QDE-800186 in the sum of Rs.1,00,200/- from the account of the Company and asked the bank to prepare a draft of Rs.1,00,000/- in favour of M/s. Mohan Dal Mill. Appellant M.C. Gupta himself prepared the draft application dated 09/07/1988. The bank, accordingly, prepared a draft of Rs.1,00,000/- on the same date and debited the amount of cheque from the account

of the Company. Appellant M.C. Gupta himself collected the said draft from the bank and sent it to his relative appellant - Mohan Lal Gupta at Orai, who deposited the same on 14/07/1988 in the aforementioned account of M/s. Mohan Dal Mill vide pay-in-slip dated 14/07/1988. Thus, appellant M.C. Gupta, in collusion with appellant Mohan Lal Gupta, dishonestly and fraudulently misappropriated the Company's money, which is public money, for wrongful gain to appellant Mohan Lal Gupta, thereby causing corresponding losses to the Company.

5. When the siphoning off of money came to light, a FIR was lodged on 19/02/1990 under Section 5(2) read with Section 5(1)(c) of the Act of 1947. After investigation, C.B.I. submitted charge-sheet against both the appellants before the Special Judge. After perusing the evidence, the Special Judge convicted and sentenced appellant M.C. Gupta to RI for one year and a fine of Rs.1,000/- for offence under Section 120-B of the IPC. He was also sentenced to RI for two years and a fine of Rs.2,000/- for offence under Section 409 of the IPC. In addition, he was sentenced to RI for one year and a fine of Rs.1,000/- under Section 5(2) read with Section 5(1)(c) of the Act of 1947. Appellant Mohan Lal Gupta was sentenced to RI for one year and a fine of Rs.1,000/- for offence under Section 120-B of the IPC. He was also sentenced to RI for one year and a fine of Rs.1,000/- for offence under Section 409 of the IPC. He was also sentenced to RI for one year and a fine of Rs.1,000/- for offence under Section 5(2) read with Section 5(1)(c) of the Act of 1947 read with Section 120-B of the IPC. All sentences were to run concurrently. In default of payment of fine, the appellants were to undergo imprisonment for six months.

6. Being aggrieved by the order of conviction and sentence, both the appellants filed separate appeals to the High Court. As we have already noted, by the impugned order, the appeals were dismissed by the High Court and, hence, the present appeals.

7. The basic submission of Mr. Amarendra Sharan and Mr.

S.K. Dubey, learned senior counsel for the appellants is based on the fact that the Act of 1947 stood repealed by the Prevention of Corruption Act, 1988 (for short, "the New Act"). The alleged crime took place between 9/7/1988 and 14/07/1988 and FIR was lodged in respect of the same on 19/02/1990 alleging offences under the Act of 1947. Counsel submitted that FIR could not have been lodged for the offences punishable under the Act of 1947, which stood repealed by the New Act. It was urged that in fact, by reason of repeal, proceedings under the Act of 1947 stand obliterated. In this connection, our attention was drawn to Section 30 of the New Act. Sub-section 1 of Section 2 thereof provides for repeal and saving. It states that the Act of 1947 stands repealed. It was pointed out that Sub-section 2 of Section 30 of the New Act states that notwithstanding such repeal, but without prejudice to the application of Section 6 of the General Clauses Act, 1897 (for short, "the GC Act"), anything done or any action taken or purported to have been done or taken under or in pursuance of the Acts so repealed shall, in so far as it is not inconsistent with the provisions of the New Act be deemed to have been done or taken under or in pursuance of the corresponding provisions of the New Act.

8. Counsel pointed out that nothing was done or no action was taken in pursuance of the Act of 1947 and, therefore, there was no question of coming to a conclusion that any action taken could be deemed to have been taken under the provisions of the New Act. Since no action was taken under the Act of 1947, there was no question of saving it. Counsel also drew our attention to Section 6 of the GC Act which speaks about the effect of repeal. Counsel submitted that the instant case is not covered by any of the sub-clauses of Section 6 of the GC Act so as to come to a conclusion that any investigation, legal proceeding or remedy may be instituted, continued or enforced or any penalty or punishment may be imposed as if the repealing Act had not been passed. Counsel submitted that, in the circumstances, the entire prosecution is vitiated and,

hence, it is necessary for this Court to quash the proceedings and set the appellants free. Alternatively, counsel submitted that since the amount of Rs.1,00,000/- was repaid by the appellants before 19/02/1990 i.e. even before the FIR was lodged, this Court should reduce the sentence of the appellants to the sentence already undergone by them. In support of this submission, counsel relied on *Satpal Kapoor etc. v. State of Punjab etc.*[1] and *Shiv Nandan Dixit v. State of U.P.*[2]. Mr. Chandhiok, learned Additional Solicitor General, for the C.B.I. supported the impugned judgment.

9. We are unable to accept the submissions of learned counsel for the appellants. It is true that according to the prosecution, the alleged offence took place between 9/7/1988 and 14/7/1988. The New Act came into force on 9/9/1988. The FIR was registered against the appellants, inter alia, for offences punishable under the Act of 1947. Charges were framed against the appellants, inter alia, under the provisions of the Act of 1947 and the appellants were tried and convicted as aforesaid. Since the repeal of Act of 1947 is the major plank of the appellants' submissions, it is necessary to quote Section 30 of the New Act which repealed the Act of 1947. It reads thus:

> *"30. Repeal and saving:-* (1) The Prevention of Corruption Act, 1947 (2 of 1947) and the Criminal Law Amendment Act, 1952 (46 of 1952) are hereby repealed.
>
> (2) Notwithstanding such repeal, but without prejudice to the application of section 6 of the General Clauses Act, 1897 (10 of 1897), anything done or any action taken or purported to have been done or taken under or in pursuance of the Acts so repealed shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under or in pursuance of the corresponding provision of this Act."

1. (1996) 11 SCC 769.
2. (2003) 12 SCC 636.

Sub-section 1 of Section 30 makes it clear that the Act of 1947 has been repealed. Sub-section 2 of Section 30 of the New Act says that anything done or any action taken or purported to have been done or taken under or in pursuance of the repealed Acts in so far as it is not inconsistent with the New Act, shall be deemed to have been done or taken in pursuance of the New Act. Thus, a deeming fiction is introduced so far as action taken under the repealed Act is concerned.

10. Sub-section 2 of Section 30 keeps the application of Section 6 of the GC Act intact and if a situation is not covered by Section 30, resort to Section 6 of the GC Act is open. Section 6 of the GC Act reads thus:

> *"6. Effect of repeal:-* Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not -
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect; or
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> (b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or
>
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or
>
> (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

11. In this connection, we may usefully refer to the decision of this court in *Bansidhar & Ors. V. State of Rajasthan & Ors.*[3] where this court was dealing with the question whether the proceedings for fixation of ceiling area with reference to the appointed date i.e. 1/4/1966 under Chapter III-B of the Rajasthan Tenancy Act, 1955 could be initiated and continued after coming into force of the Rajasthan Imposition of Ceiling on Agricultural Holdings Act which with effect from 1/1/1973 repealed Section 5(6-A) and Chapter III-B of the Rajasthan Tenancy Act, 1955. While dealing with this question, this court observed that when there is a repeal of a statute accompanied by re-enactment of a law on the same subject, the provisions of the new enactment would have to be looked into not for the purpose of ascertaining whether the consequences envisaged by Section 6 of the GC Act ensued or not - but only for the purpose of determining whether the provisions in the new statute indicate a different intention. This court further observed that a saving provision in a repealing statute is not exhaustive of the rights and obligations so saved or the rights that survive the repeal. This court quoted a paragraph from its judgment in *I.T. Commissioner v. Shah Sadiq & Sons*[4]: (SCC p.524, para 15). It reads thus:

> "… In other words whatever rights are expressly saved by the 'savings' provision stand saved. But, that does not mean that rights which are not saved by the 'savings' provision are extinguished or stand ipso facto terminated by the mere fact that a new statute repealing the old statute is enacted. Rights which have accrued are saved unless they are taken away expressly. This is the principle behind Section 6(c), General Clauses Act, 1897. …"

3. (1989) 2 SCC 557.
4. (1987) 3 SCC 516.

12. Thus assuming the proceedings under the Act of 1947 initiated against the appellants cannot be saved by Section 30(2) of the New Act because no action was taken pursuant to the Act of 1947, prior to coming into force of the New Act, saving clause contained in Section 30 is not exhaustive. Section 6 of the GC Act can still save the proceedings.

13. Viewed from this angle, clauses (c) and (e) of Section 6 of the GC Act become relevant for the present case. Sub-clause (c) says that if any Central Act repeals any enactment, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed. In this case, the right which had accrued to the investigating agency to investigate the crime which took place prior to the coming into force of the New Act and which was covered by the Act of 1947 remained, unaffected by reason of clause (c) of Section 6. Clause (e) says that the repeal shall not affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment and Section 6 further states that any such investigation, legal proceeding or remedy may be instituted, continued or enforced and such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed. Therefore, the right of C.B.I. to investigate the crime, institute proceedings and prosecute the appellants is saved and not affected by the repeal of Act of 1947. That is to say, the right to investigate and the corresponding liability incurred are saved. Section 6 of the GC Act qualifies the effect of repeal stated in sub-clauses (a) to (e) by the words 'unless a different intention appears'. Different intention must appear in the repealing Act (See Bansidhar). If the repealing Act discloses a different intention, the repeal shall not result in situations stated in sub-clauses (a) to (e). No different intention is disclosed in the provisions of the New Act to hold that repeal of the Act of 1947 affects the right of the investigating agency

to investigate offences which are covered by the Act of 1947 or that it prevents the investigating agency from proceeding with the investigation and prosecuting the accused for offences under the Act of 1947. In our opinion, therefore, the repeal of the Act of 1947 does not vitiate or invalidate the criminal case instituted against the appellants and the consequent conviction of the appellants for offences under the provisions of the Act of 1947.

14. There is no substance in the contention that the appellants could not have been charged under the provisions of the Act of 1947 after its repeal. As we have already noted, the offence is alleged to have been committed prior to the coming into force of the New Act. When the offence was committed, the Act of 1947 was in force. It is elementary that no person shall be convicted of any offence except for violation of a law in force at the time of commission of the act charged as an offence nor can he be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. Article 20(1) of the Constitution of India is clear on this point. The appellants were, therefore, rightly charged, tried and convicted under the provisions of the Act of 1947. We may also note that the provisions of the New Act are more stringent than the provisions of the Act of 1947. The appellants cannot, therefore, be said to have been prejudiced.

15. So far as the merits of the case are concerned, in our opinion, the guilt of the appellants is clearly established and, hence, no interference is necessary with the impugned judgment of the High Court which has confirmed the conviction and sentence of the appellants.

16. That takes us to the arguments on quantum of sentence. In *Satpal Kapoor,* the appellant therein was charged, inter alia, under Section 5(2) of the Act of 1947. He was an angina patient, suffering from coronary diseases requiring medical attention. He was 60 years of age. Considering these

facts, his sentence was reduced to four months' simple imprisonment.

17. In *Shiv Nandan Dixit,* the appellants therein were charged, inter alia, under Section 5(1)(c) read with Section 5(2) of the Act of 1947. While considering the quantum of sentence, this court took into account the fact that the incident had taken place nearly 23 years ago. Considering the fact that the appellants therein had lost their jobs and retiral benefits; that the prolonged litigation had caused considerable loss to them and that they had crossed 60 years of age, this court reduced the sentence of one year RI to a period of six months' RI.

18. In this case, so far as appellant M.C. Gupta is concerned, he is about 70 years' old and is stated to be suffering from various ailments. The crime in question took place about 24 years ago. In the circumstances, we are of the opinion that his sentence of two years' RI for offence under Section 409 of the IPC should be reduced to one year's RI and is accordingly reduced. Rest of the sentences awarded to him shall remain intact. So far as appellant Mohan Lal Gupta is concerned, he has been sentenced to one year's RI for offence under Section 5(2) read with Section 5(1)(c) of the Act of 1947. Considering the fact that he was the beneficiary of the dishonest and fraudulent misappropriation of the Company's money, we are not inclined to reduce his sentence. We clarify that the sentence of fine imposed on both the appellants is confirmed. The appeals are disposed of in the aforestated terms.

R.P. Appeals disposed of.

LAVESH
v.
STATE (NCT OF DELHI)
(Criminal Appeal No. 1331 of 2012)

AUGUST 31, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

CODE OF CRIMINAL PROCEDURE, 1973:

s.438 read with s.82 - Application for anticipatory bail by an accused declared as "proclaimed offender" in a case of dowry death - Held: Normally, court should not exercise its discretion to grant anticipatory bail in disregard of the magnitude and seriousness of the matter - When a person against whom a warrant has been issued and is absconding or concealing himself in order to avoid execution of warrant and has been declared as a "proclaimed offender", he is not entitled to the relief of anticipatory bail - On facts, the FIR and the statements recorded during investigation indicate that all the family members of husband of deceased including the appellant subjected her to cruelty by demanding a sizable amount - Even after the appellant was granted interim protection, he did not co-operate with the investigating agency - Considering his conduct not amenable for investigation and his being declared as an absconder, he is not entitled to anticipatory bail - Interim protection granted by the Court stands vacated.

An FIR was registered on the allegations that the appellant's younger brother's wife, a pregnant woman, committed suicide in the matrimonial home as she had been subjected to cruelty by the appellant and his family members with a view to demand dowry since the date of her marriage, which had taken place 1 year and eight months prior to the date of occurrence. The husband and the mother-in-law of the deceased were arrested on the

date of registration of the FIR. The applicant's applications for anticipatory bail having been rejected by the Court of Session as also by the High Court, he filed the appeal.

Dismissing the appeal, the Court

HELD: 1.1. While considering the request for anticipatory bail in terms of s.438 CrPC, the court has to take into consideration the nature and the gravity of the accusation, antecedents, possibility of the applicant to flee from justice etc. Further, normally, the court should not exercise its discretion to grant anticipatory bail in disregard of the magnitude and seriousness of the matter. [para 6] [474-A-B]

1.2 In the instant case, the matter regarding the unnatural death of the daughter-in-law at the house of her in-laws was still under investigation and the appropriate course to adopt was to allow the Magistrate concerned to deal with the same on the basis of the material before the court. The FIR, statements of various persons including the father and the mother of the deceased and neighbours clearly show that all the family members of the husband of the deceased including the appellant, who is elder brother of the husband of the deceased, subjected her to cruelty by demanding a sizeable amount in order to settle the payment of the DDA flat. [para 6 and 11] [474-B-C; 475-D-E]

2.1 When a person against whom a warrant has been issued and is absconding or concealing himself in order to avoid execution of warrant and has been declared as a "proclaimed offender" in terms of s. 82 CrPC, he is not entitled the relief of anticipatory bail. The relevant materials and two status reports submitted by the police and the counter affidavit filed in this Court on 25.06.2012, indicate that the appellant has been declared a Proclaimed Offender in the case. [para 9-10] [474-G-H; 475-A-C]

2.2 Even though this Court on 23.03.2012, while ordering notice, granted interim protection, namely, not to arrest the appellant in connection with FIR No. 259/ 2011, he is said to have not co-operated in the investigation. Considering his conduct not amenable for investigation and, moreover, his being declared as an absconder, he is not entitled to anticipatory bail as prescribed in s. 438 of the Code. The impugned order dated 05.12.2011 passed by the High Court is confirmed. The interim protection granted by this Court on 23.03.2012 stands vacated. [para 12-16] [475-F-G; 476-B-C-E-G-H]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1331 of 2012.

From the Judgment & Order dated 05.12.2011 of the High Court of Delhi at New Delhi in Anticipatory Bail Application No. 1602 of 2011.

Dr. Sarbjit Sharma, Sumit Sharma, S.K. Verma for the Appellant.

Sidharth Luthra, ASG, Ranjana Narain, Gargi Khanna, Shiv Pandey, Aditya Singla, B.V. Balaram Das for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is filed against the final order dated 05.12.2011 passed by the High Court of Delhi at New Delhi in Anticipatory Bail Application No. 1602 of 2011 whereby the High Court dismissed the application filed by the appellant herein.

3. Brief facts:

(a) The appellant herein is the elder brother of the husband of the deceased - Vibha. The appellant is engaged in the

business of cutting of diamonds and getting them manufactured as per the specifications of his clients. He is married for the last seven years and has two children. According to him, he resides with his wife and children in the separate portion of the house in Paschim Puri, New Delhi whereas one portion is occupied by his parents and one by his younger brother.

(b) On 19.01.2010, younger brother of the appellant got married to Vibha (since deceased). He lived with his wife on the first floor of the same house. On 01.09.2011, Vibha, committed suicide. On the same day, the mother of the deceased lodged a complaint against the family members of the husband of the deceased with the Police Station at Punjabi Bagh, New Delhi.

(c) On the basis of the complaint, an FIR was registered vide No. 259/11 at Punjabi Bagh Police Station. On the same day, the husband and mother-in-law of the deceased were arrested. The appellant herein moved an application for anticipatory bail. The Additional Sessions Judge, Delhi, by order dated 05.11.2011, dismissed the said application.

(d) Against the said order, the appellant moved an application for anticipatory bail before the High Court. By the impugned order dated 05.12.2011, the High Court dismissed the said application. Aggrieved by the said order of the High Court, the appellant preferred this appeal by way of special leave petition.

4. Heard Dr. Sarbjit Sharma, learned counsel for the appellant and Mr. Sidharth Luthra, learned Additional Solicitor General for the respondent-State.

5. The only point for consideration in this appeal is whether the appellant, who is elder brother of the husband of the deceased, has made out a case for anticipatory bail in terms of Section 438 of the Criminal Procedure Code, 1973 (hereinafter referred to as "the Code")?

6. Before considering the claim of the appellant, it is useful to refer Section 438 of the Code relating to grant of bail to a person who is apprehending arrest which reads as under:

> "438. Direction for grant of bail to person apprehending arrest - (1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:-
>
> (i) the nature and gravity of the accusation;
>
> (ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;
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> (iii) the possibility of the applicant to flee from justice; and
>
> (iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,
>
> either reject the application forthwith or issue an interim order for the grant of anticipatory bail:
>
> Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application. ……."

It makes it clear that in a non-bailable offence if a person has reason to believe that he may be arrested, he is free to apply to the High Court or the Court of Session praying that in the event of such arrest, he shall be released on bail. The belief

that the applicant may be arrested must be founded on reasonable grounds. While considering such a request, the Court has to take into consideration the nature and the gravity of the accusation, antecedents, possibility of the applicant to flee from justice etc. Further, normally, the Court should not exercise its discretion to grant anticipatory bail in disregard of the magnitude and seriousness of the matter. The matter regarding the unnatural death of the daughter-in-law at the house of her in-laws was still under investigation and the appropriate course to adopt was to allow the concerned Magistrate to deal with the same on the basis of the material before the Court.

7. It is seen that the deceased had allegedly committed suicide after one year and eight months of marriage and further she was pregnant at the time when she had taken her life. On the basis of the complaint filed by the mother of the deceased, an FIR was registered and during the course of the investigation, the police recorded the supplementary statements of Hira Lal, father of the deceased, the neighbour of the deceased near the matrimonial home as well as the complainant -mother of the deceased.

8. According to the prosecution, if we look into all the above particulars coupled with the supplementary statements, it has been clearly made out, particularly, insofar as the appellant is concerned, that there was a definite allegation against him. Further, the appellant and other family members subjected the deceased to cruelty with a view to demand dowry, right from the date of marriage and also immediately before the date of her death.

9. By placing the relevant materials and two status reports submitted by the police, Mr. Sidharth Luthra, learned ASG submitted that the appellant was a Proclaimed Offender. To this effect, Mr. V. Ranganathan, Additional Commissioner of Police, West District, New Delhi, in his counter affidavit, filed in this Court on 25.06.2012, has stated that, "Efforts were made to

arrest the petitioner but he absconded as such he was got declared a Proclaimed Offender. The case is pending trial." The same has been reiterated in the status report filed by Mr. Virender Dalal, Station House Officer, P.S. Punjabi Bagh, New Delhi, before the High Court.

10. From these materials and information, it is clear that the present appellant was not available for interrogation and investigation and declared as "absconder". Normally, when the accused is "absconding" and declared as a "proclaimed offender", there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code is not entitled the relief of anticipatory bail.

11. On reading the FIR, statements of various persons including father and mother of the deceased, neighbours and supplementary statement of mother of the deceased clearly show that all the family members of the husband of the deceased including the appellant, who is elder brother of the husband of the deceased, subjected her to cruelty by demanding sizeable amount in order to settle the payment of Rs.5 lakhs of the allotted DDA flat.

12. Another circumstance against the appellant is that even though this Court on 23.03.2012, while ordering notice, granted interim protection, namely, not to arrest the appellant in connection with FIR No. 259/2011 registered at Police Station, Punjabi Bagh, New Delhi, it is the claim of the respondent-State that the appellant did not cooperate and visit the said police station. Though Dr. Sarbjit Sharma, learned counsel for the appellant, submitted that the appellant visited the police station on 23.03.2012, 20.07.2012, 24.07.2012 and 27.07.2012, it is brought to our notice that at the relevant period, viz., 07.04.2012, 01.05.2012 and 18.06.2012, he neither visited the police station nor contacted Mr. Narender Khatri, Inspector - Investigation, Punjabi Bagh Police Station. The last three dates are relevant since after getting the interim protection granted by this Court on 23.03.2012, the appellant did not care either to visit the police station or to the Investigation Officer concerned. The claim of his visit on later dates, particularly, in the month of July, 2012 have no relevance. Considering his conduct, not amenable for investigation and, moreover, declaring him as an absconder, there is no question of granting anticipatory bail. Thus, the conduct of the appellant does not entitle him to anticipatory bail as prescribed in Section 438 of the Code.

13. Taking note of all these aspects, in the light of the conditions prescribed in Section 438 of the Code and conduct of the appellant immediately after the incident as well as after the interim protection granted by this Court on 23.03.2012, we are of the view that the appellant has not made out a case for anticipatory bail. Unless free hand is given to the investigating agency, particularly, in the light of the allegations made against the appellant and his family members, the truth will not surface.

14. Under these circumstances, we are unable to accept the claim of the appellant. On the other hand, we agree with the contentions raised by the learned ASG and confirm the impugned order dated 05.12.2011 passed by the High Court in Bail Application No.1602/2011.

15. We make it clear that while upholding the rejection of the anticipatory bail, we have not expressed any opinion on the merits of the case. We also clarify that after surrender, the appellant is free to move bail application before the Court concerned which may be disposed of in accordance with law.

16. With the above observation, the appeal is dismissed and the interim protection granted by this Court on 23.03.2012 stands vacated. The appellant is directed to surrender within a period of one week from today.

R.P. Appeal dismissed.

BABLA @ DINESH
v.
STATE OF UTTARAKHAND
(Criminal Appeal No. 1349 of 2012)

SEPTEMBER 04, 2012

[H.L. DATTU AND CHANDRAMAULI KR. PRASAD, JJ.]

JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT 2000:

ss. 2(k) and 15 - Plea of juvenility - Held: Can be raised even before Supreme Court for the first time - The report of Addl. Sessions Judge concluding that the appellant was aged about 10-15 years on the date of commission of the offence (i.e. 1.12.1991) is accepted - Appellant is, thus, juvenile within the expression u/s 2(h) of 1986 Act and s.2(k) of 2000 Act - Appellant has undergone the actual period of more than 3 years out of the maximum period prescribed u/s 15 - While sustaining the conviction, the sentence awarded to him by courts below is set aside - Juvenile Justice Act, 1986 - s.2(h) - Juvenile Justice (Care and Protection of Children) Rules, 2007 - r.2 - Penal Code, 1860 - s.302/149.

The appellant, who was one of the accused before the trial court, was convicted and sentenced to imprisonment for life u/s 302/149 IPC. The High Court confirmed the judgment rejecting the plea of juvenility of the appellant on the ground that it was not raised before the trial court and no evidence was adduced in defence.

Partly allowing the appeal, the Court

HELD: 1.1 The High Court has erred in dismissing the appeal on the ground that no evidence was adduced and no suggestion was made to the witnesses regarding juvenility of the appellant during the trial. The issue of

raising the plea for determination of juvenility for the first time at the appellate stage is no more res integra. This Court in Lakhan Lal's* case, taking note of its previous decisions on this point has allowed such plea raised before this Court for the first time. [para 9] [481-F-G]

Lakhan Lal v. State of Bihar **2011 (1) SCR 770 = (2011) 2 SCC 251;** *Umesh Singh and Anr. v. State of Bihar,* **(2000) 6 SCC 89;** *Bhola Bhagat v. State of Bihar,* **1997 (4) Suppl. SCR 711 = (1997) 8 SCC 720;** *Gopinath Ghosh v. State of W.P.* **1984 SCR 803 =1984 Supp SCC 228; and** *Bhoop Ram v. State of U.P.* **(1989) 3 SCC 1; and** *Pradeep Kumar v. State of U.P.,* **1995 Supp(4) SCC 419 - relied on.**

1.2 Pursuant to the directions issued by this Court, the Additional Sessions Judge has conducted inquiry by following the procedure prescribed under the Juvenile Justice (Care and Protection of Children) Rules, 2007 and submitted his report dated 03.12.2011, wherein, it is concluded that the appellant was aged about 10-15 years on the date of the commission of the offence i.e. 1.12.1991. The report is accepted. Accordingly, this Court holds that the appellant was juvenile within the meaning of the expression u/s 2(h) of the Juvenile Justice Act, 1986 and s. 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000 and the Rules framed thereunder on the date of commission of the offence. The Jail Custody Certificate, produced by the appellant suggests that he has undergone the actual period of sentence of more than three years out of the maximum period prescribed u/s 15 of the Act. In the circumstance, while sustaining the conviction of the appellant, the sentence awarded to him by the trial court and confirmed by the High Court is set aside. [para7 and 12] [481-C-D; 483-F-G]

Case Law Reference:

2011 (1) SCR 770	**relied on**	**para 9**

2000 (6) SCC 89	**relied on**	**para 9**
1997 (4) Suppl. SCR 711	**relied on**	**para 9**
1984 SCR 803	**relied on**	**para 9**
1989 (3) SCC 1	**relied on**	**para 9**
1995 (4) Suppl. SCC 419	**relied on**	**para 9**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1349 of 2012.

From the Judgment & Order dated 21.07.2009 of the High Court of Uttarakhand at Nainital in Criminal Appeal No. 1481 of 2001 (Old No. 1852 of 1995).

T.N. Singh, Vikas K. Singh, H.L. Srivastava for the Appellant.

Mukesh Verma, (For Jatinder Kumar Bhatia) for the Respondent.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. Leave granted.

2. This appeal is directed against the judgment and order passed by the High Court of Uttarakhand at Nainital in Criminal Appeal No.1481 of 2001 dated 21.07.2009. By the impugned judgment, the High Court has confirmed the Order of conviction and sentence of the appellant passed by the Trial Court under Section 302 read with Section 149 of the Indian Penal Code, 1860 (for short 'the IPC').

3. The appellant was one of the accused before the Trial Court for the alleged offences punishable under Section 302 read with Sections 149 and 147 of the IPC. The Trial Court by its judgment and order dated 18.10.1995 in Sessions Trial No. 39 of 1992, convicted and sentenced the appellant for rigorous imprisonment of two years under Section 147 and imprisonment for life under Section 302 read with Section 149

IPC, both sentences to run concurrently. Aggrieved by the order so made, the appellant and others approached the High Court of Uttarakhand at Nainital by way of criminal appeal under Section 374(2) of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.') on various grounds.

4. Before the High Court, apart from others, the learned counsel for appellant raised the contention that the appellant was juvenile on the date of the commission or occurrence of the offence, i.e. on 01.12.1991. The said contention was rejected by the High Court on the ground that it was not raised before the Trial Court and no evidence has been adduced in defence and no suggestion had been made to the witnesses during the trial and that the appellant admitted his age as 20 years at the time of recording his statement under Section 313 of the Cr. P.C.. In conclusion, the Court has observed:

> "11. Learned counsel for the appellants contended that appellants Gadha and Babla, were minors on the day of the incident. But no such suggestion was made to any of the witnesses nor is any evidence adduced in defence. Rather the accused / appellants Gadha and Babla have disclosed their age 20 years on the day when their statement under Section 313 Cr.P.C. were recorded also makes out the case that their age was more than 16 years on the day of the incident. It is pertinent to mention here that on the day of the incident, and during the trial, Juvenile Justice Act, 1986, was applicable to the cases of Juveniles and not Juvenile Justice (Care and Protection of Children) Act 2000."

5. After issuing notice to the opposite parties in the special leave petition, by our Order dated 18.04.2011, we had directed the learned Sessions Judge or his nominee to conduct an inquiry into the question of the age of the appellant on the date of commission of offence and to submit a report as envisaged under Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (for short 'Rules, 2007).

6. Pursuant to the aforesaid direction, the inquiry report was submitted before this Court, but the same was not accepted, as it was merely based on the opinion of an individual doctor which was not in accordance with the procedure prescribed under Rule 12 of the Rules, 2007. Therefore, by our Order dated 01.11.2011, we had, once again, directed the learned Sessions Judge to conduct an inquiry as prescribed under Rule 12 of the Rules, 2007 and submit his report.

7. Pursuant to the directions issued by us, the learned Additional Sessions Judge has conducted inquiry by following the prescribed procedure under the Rules, 2007 and submitted his inquiry report dated 03.12.2011, wherein, it is concluded that the appellant was aged about 10-15 years on the date of the commission of the offence i.e. 01.12.1991. Therefore, the appellant is juvenile within the meaning of the expression under Section 2(h) of the Juvenile Justice Act, 1986 and Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000.

8. This report is not disputed by the learned counsel for the respondent-State.

9. We have heard the learned counsel for the parties to the lis. We have also carefully perused the judgment and order passed by the High Court. We are of the opinion that the High Court has erred in dismissing the appeal on the ground that no evidence was adduced and no suggestion was made to the witnesses regarding juvenility of the appellant during the trial. In our opinion, the issue of raising the plea for determination of juvenility for the first time at the appellate stage is no more res integra. This Court in *Lakhan Lal v. State of Bihar,* (2011) 2 SCC 251, has allowed such plea raised before this Court for the first time and, taking note of its previous decisions on this point, has observed thus :

> "The fact remains that the issue as to whether the appellants were juvenile did not come up for consideration for whatever reason, before the Courts below. The question

> is whether the same could be considered by this Court at this stage of the proceedings. A somewhat similar situation had arisen in *Umesh Singh and Anr. v. State of Bihar,* (2000) 6 SCC 89 wherein this Court relying upon the earlier decisions in *Bhola Bhagat v. State of Bihar,* (1997) 8 SCC 720, *Gopinath Ghosh v. State of W.P.* 1984 Supp SCC 228 and *Bhoop Ram v. State of U.P.,* (1989) 3 SCC 1, while sustaining the conviction of the Appellant therein under all the charges, held that the sentences awarded to them need to be set aside. It was also a case where the appellant therein was aged below 18 years and was a child for the purposes of the Bihar Children Act, 1970 on the date of the occurrence. The relevant paragraph reads as under (Umesh Singh case, SCC, pp.93-94, para 6) :
>
> "6. So far as Arvind Singh, appellant in Criminal Appeal No. 659 of 1999 is concerned, his case stands on a different footing. On the evidence on record, the learned Counsel for the appellant, was not in a position to point out any infirmity in the conviction recorded by the trial court as affirmed by the appellate court. The only contention put forward before the court is that the appellant is born on 1-1-67 while the date of the incident is 14-15-1980 and on that date he was hardly 13 years old. We called for report of experts being placed before the court as to the age of the appellant, Arvind Singh. The report made to the court clearly indicates that on the date of the incident he may be 13 years old. This fact is also supported by the school certificate as well as matriculation certificate produced before this Court which indicate that his date of birth is 1-1-1967. On this basis, the contention put forward before the court is that although the appellant is aged below 18 years and is a child for the purpose of the Bihar Children Act, 1970 on the date of the occurrence, his trial having been conducted along with other accused who are not children is not in accordance with law. However, this

contention had not been raised either before the trail court or before the High Court. In such circumstances, this Court in *Bhola Bhagat v. State of Bihar,* 1997 (8) SCC 720, following the earlier decision in *Gopinath Ghosh v. State of West Bengal,* 1984 Supp. SCC 228 and *Bhoop Ram v. State of U.P.,* 1989 (3) SCC 1 and *Pradeep Kumar v. State of U.P.,* 1995 Supp(4) SCC 419, while sustaining that the sentences awarded to them need to be set aside. In view of the exhaustive discussion of the law on the matter in Bhola Bhagat case, we are obviated of the duty to examine the same but following the same, with respect, we pass similar orders in the present case. Conviction of the appellant Arvind Singh is confirmed but the sentence imposed upon him stands set aside. He is, therefore, set at liberty, if not required in any other case."

10. We are in respectful agreement with the view expressed by this Court in the aforesaid decision.

11. We have carefully perused the report dated 03.12.2011 of the learned Additional Sessions Judge. Since the report is made after holding due inquiry as required under the Act and the Rules, we accept the same. Accordingly, we hold that the appellant was juvenile, as envisaged under the Act and the Rules framed thereunder, on the date of commission of the offence.

12. The Jail Custody Certificate, produced by the appellant suggests that he has undergone the actual period of sentence of more than three years out of the maximum period prescribed under Section 15 of the Act. In the circumstance, while sustaining the conviction of the appellant for the aforesaid offences, the sentence awarded to him by the Trial Court and confirmed by the High Court is set aside. Accordingly, we direct that the appellant be released forthwith, if not required in any other case. The appeal is partly allowed.

R.P. Appeal Partly allowed.

DEEPAK @ WIRELESS
v.
STATE OF MAHARASHTRA
(Criminal Appeal No. 438 of 2009)

SEPTEMBER 4, 2012

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

PENAL CODE, 1860:

ss.395, 396 and 397 - Ingredients of - Explained - Appellant along with four others (two juveniles and two remained absconding) committing robbery resulting in death of one victim and grievous injuries to the other - Held: The injured witness clearly stated that the number of assailants was five - She identified the appellant unhesitatingly in the court and stated that he was one of the assailants - The factum of death of one of the victims and grievous injuries to the witness has been supported by medical evidence - The evidence of the brother of the deceased and the spot panchnama recorded in his presence show that the accused had taken away cash as also ornaments worn by the inured witness - Therefore, the conviction of the appellant for his involvement in the crime with four others falling u/ss 395, 396 and 397 IPC, as recorded by trial court and confirmed by High Court, does not call for any interference - Evidence - Identification of accused.

EVIDENCE:

Dacoity - Identification of accused in court - Held: The witness was a victim at the hands of the accused-appellant and suffered grievous injuries which disabled her movements for quite a long time - In fact, the trial court has observed descriptively as to how she was placed in a situation where

she was able to observe the conduct of the appellant and other accused so closely giving no scope for any doubt as to her unhesitant identification of the appellant at the time of trial - Penal Code, 1860 - ss.395, 396 and 397.

The appellant was prosecuted for committing offences punishable u/ss 395, 396 and 397 IPC. The prosecution case was that the appellant along with four others committed dacoity in which the brother of PW2 was killed and PW-9, the wife of PW-2, was seriously injured by the accused. Out of the said 5 accused, two remained absconding; and two being juveniles, their case was separated. The trial court convicted the appellant under each of the three counts and sentenced him to various terms including imprisonment for life u/s 396 IPC. The High Court confirmed the conviction and the sentence.

In the instant appeal it was, inter alia, contended for the appellant-accused that the offence of dacoity per se was not made out in as much as the basic ingredient of five persons conjointly committing the offence of robbery and murder was not made out; that no recoveries from any person, much less the appellant, were made as regards the alleged articles looted in the occurrence; and that identification of the appellant in the court without holding any proper test identification parade could not form the basis of his conviction.

Dismissing the appeal, the Court

HELD: 1.1 In order to find a person guilty of offences punishable u/ss 395, 396 and 397 of IPC, his participation along with a group of five or more persons indulging in robbery and in that process committing murder and also attempting to cause death or grievous hurt with deadly weapons would be sufficient. Use of a knife in the course

of commission of such a crime has always been held to be use of a deadly weapon. [para 5] [494-G-H]

1.2 In the case on hand, three persons were arrested and since two accused persons other than the appellant were juveniles, they were stated to have been proceeded separately. Besides, two other accused were absconding throughout the stage of trial. In order to prove the participation of five persons, the sole reliance was placed upon the deposition of P.W.9, the victim who suffered severe injuries at the hands of the accused. In her chief-examination she stated that on the date of occurrence four to five thieves entered their house. In the cross-examination, however, she came out with a definite answer that the number of persons involved in the offence was five. She further stated that on hearing the shouts of her brother-in-law she went to the adjacent room and saw those persons assaulting her brother-in-law with the aid of knives, rods and wooden club. She also described the features of those persons as belonging to the age group of 18 to 25 years. According to her, after witnessing the attack on the person of her brother-in-law, when she started shouting, the accused persons turned towards her and started assaulting her by inflicting injuries on her eyes, head, back etc. As far as the appellant was concerned, P.W.9 identified him unhesitatingly in the court and declared that he was one of the assailants. There is no reason why the version of P.W.9 should not be believed. She had the first hand information relating to the crime and who suffered extensively at the hands of the accused persons. Her statement before the court did not appear to be vacillating. Having regard to the definite statement made by P.W.9, who was able to witness the whole occurrence, namely, the initial assault on her brother-in-law which cost his life and thereafter on herself, that the number of

persons involved in the offence was five, the reliance placed upon her version by the courts below was well justified for proceeding against the appellant for the offences falling u/ss 395, 396 and 397 of IPC. [para 6 and 8] [495-B-H; 496-G-H; 497-C-E]

1.3 P.W.4, the Panch witness, confirmed the seizure of the full pant and shirt worn by the appellant, a motorcycle key, a knife and cash of Rs.150/- from the person of the appellant which were marked as Ext. 19. It was pointed out by the said witness that the act of seizure from the accused was made in his presence. PW-10, after holding the investigation, filed charge-sheet before the court wherein it was alleged that the appellant along with two juveniles and two others (the last two were stated to be absconding) indulged in the offence on the night of 13/14.06.2004. [para 7] [496-C-E]

1.4 Therefore, it cannot be said that the basic ingredient of involvement of minimum of five persons for the offences u/ss 395, 396 and 397 IPC was lacking in this case. [para 9] [497-F]

2. As regards the robbery committed by the accused, the evidence of P.W.2, the husband of P.W.9, assumes significance. He stated that the assailants had taken away a sum of Rs.4,000/- to 5,000/- cash as well as the ornaments worn by P.W.9 on her neck and hands. It is true that P.W.9 has not referred about removal of either cash or ornaments from her body and P.W.2 was not present at the time when the occurrence took place. In fact the judgment of the trial court shows that Ext. 28, which is spot-panchnama recorded in the presence of P.W.2, disclosed that the appellant and the other accused relieved the victim of cash and other jewels while committing the murder of the deceased. One relevant factor which is to be noted was that P.W.9 was so very

seriously injured that she was hospitalized for 2-3 months after the occurrence. Therefore, when such a seriously injured witness was examined and there was a slip in referring to removal of stolen articles and when there is definite evidence of P.W.2 who is none other than her husband who specifically stated the articles which were stolen by the appellant and the other accused, in the absence of anything brought out in the cross-examination of P.W.2 as regards the stolen articles, this Court holds that in the peculiar facts of the case, the said evidence was sufficient for the courts below to hold that there was really an act of theft committed by the appellant and other accused. The said commission of offence having regard to the involvement of number of persons and the murder of the deceased and the grievous injuries inflicted upon P.W.9 would definitely constitute the offence falling u/ss 395, 396 and 397 of IPC. [para 9] [497-G-H; 498-A-F]

3. In the case on hand, P.W.9 was a victim at the hands of the appellant and the other accused and suffered grievous injuries which disabled her movements for quite a long time. She had the opportunity of witnessing the involvement of the appellant and the other accused in the gruesome act of killing her brother-in-law by beating him severely. She was also assaulted by the accused so severely which according to P.W.1 disabled her movements for quite sometime. In fact, the trial court has observed descriptively as to how P.W.9 was placed in a situation where she was able to observe the conduct of the appellant and other accused so closely giving no scope for any doubt as to her unhesitant identification of the appellant at the time of trial. P.W.9 also in her evidence gave the description of all the accused and the clothes worn by them as well as their physical features. [para 13] [501-C-E]

Dana Yadav alias Dahu and others v. State of Bihar **2002 (2) Suppl. SCR 363 = (2002) 7 SCC 295,** *Simon and others v. State of Karnataka* **2004 (1) SCR 1164 = (2004) 2 SCC 694 and** *Daya Singh v. State of Haryana* **- 2001 (1) SCR 1115 = AIR 2001 SC 1188 - relied on.**

Mohd. Abdul Hafeez v. State of Andhra Pradesh **(1983) 1 SCC 143 - distinguished.**

Suraj Pal v. State of Haryana **1994 (5) Suppl. SCR 373 = (1995) 2 SCC 64 - referred to.**

4. The factum of death of the deceased and the grievous injuries suffered by P.W.9, was supported by the evidence of P.W.1, the postmortem doctor who also attended on P.W.9. In the absence of any other contra evidence, the murder of deceased as well as the grievous injuries caused on P.W.9 were beyond any controversy. In the said circumstances, the reliance placed upon the evidence of PW-2, the husband of PW-9 who gave the details about the loss of properties in the crime committed by the accused was well justified. Therefore, the conviction for the offences alleged against the appellant of his involvement with four others falling u/ss 395, 396 and 397 of IPC as found proved and as confirmed by the High Court does not call for any interference. [para 11] [498-G-H; 500-A-C]

Rafiq Ahmad alias Rafi v. State of Uttar Pradesh **(2011) 8 SCC 300 - cited**

Case Law Reference:

1994 (5) Suppl. SCR 373	**referred to**	**para 3**
1983 (1) SCC 143	**distinguished**	**para 3**
(2011) 8 SCC 300	**cited**	**para 4**

2002 (2) Suppl. SCR 363	**relied on**	**para 12**
2004 (1) SCR 1164	**relied on**	**para 12**
2001 (1) SCR 1115	**relied on**	**para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 438 of 2009.

From the Judgment & Order dated 25.04.2007 of the High Court of Bombay at Aurangabad in Crl. Appeal No. 403/2005.

Rajiv Nanda for the Appellant.

Aprajita Sinha, Asha Gopalan Nair for the Respondent.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. This appeal is directed against the judgment of the High Court of Bombay Bench at Aurangabad dated 25.04.2007 by which the High Court dismissed the Criminal Appeal No.403 of 2005 and confirmed the conviction and sentence imposed on the appellant for offences under Sections 395, 396 and 397 of IPC. The appellant was imposed with punishment of rigorous imprisonment of five years and a fine of Rs.500/- in default to undergo further three years rigorous imprisonment for offence under Section 395 of IPC, rigorous imprisonment for life and fine of Rs.500/- for offence under Section 396 of IPC and further rigorous imprisonment for three years and fine of Rs.500/- in default to undergo one year rigorous imprisonment for the offence under Section 397 of IPC.

2. The genesis of the case was that on the date of occurrence, namely, 13/14.06.2004, P.W.10 A.P.I., attached to police station Pachod received a wireless message from P.S.I. Dhakne, who was on patrol duty, that some thieves had entered in that area. P.W.10, therefore, proceeded to the police station and on the way he met P.S.I. Dhakne and others and in the

enquiry it came to light that the thieves had gone to the adjoining area. They started combing operation in that area and while they were going towards Aurangabad they noticed three persons fleeing on a motorcycle in high speed. The team led by P.W.10 followed those persons and that after a distance of chase those persons abandoned the motorcycle in the place called Jamkhed crossroad and started running in the open field. The police party chased them and could apprehend two out of the three persons. Out of the two persons who were apprehended, one was the appellant. The suspects were brought to the police station and in the meantime, P.W.10 received a telephone call that a theft had taken place in the house of one Vasanta Bhumre. On reaching the house of Vasanta Bhumre, P.W.10, noticed the wife of Vasanta Bhumre lying in the middle room in a pool of blood and his brother Sharad was found dead in the adjacent passage. P.W.10 arranged for sending the injured wife of P.W.2-Vasanta Bhumre to the hospital in the police vehicle and while going to the hospital P.W.9-Mirabai informed P.W.10 that about four to five assailants wearing pant and shirt caused injuries to her as well as the deceased Sharad and fled away from the scene of occurrence in a motorcycle. After admitting P.W.9 in the hospital, P.W.10 said to have returned back to the scene of occurrence and sent the dead body for postmortem after holding the inquest. P.W.10, based on the investigation stated to have learnt that the appellant and his accomplices, namely, Rahul Bhosle, Ravi Shinde, one Balaji and another unknown person (the last two were absconding) indulged in the dacoity in the house of P.W.2 on the night of 13/14.06.2004. The appellant alone was proceeded for the offences under Sections 395, 396 and 397 of IPC, since the other two were juvenile, they were dealt with separately. The prosecution examined as many as 10 witnesses on its side apart from the material objects and chemical analysis report in support of the case. The Trial Court by its judgment dated 09.05.2005 convicted the appellant and imposed the punishment, as above, and the same was

confirmed by the High Court, aggrieved by the same the appellant has come before this Court.

3. Assailing the judgment of the Courts below, Mr. Rajiv Nanda, learned counsel for the appellant in his submissions contended that the offence of dacoity per se was not made out in as much as the basic ingredient of five persons conjointly committing the offence of robbery and murder was not made out. The learned counsel also argued that no recoveries either from the appellant or any other person were made as regards the alleged articles looted in the occurrence and, therefore, neither the charge of robbery nor that of dacoity was made out. In support of the said submission learned counsel also contended that though from the chemical analysis report the blood sample found in the clothes of the appellant was found to be of 'Group B', no comparison of the blood group of the appellant with that of the deceased was ever carried out and, therefore, merely based on the blood stains, found on the clothes of the appellant, there was no scope to connect the appellant to the offence of dacoity and murder falling under Section 396 of IPC. According to learned counsel, the police foisted a false case against the appellant by arresting him from his residence and that the appellant was not involved in the crime. The learned counsel contended that P.W.9, the so called eye-witness, never deposed that any jewels or other properties were stolen on that day and that identification of the appellant in the Court, without holding proper test identification parade cannot form the basis for convicting the appellant for the serious offence of dacoity and murder. The learned counsel summed-up his submissions by stating that there was no test identification parade, that there was no recovery of pant or stolen goods and the basic ingredient of conjoint effort of five persons in the involvement of the offence proved fatal to the case of the prosecution. Learned counsel also relied upon the decisions of this Court in *Suraj Pal v. State of Haryana* - reported in (1995) 2 SCC 64 and *Mohd. Abdul Hafeez v. State*

of Andhra Pradesh - reported in (1983) 1 SCC 143 in support of his submission.

4. The learned counsel for the State in his submissions by retracing the sequence of events, which ultimately resulted in the arrest of accused persons, contended that P.W.9 was an eye-witness to the occurrence who after hearing the cries of her brother-in-law, namely, the deceased Sharad in the early hours of 13/14.06.2004 at about 2 to 2.30 a.m. noticed that the appellant and the other accused were brutally beating the deceased with knife, iron rod and wooden club and when she started shouting for help, the accused persons ran towards her and caused injuries by knife as well as by other weapons on her face and other parts of her body. The learned counsel, therefore, contended that since P.W.9 before the infliction of injuries upon her was able to view the brutal attack on her brother-in-law by the accused and, thereafter, such persons attacked the witness herself, she was able to identify the appellant without any hesitation in the Court. As far as the number of persons who participated in the crime is concerned, here again learned counsel would draw support from the version of P.W.9 herself in her cross-examination where she stated in uncontroverted terms that five individuals were involved in the crime at that point of time. As far as stealing of articles is concerned, the learned counsel by referring to the evidence of P.W.2 contended that he was able to specify the articles stolen while committing the dacoity in his house by way of cash as well as jewels removed from the body of P.W.9. As far as the non-production of weapons and the stolen articles are concerned, the Trial Court has noted that due to inability of the police to arrest the two absconding accused, recoveries of those items were not placed before the Court. The learned counsel for the State by relying upon the said conclusion of the Trial Court contended that the said conclusion was well justified and, therefore, on that ground the conviction cannot be interfered with. The learned counsel also pointed out that the evidence of P.W.8 whose motorcycle was stolen in the early

hours of 14.06.2004, which was recovered and handed over to him, supported the case of the prosecution in finding the appellant guilty of the offence. Learned counsel placed reliance upon the recent decision of this Court where one of us (Hon'ble Mr. Justice Swatanter Kumar) was a party-*Rafiq Ahmad alias Rafi v. State of Uttar Pradesh* - reported in (2011) 8 SCC 300 in support of his submissions.

5. In the above said background of the case pleaded by both the parties, when we examine the case on hand, the appellant was convicted and imposed with sentences for offences falling under Sections 395, 396 and 397 of IPC. When we examine the said offences alleged and found proved against the appellant, it will have to be stated that when a person is involved in an offence of theft of higher magnitude, then it becomes dacoity and when dacoity is committed with murder and also results in causing grievous hurt to others, it becomes robbery punishable under Sections 395, 396 and 397 of IPC. In other words, when the offence of theft is committed conjointly by five or more persons, it becomes dacoity and such dacoity by those persons also results in commission of murder as well as causing of grievous hurt to the victims, it results in an offence of robbery. A reading of Sections 395, 396 and 397 of IPC makes the position clear that by virtue of the conjoint effort of the accused while indulging in the said offence makes every one of them deemed to have committed the offence of dacoity and robbery. In the result, when such offences of dacoity and robbery are committed, the same result in the death of a person or hurt or wrongful restrain or creating fear of instant death or instant hurt or instant wrongful restraint. In substance, in order to find a person guilty of offences committed under Sections 395, 396 and 397 of IPC, his participation along with a group of five or more persons indulging in robbery and in that process commits murder and also attempts to cause death or grievous hurt with deadly weapons would be sufficient. Use of a knife in the course of commission of such a crime has always been held to be use of a deadly weapon.

6. Keeping the above basic prescription of the offence described in the above provisions in mind, we examined the case on hand. In the first instance, what is to be examined is whether the basic ingredient of the offence falling under Sections 395, 396 and 397 of IPC, namely, participation of five or more persons was made out. In the case on hand, as has been stated by the Courts below, the appellant alone was proceeded, though three out of five persons said to have been taken into custody. As per the judgment of the High Court three persons were arrested and since two accused persons other than the appellant were juveniles, they were stated to have been proceeded separately. It is the case of the prosecution that two other accused, namely, one Balaji and another unknown person were absconding through-out the stage of trial. In order to prove the participation of five persons, the sole reliance was placed upon the deposition of P.W.9, the victim who suffered severe injuries at the hands of the accused. In her evidence in the chief examination she stated that on the date of occurrence four to five thieves entered their house, that on hearing the shouts of her brother-in-law she went to the adjacent room and saw those persons assaulting her brother-in-law with the aid of knives, rods and wooden club. She also described the features of those persons as belonging to the age group of 18 to 25 years, that they were wearing trousers and shirts, that they were of medium height and dark in complexion. According to her, after witnessing the attack on the person of her brother-in-law Sharad, when she started shouting, the accused persons turned towards her and started assaulting her by inflicting injuries on her eyes, head, back etc. On the morning of 14.06.2004, after the police party arrived and when she was being taken to the hospital in the police vehicle by P.W.10, she stated to have informed him that four to five persons indulged in the said offence. In the cross-examination, however, she came out with a definite answer that the number of persons involved in the offence was five. As far as the appellant was concerned, P.W.9 identified him unhesitatingly in the Court and declared that he was one of the assailants. P.W.10, the investigating officer in

his evidence stated that after apprehending two out of the three accused persons who were fleeing on the motorcycle, they were brought to the police station who disclosed their names as Deepak and Rahul Bhosale and that third person who fled away was Ravi Shinde by name. The Rahul Bhosale and Ravi Shinde were stated to be juveniles and, therefore, they were proceeded separately.

7. P.W.4 the Panch witness confirmed the seizure of the full pant and shirt worn by the appellant, a motorcycle key, a knife and cash of Rs.150/- from the person of the appellant which were marked as Exhibit 19. It was pointed out by the said witness that the act of seizure from the accused was made in his presence between 9 a.m. and 10 a.m. in the morning of 14.06.2004. He, however, stated that police did not take into custody the wooden articles from the accused in his presence and it was, therefore, contended that his version cannot be believed. After holding the investigation P.W.10 filed chargesheet before the Court wherein it was alleged that the appellant along with juveniles Rahul son of Rambhau and Ravi son of Laxman and two others, namely, one Balaji and another unknown person (the last two were stated to be absconding) indulged in the offence on the night of 13/14.06.2004. The question for consideration is whether with the above evidence available on record, the conclusion of the Courts below in having held the appellant guilty of the offences under Sections 395, 396 and 397 of IPC merits acceptance.

8. Primarily the version of P.W.9 who was a victim has stated that on the night of 14.06.2004 four to five thieves entered their house and indulged in the crime. In the cross-examination, however, she asserted that the number of persons were five. There is no reason why the version of P.W.9 should not be believed. She had the first hand information relating to the crime and who suffered extensively at the hands of the accused persons. Her statement before the Court did not appear to be vacillating. It is true that initially in her chief examination she

stated that four or five persons were involved in the crime but the said doubt, if any, as regards the involvement of number of persons was cleared thankfully at the instance of the appellant himself by getting a definite answer from the witness in the cross-examination that the number of persons were five in all. Such a definite answer in the cross-examination should bind the appellant and, therefore, there is no reason to discard the said version of P.W.9. It was argued that when the police could apprehend three of the accused and also ascertained the name of fourth person as Balaji; its failure to even find out the name of fifth person creates serious dent in the case of the prosecution. In the first blush, such a submission though appears to be sound, having regard to the definite statement made by P.W.9 who suffered at the hands of the appellant and the other accused who was also able to witness the whole occurrence, namely, the initial assault on her brother-in-law which cost his life and thereafter on herself in making a clear cut statement that the number of persons involved in the offence was five, we are of the view that the reliance placed upon her version by the Courts below was well justified for proceeding against the appellant for the offences falling under Sections 395, 396 and 397 of IPC.

9. We are, therefore, not able to countenance the contention of learned counsel for the appellant that the basic ingredient of involvement of minimum of five persons for the offences under Sections 395, 396 and 397 of IPC was lacking in this case. Once we get rid of the said hurdle and hold that the case of the prosecution as proceeded against the appellant for the said offences was maintainable, the next question for consideration is whether there was any robbery committed by the accused. In this respect, the evidence of P.W.2 the husband of P.W.9 assumes significance. P.W.2 in his evidence stated that the assailants had taken away a sum of Rs.4,000/- to 5,000/- cash as well as the ornaments worn by P.W.9 on her neck and hands. It is true that P.W.9 has not referred about removal of either cash or ornaments from her body. P.W.2 was not

present at the time when the occurrence took place. One relevant factor which is to be noted was that P.W.9 was seriously injured. In fact the judgment of the Trial Court disclose that Exhibit 28, which is spot-panchnama recorded in the presence of P.W.2, disclosed that there was blood everywhere and the cupboard of the room was open and curtains were thrown here and there and the household articles were lying all over and the window was forcibly opened and was found broken which was relied upon by the Court below to hold that the appellant and the other accused relieved the victim of cash and other jewels while committing the murder of deceased Sharad. P.W.9 was so very seriously injured that she was hospitalized for two to three months after the occurrence. In fact, at one stage having regard to the physical condition of P.W.9, a commission was appointed to record her evidence though later on the same was given up. Therefore, when such a seriously injured witness at the hands of the appellant was examined and there was a slip in referring to removal of stolen articles and when there is definite evidence of P.W.2 who is none other than her husband who specifically stated the articles which were stolen by the appellant and the other accused, in the absence of anything brought out in the cross-examination of P.W.2 as regards the stolen articles, we hold that in the peculiar facts of this case, the said evidence was sufficient for the Court below to hold that there was really an act of theft committed by the appellant and other accused. The said commission of offence having regard to the involvement of number of persons and the murder of Sharad and the grievous injuries inflicted upon P.W.9 would definitely constitute the offence falling under Sections 395, 396 and 397 of IPC.

10. When we come to the question of death of the deceased and the grievous injuries suffered by P.W.9, the evidence of P.W.1, the postmortem doctor who also attended on P.W.9, in his evidence after referring to the 11 injuries found on the body of the deceased made it clear that the cause of death was cardio respiratory arrest due to head injury

associated with asphyxia due to aspiration of blood oozing from the compound fracture mandible and laceration of mucus membrane of the gum. P.W.1 also in his chief stated that injuries found on the body of P.W.9 which by the description themselves made it clear that they were of grievous in nature. In order to appreciate the nature of injuries sustained by P.W.9 the injuries themselves can be noted which were as under:

"1. Incised wound on right forehead, 3 x 2 x 2 cms. caused by sharp weapon.

2. Incised wound on the right side of right eye measuring 6 x 2 x 2 cm caused by sharp weapon.

3. Incised wound on cheek 3 x 1 x 1 cm, caused by a sharp weapon.

4. Contusion on right cheek and infra-orbital region 6 x 5 cm caused by hard and blunt object.

5. Evidence of fracture mandible at the middle region with loose teeth lower incisor nature of injury, grievous in nature, caused by hard and blunt object.

All the injuries in my opinion were caused within 6 hours, patient was referred to Govt. Medical College Hospital, Aurangabad, for further management and treatment. The certificate issued bears my signature. Its contents are correct. It is at Exh.12."

11. In the cross-examination of P.W.1, it was suggested that the injuries found on the deceased and noted under exhibit 11 could have been caused in a fatal motor vehicle accident, which was duly denied by P.W.1. It also came out in the cross-examination of P.W.1 that when P.W.9 was brought before him she could not speak and was in a critical condition. Here again he denied a suggestion that the injuries on the person of P.W.9 could have been caused by a metal sheet striking her. Beyond

that nothing else was elicited from P.W.1 by way of cross-examination. P.W.9 in the course of her examination before the Court showed the scar injury which was visible on her face which was duly noted by the Trial Court. In the said circumstance, in the absence of any other contra evidence, the murder of deceased Sharad as well as the grievous injuries caused on P.W.9 were beyond any controversy. In the said circumstances, the reliance placed upon the evidence of PW-2, the husband of PW-9 who gave the details about the loss of properties in the crime committed by the accused was well justified. Therefore, the conviction for the offences alleged against the appellant of his involvement with four others falling under Sections 395, 396 and 397 of IPC as found proved and as confirmed by the High Court does not call for any interference.

12. As far as the decision relied upon by learned counsel for the appellant in the case of *Mohd. Abdul Hafeez* (supra), it was held therein that the identification of the accused by the victim in the absence of a test identification parade cannot be believed. While holding so, this Court noted that though no fault can be found with the said witness in not mentioning the names as the accused were not known to him, the failure to give some description of the accused who said to have removed cash from his pocket coupled with the non-holding of the test identification parade was such that his evidence cannot be relied upon. The said decision was in the peculiar facts of that case. On the other hand, the decisions relied upon by the High Court for accepting the statement of P.W.9 even in the absence of test identification parade fully supports the case on hand. Those decisions referred to by the High Court in *Dana Yadav alias Dahu and others v. State of Bihar* - (2002) 7 SCC 295, *Simon and others v. State of Karnataka* - (2004) 2 SCC 694 and *Daya Singh v. State of Haryana* - AIR 2001 SC 1188 are apposite on the point. Therefore, the said decision relied upon by the learned counsel is of no assistance to the appellant. In *Suraj Pal* (supra) at paragraph 14 of the said judgment while insisting on holding the test identification parade, it was held that the same would

enable the identification of the accused at the earliest possible opportunity after the occurrence by such witnesses is of vital importance with a view to avoid the chance of his memory fading away by the time he is examined in the Court after some lapse of time. There can be no two opinion about the principle laid down in the said decision relating to the importance of holding of test identification parade.

13. In the case on hand, we have elaborately stated as to how P.W.9 who was a victim at the hands of the appellant and the other accused and who suffered grievous injuries which disabled her movements for quite a long time and who had the opportunity of witnessing the involvement of the appellant and the other accused in the gruesome act of killing her brother-in-law by beating him severely and after successfully beating him to death also assaulted her so severely which according to P.W.1 disabled her movements for quite sometime. In fact, the Presiding Officer of the Trial Court has observed descriptively as to how P.W.9 was placed in a situation where she was able to observe the conduct of the appellant and other accused so closely giving no scope for any doubt as to her unhesitant identification of the appellant made in his presence at the time of trial. P.W.9 also in her evidence gave the description of all the accused and the clothes worn by them as well as their physical features. Therefore, the decision relied upon by learned counsel for the appellant is of no assistance on this aspect while the decision relied upon by the High Court fully supported the case of the prosecution.

14. Having regard to our above conclusion, we do not find any merit in this appeal, the appeal fails and the same is dismissed.

R.P. Appeal dismissed.

STATE OF KERALA AND OTHERS
v.
THE TRIBAL MISSION
(Civil Appeal No. 6267 of 2012)

SEPTEMBER 4, 2012

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

KERALA EDUCATION RULES 1959:

rr. 2 and 2A read with Government's Policy dated 13.6.2007 - Granting of recognition to schools in unaided sector - Held: Indiscriminate grant of recognition to schools in the unaided sector may have an adverse affect on the State owned schools as well as the existing schools in the aided sector, by way of division fall, retrenchment of teachers etc. - Therefore, the procedure laid down in rr. 2, 2A cannot be overlooked, otherwise it is bound to provide scope for discrimination, arbitrariness, favouritism - Besides,- Para 1 of the Policy indicates that unaided schools need not be given recognition in future - However, the recognition granted by State Government to the respondent school for conducting classes 1 to 10 from the academic year 2010-11 onwards, in the peculiar circumstances of the case, is not interfered with, but it shall not be treated as a precedent - Education/ Educational institutions.

The respondent-Tribal Mission established an English Medium school in the year 2001 in the State of Kerala in the unaided sector, and applied for recognition to the school in the year 2003. The Deputy Director of Education forwarded a report dated 19.10.2007 to the State Government pointing out existence of three recognized schools within a distance of 2.5-5 kms from the respondent school. It was further pointed out that granting recognition would adversely affect the other

aided schools functioning in the area and there was also the possibility of division fall in the said schools. The application of the respondent was rejected. The Single Judge of the High Court upheld the order, but the Division Bench directed the State Government to grant recognition to the respondent school as a self-Finance English medium school to run classes from 1 to 10 from the academic year 2010-2011. Aggrieved, the State Government filed the appeal.

Disposing of the appeal, the Court

HELD: 1.1 The Government's Policy issued by GO (P) No.107/07/G Edn. dated 13.6.2007 with regard to up-gradation of existing schools and recognition of unaided schools applies to the respondent school as well. Para 3 of the said policy will not give any Carte Blanche to start a school in the unaided sector and then seek recognition as a matter of right, because Para 1 thereof indicates that, as a policy, unaided schools need not be given recognition in future. In the instant case, it is after starting the school that the respondent school is pressing for recognition which is not a correct procedure. Assuming that the respondent school has satisfied all the requirements stipulated in Para 3, still it has to undergo the procedure laid down under r. 2 and r. 2A of Chapter V of KER, otherwise, as held by this Court in K. Prasad's case*, it is bound to provide scope for discrimination, arbitrariness, favouritism and also would affect the functioning of other recognized schools in the locality. The view of the Division Bench of the High Court that once the respondent satisfies Para 3 of the Policy, the State Government has to grant recognition would go contrary to the view expressed by this Court in K. Prasad' Case and violates rr.2 and 2A of Chapter V of KER. [Para 8-10]

State of Kerala & Others v. K. Prasad & Another **2007 (8) SCR 115 = (2007) 7 SCC 140 - relied on**

1.2 The question, as to whether, the grant of recognition would affect the existing schools is also a relevant consideration. The State spends large amounts by way of aid, grant etc. for running schools in the aided sector as well as the State owned schools. Indiscriminate grant of recognition to schools in the unaided sector may have an adverse affect on the State owned schools as well as the existing schools in the aided sector, by way of division fall, retrenchment of teachers etc. Therefore, the procedure laid down in rr. 2, 2A of Chapter V of KER cannot be overlooked. [Para 10] [512-B-C]

1.3 The State Government, in the instant case, has already granted recognition to the respondent school for conducting the classes from 1 to 10 in the academic year 2010-11 onwards, of course, subject to the result of this appeal. Considering the fact that the local body has also recommended recognition and large number of students are now studying in the school, and the same is situated in a Tribal area, there is no reason to interfere with the recognition already granted to the respondent school as a special case, but it is made clear that this order shall not be treated as a precedent. [Para 11] [512-D-F]

Case Law Reference:

2007 (8) SCR 115 relied on para 7

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6267 of 2012.

From the Judgment and Order dated 18.08.2010 of the High Court of Kerala at Ernakulam in W.A. No. 896 of 2010.

Bina Madhavan for the Appellants.

George Poonthottam, M.P. Vinod, Dileep Pillai, Ajay K. Jain, Neelam Saini for the Respondent.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Leave granted.

2. We are, in this case, concerned with the question whether the State is duty bound to grant recognition to an unaided educational institution on the touchstone of Article 21A of the Constitution of India overlooking the procedure laid down under Rule 2 and Rule 2A of Chapter V of the Kerala Education Rules (for short 'KER').

3. Respondent established a school by name Betham English Medium School in the year 2001 at Attappady in the Palakkad District, State of Kerata in the unaided sector. An application for recognition was submitted by the respondent school in the year 2003 before the Government. The Deputy Direction of Education, however, forwarded a report/letter No. B1/8863/07 dated 19.10.2007 to the State Government pointing out existence of a three recognized schools within a distance of 5 km from the respondent school following Tamil and Malayalam mediums having Standard 1 to 7, of which one is situated within a distance of 2.5 km. Further, it was pointed out that the respondent school though was having sufficient infrastructure, granting recognition would adversely affect the other aided schools functioning in that area and the possibility of division fall in these schools could not be ruled out.

4. The Government rejected the application for recognition on the ground that it would violate the Government's Policy referred to in GO (P) No.107/07/G Edn dated 13.06.2007. Further, it was also pointed out that the procedure for granting recognition to new schools is laid down in Chapter V of KER and as per sub-rule (2) of Rule 2A of Chapter V of KER, an application for opening a school should be in response to the notification under sub-rule (1) of Rule 2A of Chapter V.

Consequently, the application was rejected by the Government vide GO (Rt) No. 5321/07/G.Edn. dated 22.11.2007.

5. Aggrieved by the said order, the respondent along with various others approached the learned single Judge of the High Court who upheld the order. Respondent took up the matter before the Division Bench of the High Court. The Division Bench of the High Court, vide its judgment dated 18.8.2010 allowed the appeal stating that the respondent has satisfied the various conditions laid down in the Government's Policy dated 13.6.2007 and therefore, directed the Government to grant recognition to the respondent school as an unaided self-finance English medium school to run classes from standard 1 to 10 from the academic year 2010-11 onwards. The State is aggrieved by that judgment and hence this appeal.

6. We have heard Ms. Bina Madhavan for the appellant and Shri M. P. Vinod for the respondent. Chapter V of KER deals with the opening and recognition of schools. For easy reference, we may extract Rule 2 and Rule 2A of Chapter V as under:

> **"2. Procedure for determining the areas where new schools are to be opened for existing schools upgraded -** (1) The Director may, from time to time, prepare two lists, one is respect of aided schools and the other in respect of recognized schools, indicating the localities were new schools or any or all grades are to be opened and existing Lower Primary School or Upper Primary Schools or both are to be upgraded. In preparing such lists he shall take into consideration the following.
>
> (a) The existing schools in and around the locality in which new schools are to be opened or existing schools are to be upgraded; 26
>
> (b) The strength of the several standards and the

accommodation available in each of the existing schools in that locality;

(c) The distance from each of the existing schools to the area where new schools are proposed to be opened or to the area where existing schools are to be upgraded;

(d) The educational needs of the locality with reference to the habit1ation and backwardness of the area; and

(e) Other matters which he considers relevant and necessary in this connection.

Explanation:- for the removal of doubts it is hereby clarified that it shall not be necessary to prepare the two lists simultaneously and that it shall be open to the Director to prepare only one of the lists.

(2) A list prepared by the Director under Sub-rule (1) shall be published in the Gazette, inviting objections or representations against such list. Objections, if any, can be filed against the list published within one month from the date of publication of the list. Such objection shall be filed before the Assistant Educational Officers or the District Educational Officers as the case may be. Every objection filed shall be accompanied by chalan for Rs. 10/- remitted into the Treasury. Objections filed without the necessary Chalan receipt shall be summarily rejected.

(3) The Assistant Educational Officer and the District Educational Officer may thereafter conduct enquiries, hear the parties, visit the areas and send their report with their views on the objections raised to the Director within two months from the last date of receipt of the objections. The Director, if found necessary, may also hear the parties and finalise the list and send his recommendations with the final list to Government within two months from the last date of the receipt of the report from the Educational Officers.

(4) The Government after scrutinizing all the records may approve the list with or without modification and forward the same to the Director within one month from the last date for the receipt of the recommendations of the Director. The list as approved by the Government shall be published by the Director in the Gazette.

(5) No appeal or revision shall lie against the final list published by the Director.

Provided that the Government may either suo motu or on application by any person objecting to the list published by the Director under sub-rule (4) made before the expiry of thirty days from the date of such publication review their order finalizing such list and make such modifications in that list as they deem fit by way of additions or omissions, if they are satisfied that any relevant ground has not been taken into consideration or any irrelevant ground has been taken into consideration or any relevant fact has not been taken into account while finalizing the said list:

Provided further that no modification shall be made under the preceding proviso without giving any person likely to be affected thereby an opportunity to make representation against such modifications.

2A. Applications for opening of new schools and upgrading of existing schools - (1) After the publication of the final list of the areas where 8[new school of any or all grades are to be opened or existing Lower Primary Schools or Upper Primary schools or both are to be upgraded the Director shall, by a notification in the Gazette [x x x] call for applications for the opening of New schools of any or all grades] and for raising of the grade of existing Lower Primary Schools or Upper Primary Schools or both] in the areas specified.

(2) Applications for opening of new schools or for raising schools shall be submitted only in response to the notification published by the Director. Applications received otherwise shall not be considered. The applications shall be submitted to the District Educational Officer of the area concerned in form No. 1 with 4 copies of the application and enclosures within one month from the date of publication of the notification under sub- rule (1).

(3) On receipt of the applications for permission to open new schools or for upgrading of existing schools, the District Educational Officer shall make such enquiries as he may deem fit as to the correctness of the statements made in the application and other relevant matters regarding such applications and forward the applications with his report thereon to the Director within one month from the last date for submitting applications under sub-rule (2).

(4) The Director on receipt of the applications with the report of the District Educational Officer shall forward the applications with his report to Government. within one month from the last date for forwarding the report by the District Educational Officer.

(5) The Government shall consider the applications in the light of the report of the District Educational Officer and the Director and other relevant matters which the Government think necessary to be considered in this connection and shall take a final decision and publish their decision in the Gazette with the list containing necessary particulars. within one month from the last date for forwarding the report by the Director."

7. The scope of the above mentioned rules came up for consideration in the case of *State of Kerala & Others v. K. Prasad & Another* (2007) 7 SCC 140, wherein this Court held as follows:

10. The two Rules, quoted above, lay down a comprehensive procedure for opening of new schools in particular areas, their recognition and upgradation. It is manifest that a decision in this behalf has to be taken primarily by the Government on an application made for that purpose under Rule 2-A. The Rules also lay down the guidelines which are to be taken into consideration for preparing the list in terms of sub-rule (1) of Rule 2. On the lists being finalised, after their publication and consideration of objections, if any, the same have to be sent to the Government for its approval, with or without modification. Nevertheless the decision by the Government, whether opening of new school is to be sanctioned or whether an existing school is to be allowed to be upgraded has to be taken on consideration of the matters enumerated in Clauses (a) to (e) of Rule 2(1) of the Rules. Similarly, an application for either opening of new school or for upgradation of an existing aided school can be submitted only after the Director publishes a final list of areas where new schools are to be opened or existing schools are to be upgraded under sub-rule (4) of Rule 2. Any application received otherwise cannot be considered. In view of such comprehensive procedure laid down in the statute, an application for upgradation has necessarily to be made and considered strictly in a manner in consonance with the Rules. It needs little emphasis that the Rules are meant to be and have to be complied with and enforced scrupulously. Waiver or even relaxation of any rule, unless such power exists under the rules, is bound to provide scope for discrimination, arbitrariness and favouritism, which is totally opposed to the rule of law and our constitutional values……."

8. The Government's Policy issued vide GO(P) No.107/07/G Edn. dated 13 June, 2007 with regard to up-gradation of existing schools and recognition of unaided schools applies to respondent school as well. The operative portion of the same

which applies to unaided schools and grant of NOC for CBSE/ ICSE Schools reads as follows:

"Recognition of Un-aided Schools and NOC for CBSE/ICSE Schools:

1. As a policy unaided recognized Schools need not be given recognition in future.

2. For those schools functioning in the state now whether they may be considered for recognition at all a policy decision may be taken at Govt. level.

3. Since many of them may be answering to the demand for English medium and better quality education in the rural areas, those having facilities as per Kerala Education Rules and maintaining better academic standards may be considered for recognition, if the local bodies also recommend recognition of a school acknowledging the need for such a school in the local body's jurisdiction. Further steps can be as in Chapter V Kerala Education Rules, which also envisages the setting up of recognized schools."

9. Para 3 above will not give any Carte Blanche to start a school in the unaided sector and then seek recognition as a matter of right because para 1 above indicates that as a policy unaided schools need not be given recognition in future. In the instant case, it is after starting the school in the unaided sector, the respondent school is pressing for recognition which, in our view, is not a correct procedure. Assuming that the respondent school has satisfied all the requirements stipulated in Para 3, still it has to undergo the procedure laid down under Rule 2 and Rule 2A of Chapter V, otherwise, as held by this Court in K. Prasad case (supra), it is bound to provide scope for discrimination, arbitrariness, favouritism and also would affect the functioning of other recognized schools in the locality.

10. The Division Bench of the High Court has expressed the view that once the respondent satisfies Para 3 of the Policy, the State Government has to grant recognition which in our view would go contrary to the view expressed by this *Prasad* Case (supra) and violates Rule 2, 2A of Chapter V of KER. The question, as to whether, the grant of recognition would affect the existing schools is also a relevant consideration. The State spends large amounts by way of aid, grant etc. for running schools in the aided sector as well as the State owned schools. Indiscriminate grant of recognition to schools in the unaided sector may have an adverse affect on the State owned schools as well as the existing schools in the aided sector, by way of division fall, retrenchment of teachers etc. Therefore, the procedure laid down in Rules 2, 2A of Chapter V of KER cannot be overlooked.

11. The State Government, in the instant case, has already granted recognition to the respondent school for conducting the classes from 1 to 10 in the academic year 2010-11 onwards, of course, subject to the result of this SLP. Considering the fact that the local body has also recommended recognition and large number of students are now studying in the school, and the same is situated in a Tribal area, we find no reason to interfere with the recognition already granted to the respondent school as a special case, but we make it clear that this order shall not be treated as a precedent. Appeal is disposed of as above. There will be no order as to costs.

R.P. Appeal disposed of.

RAKHAL DEBNATH
v.
STATE OF WEST BENGAL
(Criminal Appeal No. 201 of 2010)

SEPTEMBER 4, 2012

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

Penal Code, 1860 - ss.306, 498A and 107 - Death of married woman due to burn injuries - Conviction of appellant-husband u/ss.306 and 498A - Justification - Held: Justified - In the facts and circumstances of the case, the conclusion of High Court that deceased committed suicide cannot be faulted - s.113A of the Evidence Act was duly attracted to the facts of the case - Deceased committed suicide within 35 days from the date of her marriage and the allegation of cruelty was also fully established - Consistent statements of PWs disclosed that deceased was not happy with the marriage and complained about the conduct of the appellant - in demanding money from her father apart from his illicit relationship with his niece - The act of appellant in pledging the jewels of the deceased was also proved - Consequently prosecution case that deceased was instigated by the appellant to take the extreme decision of committing suicide by pouring kerosene on herself and set herself on fire was fully established and thereby charge of abetment u/s.306 and as well as s.498A stood proved - Evidence Act, 1872 - s.113A.

The wife of accused-appellant died due to severe burn injuries. The death occurred within 35 days after her marriage. In the hospital register it was noted by the doctor-P.W.19 that as per the statement of appellant, the deceased suffered burn injuries from the burning stove when she was preparing tea and bread in the kitchen.

However, according to the prosecution, shortly after marriage, the appellant demanded money from his father-in-law, PW3, for purpose of his business which was declined whereupon the appellant retorted that he knew how to collect money from him through his own daughter, and thereafter pledged the jewels of his wife with PW17 for a specified sum. The appellant's wife was also stated to have been nurturing a grievance against the appellant in view of his illicit contacts with his niece (the second accused) who lived in the very same house of appellant. It was alleged by the prosecution that all this ultimately resulted in the appellant's wife taking the extreme decision of committing suicide by pouring kerosene on herself and setting herself on fire.

The appellant was proceeded against for offences under Sections 306 and 498A of IPC. The trial court acquitted the appellant-accused. In appeal, the High Court reversed the acquittal of appellant and held him guilty on both the charges. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1.1. P.W.19 the doctor who examined the deceased (the appellant's wife) immediately after she was brought to the hospital reported that according to the appellant the deceased suffered the burn injuries from the burning stove when she was preparing tea and bread. However, in the 313 CrPC questioning the appellant made it clear that he did not make any such statement. If the said statement is to be accepted then what remains is the postmortem report, the evidence of the post mortem doctor P.W.15 and the recoveries made at the place of occurrence, namely, kitchen (viz) the 20 litre cane in which about a litre of kerosene was found, the quilt and pillows and a piece of cloth soaked in kerosene and the clothes worn by the deceased which also smelled

kerosene. The question of deceased having suffered burn injuries from the burning stove is ruled out by the own version of the appellant. [Para 6] [521-G-H; 522-A-B]

1.2. Considering the extent of burn injuries stated by the doctor in the postmortem report (viz.) the first degree burn injuries from top of the head up to the tip of the leg makes it clear that it could have been caused only by pouring kerosene from the cane over the head and by burning the person after that. The smell of kerosene oil in the clothes and other materials recovered at the scene of occurrence also fully support such a situation which could have only been inflicted by the deceased herself and, therefore, the conclusion of the High Court in having held that the deceased committed suicide cannot be found fault with. [Para 7] [522-C-E]

2.1. The consistent statements of PWs 3, 9 and 11 which disclose the complaint made by the deceased about the conduct of the appellant that he made a demand for money from her father apart from his illicit relationship with the second accused merits acceptance. P.W.3 stated that after some days of the marriage the appellant approached him and his son for a sum of Rs.40,000/-, that when PW 3 expressed his inability to make the payment the appellant left the place in a huff by stating that he knows how to get the money from him through his own daughter. P.W.3 also stated that the deceased herself informed him about the torture meted out to her by the appellant along with second accused for money when P.W.3 declined to pay any money to the appellant. P.W.3 further stated that the deceased also informed him about the illicit relationship of appellant with the second accused. The pledging of jewels of the deceased with P.W.17 was also proved by producing Exhibit 3 by which P.W.3 repaid a sum of Rs.11,000/- to P.W.17 to get back the jewels which were seized by the

police along with ornaments. P.W.17 in his evidence also confirmed that the appellant pledged the jewels with him. P.W.3 also identified the jewels which he gifted to his daughter at the time of the marriage which were recovered from P.W.17 and marked as Exhibit 1 (collectively). The receipts Exhibit 3 and 3A disclosed that the said jewels were pledged by the appellant for a sum of Rs.11,000/-. If those jewels really did not belong to the deceased the same could have been established only by the appellant by producing proper evidence before the Court. Except mere denial in the 313 statement, the appellant failed to show that those jewels which were pledged by him did not belong to the deceased. [Paras 8,11] [522-F-H; 523-A-C; 524-D-E]

2.2. PW3 stated that though his daughter complained to him about the monetary demand as well as illicit relationship of the appellant with the second accused he did not inform the same to others except his close relatives fearing any damage that may be caused to the matrimonial life of his daughter which conduct of P.W.3 as a father of the deceased was quite natural. [Para 9] [523-D-E]

2.3. P.W.5 who is a relative of the deceased also stated that the deceased informed him once about the illicit intimacy of the appellant with second accused. P.W.10 who is stated to be the cousin of the deceased deposed that when she visited his house once after marriage she informed him that she did not like the environment of her matrimonial home and that the appellant and second accused used to talk in code language. P.W.11 who is the neighbour of P.W.3, in his evidence also deposed that when the deceased visited her parental home on the occasion of Dwira Gaman Ceremony she informed him that she did not like the relationship of the appellant with the second accused and

that appellant was demanding money from her father. P.W.11 further stated that deceased also requested him to tell her father not to give any money to appellant. P.W.11 also stated that according to the deceased she was not happy with the marriage. To the same effect was the version of P.W.12. [Para 10] [523-F-H; 524-A]

2.4. As rightly held by the High Court the father of the deceased cannot be expected to inform everyone living around him about the unpleasant factum of the daughter's embarrassing living condition in her matrimonial home and, therefore, mere non-disclosure of those facts to others cannot be a ground to disbelieve the version of P.W.3. No inconsistency was found in the evidence of P.W.3 and other witnesses who had the advantage of hearing from the mouth of the deceased about the conduct of the appellant relating to his demand, as well as, his illicit intimacy with the second accused. Nothing was suggested to any of the witnesses on behalf of the appellant to state that they were deposing against him with any other ulterior motive. [Para 12] [524-F-H]

3. The relevant criteria for application of Section 113A of the Evidence Act, 1872 is duly attracted to the facts of the instant case. The deceased (appellant's wife) committed suicide within 35 days from the date of her marriage and the allegation of cruelty was also fully established. The evidence thus disclosed that the conduct of the appellant vis-à-vis the deceased coupled with the consequential demand of money from P.W.3 the father of the deceased and also the pledging of the jewels of the deceased fully established the case of the prosecution that the deceased was instigated by the appellant to take the extreme decision of committing suicide by pouring kerosene on herself and set herself on fire and thereby the charge of abetment under Section 306 and as well as Section 498A stood proved. There is no merit in this appeal. [Paras 14] [526-E-G]

Ramesh Kumar v. State of Chhattisgarh **(2001) 9 SCC 618: 2001 (4) Suppl. SCR 247 and** *Thanu Ram v. State of Madhya Pradesh (Now Chhattisgarh)* **(2010) 10 SCC 353: 2010 (12) SCR 710 - relied on.**

K. Prema S. Rao and Anr. v. Yadla Srinivasa Rao and Ors. **(2003) 1 SCC 217: 2002 (3) Suppl. SCR 339 and** *Devi Lal v. State of Rajasthan* **(2007) 14 SCC 176: 2007 (11) SCR 219 - cited.**

Case Law Reference:

2001 (4) Suppl. SCR 247	**relied on**	**Para 4, 13**
2002 (3) Suppl. SCR 339	**cited**	**Para 4**
2007 (11) SCR 219	**cited**	**Para 4**
2010 (12) SCR 710	**relied on**	**Para 15**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 201 of 2010.

From the Judgment & Order dated 24.12.2008 of the High Court Court at Calcutta in G.A. No. 27/1990.

Ravi Kumar Tomar, Amitava Acharjee, H.B. Tiwari, Smriti for the Appellant.

Chanchal Kumar Ganguly, Avijit Bhattacharjee for the Respondent.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. The first accused is the appellant. The appellant was proceeded against for offences under Sections 306 and 498A of IPC. The Trial Court acquitted the appellant and by the impugned order, the High Court while reversing the judgment of the Trial Court found the appellant guilty on both the charges and imposed the sentence of imprisonment of 10 years and also a fine of

Rs.10,000/-, in default to suffer further one year rigorous imprisonment for the offence under Section 306 of IPC. He was also sentenced to suffer rigorous imprisonment for three years apart from fine of Rs.10,000/-, in default to suffer further rigorous imprisonment for one year for the offence under Section 498A of IPC. Both the sentences were directed to run consecutively. The High Court thus partly allowed the appeal of the State. The acquittal of the second accused, however, was confirmed by the High Court.

2. The case of the prosecution was that the appellant got married to the deceased Krishna as per Hindu rites and customs on 22.04.1987. The unfortunate incident of the death of the deceased Krishna occurred on 26.05.1987 when she was admitted to SSKM Hospital with severe burn injuries at 08.35 a.m. and she was declared dead at 08.37 a.m. In the hospital register it was noted by the doctor-P.W.19 that as per the statement of the appellant at 07.35 a.m. in the morning while the deceased was preparing tea and bread in the kitchen of the house she got burnt of the burning stove. However, according to the prosecution shortly after the marriage the appellant demanded a sum of Rs.40,000/- from the father of the deceased Krishna for the purpose of his business which was declined, that upset by the declining of his demand by the father of the deceased the appellant stated to have retorted then that he knew how to collect the money from his father-in-law through his wife, and that thereafter on 22.05.1987, the appellant pledged the jewels of deceased Krishna for a sum of Rs.11,000/-. The deceased Krishna was also stated to have been nurturing a grievance against the appellant about his illicit contacts with the second accused Anima who was none other than the niece of the appellant. The prosecution filed its final report before the Trial Court and, thereafter, the charges under Sections 306 and 498A of IPC were leveled against the appellant.

3. Learned counsel appearing for the appellant while

assailing the judgment of the High Court submitted that the postmortem doctor-P.W.15 stated that he was not able to come to any definite opinion as to whether the death was homicidal, suicidal or accidental. Therefore, the main ingredient for the alleged offences against the appellant was not established by the prosecution. Learned counsel then contended that the whole case was based on circumstantial evidence and that there was no circumstance to link the appellant with the death of the deceased. Elaborating his submission learned counsel contended that none of the ingredients for the offences under Section 306 as well as 498A of IPC was demonstrably placed before the court below by the prosecution and, therefore, the conviction and sentence cannot be sustained. He further contended that FIR was based on the complaint of P.W.3 which was not written by him, that the version of P.W.3, who was the father of the deceased, did not in any way disclose any factor or even remotely suggest that there was any abetment on the part of the appellant for the deceased to commit suicide. The learned counsel therefore contended that the acquittal made by the Trial Court was a well considered judgment and the interference with the same by the High Court was not justified. The submission of learned counsel for the appellant was that there was no evidence for abetment nor was there any evidence to show that the appellant caused any cruelty to the deceased in order to convict the appellant for the offences falling under Sections 306 and 498A of IPC.

4. As against above submissions the learned counsel appearing for the State contended that the death of the deceased occurred hardly within 35 days after her marriage with the appellant, that the ocular evidences of P.Ws.3, 9 and 11 amply disclosed that within few days after the marriage the appellant made a demand for a sum of Rs.40,000/-, that the non-payment of the said money to the appellant and the subsequent pledging of the jewels of the deceased which was established by Exhibit 7 as well as evidence of P.W.17 showed that the demand of dowry was amply established. The learned

counsel submitted that the evidence of P.Ws.3, 9 and 11 disclosed that the deceased duly conveyed to both the witnesses the conduct of the appellant in having raised a demand for money apart from his illicit behaviour with his niece which ultimately resulted in the deceased taking the extreme decision of pouring kerosene and setting fire to herself. The learned counsel pointed out that the recoveries made at the place of occurrence such as kerosene cane, piece of cloth soaked in kerosene, the quilt and pillows and the wearing apparels of the deceased which had the smell of kerosene and the burn injuries suffered by the deceased amply proved that the deceased committed suicide and that such an extreme decision to commit suicide was pursuant to the constant instigation of the appellant to get money from the parental home of the deceased and also his illicit relationship with second accused. The learned counsel relied upon the decisions of this Court reported as *Ramesh Kumar v. State of Chhattisgarh* - (2001) 9 SCC 618, *K. Prema S. Rao and another v. Yadla Srinivasa Rao and others* - (2003) 1 SCC 217 and *Devi Lal v. State of Rajasthan* - (2007) 14 SCC 176.

5. Having heard learned counsel for the appellant as well as the learned counsel for the State and having perused the judgment impugned in this appeal and other related papers, at the very outset, it will have to be stated that there is no merit in this appeal.

6. The deceased died due to extensive burn injuries on her body which was fully established by the postmortem report as well as by the evidence of doctor P.W.15 who conducted the postmortem. The same is also not disputed by the appellant. In fact, P.W.19 the doctor who examined the deceased immediately after she was brought to the hospital reported that according to the appellant the deceased suffered the burn injuries from the burning stove when she was preparing tea and bread. However, in the 313 questioning the appellant made it clear that he did not make any such statement. If the said

statement is to be accepted then what remains is the postmortem report, the evidence of P.W.15 and the recoveries made at the place of occurrence, namely, kitchen (viz) the 20 litre cane in which about a litre of kerosene was found, the quilt and pillows and a piece of cloth soaked in kerosene and the clothes worn by the deceased which also smelled kerosene. The question of deceased having suffered burn injuries from the burning stove is ruled out by the own version of the appellant.

7. Considering the extent of burn injuries stated by the doctor in the postmortem report (viz) the first degree burn injuries from top of the head up to the tip of the leg makes it clear that it could have been caused only by pouring kerosene from the cane over the head and by burning the person after that. The smell of kerosene oil in the clothes and other materials recovered at the scene of occurrence also fully support such a situation which could have only been inflicted by the deceased herself and, therefore, the conclusion of the High Court in having held that the deceased committed suicide cannot be found fault with.

8. If once the said conclusion is irresistible, what remains to be examined is what was the reason for the deceased to take that extreme decision to burn herself. For that purpose, when we examine the ocular evidence placed before the court below, we find the consistent statements of P.Ws.3, 9 and 11 which disclose that the complaint made by the deceased about the conduct of the appellant that he made a demand for money from her father apart from his illicit relationship with the second accused merits acceptance. P.W.3 stated that after some days of the marriage the appellant approached him and his son for a sum of Rs.40,000/-, that when P.W.3 expressed his inability to make the payment the appellant left the place in a huff by stating that he knows how to get the money from him through his own daughter. P.W.3 also stated that the deceased herself informed him about the torture meted out to her by the appellant

along with second accused for money when P.W.3 declined to pay any money to the appellant. P.W.3 further stated that the deceased also informed him about the illicit relationship of appellant with the second accused. The pledging of jewels of the deceased with P.W.17 was also proved by producing Exhibit 3 by which P.W.3 repaid a sum of Rs.11,000/- to P.W.17 to get back the jewels which were seized by the police along with ornaments. P.W.17 in his evidence also confirmed that the appellant pledged the jewels with him. P.W.3 also indentified the jewels which he gifted to his daughter at the time of the marriage which were recovered from P.W.17 and marked as Exhibit 1 (collectively).

9. The factum of the living of second accused in the very same house of the appellant was not in dispute and the same was also deposed by P.W.3. He further stated that though his daughter complained to him about the monitory demand as well as illicit relationship of the appellant with the second accused he did not inform the same to others except his close relatives fearing any damage that may be caused to the matrimonial life of his daughter which conduct of P.W.3 as a father of the deceased was quite natural.

10. P.W.5 who is a relative of the deceased also stated that the deceased informed him once about the illicit intimacy of the appellant with second accused. P.W.10 who is stated to be the cousin of the deceased deposed that when she visited his house once after marriage she informed him that she did not like the environment of her matrimonial home and that the appellant and second accused used to talk in code language. P.W.11 who is the neighbour of P.W.3, in his evidence also deposed that when the deceased visited her parental home on the occasion of Dwira Gaman Ceremony she informed him that she did not like the relationship of the appellant with the second accused and that appellant was demanding money from her father. P.W.11 further stated that deceased also requested him to tell her father not to give any money to appellant. P.W.11 also

stated that according to the deceased she was not happy with the marriage. To the same effect was the version of P.W.12.

11. The High Court while examining the charge of abetment of the suicide committed by the deceased as well as cruelty meted out to her falling under Sections 306 and 498A of IPC made a detailed analysis of the above evidence and held that the charges were proved. Though the learned counsel for the appellant attempted to point out that there was no proof to show that the appellant pledged the jewels of the deceased, we are not in a position to appreciate the said contention for more than one reason. In the first place P.W.3 the father of the deceased identified the jewels which were recovered from P.W.17. P.W.17 himself confirmed that those jewels were pledged by the appellant with him. The receipts Exhibit 3 and 3A disclosed that the said jewels were pledged by the appellant for a sum of Rs.11,000/-. If those jewels really did not belong to the deceased the same could have been established only by the appellant by producing proper evidence before the Court. Except the mere denial in the 313 statement, the appellant failed to show that those jewels which were pledged by him did not belong to the deceased.

12. As rightly held by the High Court the father of the deceased cannot be expected to inform everyone living around him about the unpleasant factum of the daughter's embarrassing living condition in her matrimonial home and, therefore, mere non-disclosure of those facts to others cannot be a ground to disbelieve the version of P.W.3. We also do not find any inconsistency in the evidence of P.W.3 and other witnesses who had the advantage of hearing from the mouth of the deceased about the conduct of the appellant relating to his demand, as well as, his illicit intimacy with the second accused. Nothing was suggested to any of the witnesses on behalf of the appellant to state that they were deposing against him with any other ulterior motive. The fact remains that the deceased committed suicide within 35 days from the date of marriage, coupled with the

untrammeled evidence before the court below about the cruelty meted out to the deceased, fully established the guilt of the appellant of abetment to the deceased to commit suicide as well as the cruelty under Section 498A of IPC.

13. In this context the reliance placed upon the decision of this Court by the counsel for the State in *Ramesh Kumar* (supra) can be usefully applied. In paragraph 12 of the said decision this Court, while explaining the application of Sections 107, 113A in regard to an offence falling under Section 306 IPC has held as under:

> "12. This provision was introduced by the Criminal Law (Second) Amendment Act, 1983 with effect from 26-12-1983 to meet a social demand to resolve difficulty of proof where helpless married women were eliminated by being forced to commit suicide by the husband or in-laws and incriminating evidence was usually available within the four corners of the matrimonial home and hence was not available to anyone outside the occupants of the house. However, still it cannot be lost sight of that the presumption is intended to operate against the accused in the field of criminal law. Before the presumption may be raised, the foundation thereof must exist. A bare reading of Section 113-A shows that to attract applicability of Section 113-A, it must be shown that (i) the woman has committed suicide, (ii) such suicide has been committed within a period of seven years from the date of her marriage, (iii) the husband or his relatives, who are charged had subjected her to cruelty. On existence and availability of the abovesaid circumstances, the court may presume that such suicide had been abetted by her husband or by such relatives of her husband. Parliament has chosen to sound a note of caution. Firstly, the presumption is not mandatory; it is only permissive as the employment of expression "may presume" suggests. Secondly, the existence and availability of the abovesaid three circumstances shall not,

> like a formula, enable the presumption being drawn; before the presumption may be drawn the court shall have to have regard to "all the other circumstances of the case". A consideration of all the other circumstances of the case may strengthen the presumption or may dictate the conscience of the court to abstain from drawing the presumption. The expression - "the other circumstances of the case" used in Section 113-A suggests the need to reach a cause-and-effect relationship between the cruelty and the suicide for the purpose of raising a presumption. Last but not the least, the presumption is not an irrebuttable one. In spite of a presumption having been raised the evidence adduced in defence or the facts and circumstances otherwise available on record may destroy the presumption. The phrase "may presume" used in Section 113-A is defined in Section 4 of the Evidence Act, which says - "Whenever it is provided by this Act that the court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it."

14. When we apply the said principle to the facts of the case, we find that the relevant criteria for application of Section 113A is duly attracted to the facts of this case. The deceased committed suicide within 35 days from the date of her marriage and the allegation of cruelty was also fully established. The evidence thus disclosed that the conduct of the appellant vis-à-vis the deceased coupled with the consequential demand of money from P.W.3 the father of the deceased and also the pledging of the jewels of the deceased fully established the case of the prosecution that the deceased was instigated by the appellant to take the extreme decision of committing suicide by pouring kerosene on herself and set herself on fire and thereby the charge of abetment under Section 306 and as well as Section 498A stood proved.

15. In this respect the subsequent decision reported as

Thanu Ram v. State of Madhya Pradesh (Now Chhattisgarh) - (2010) 10 SCC 353 can also be usefully referred to. In paragraphs 26 and 27 this Court has explained the legal position as under:

> "26. In the Explanation to Section 113-A it has also been indicated that for the purpose of the said section, the expression "cruelty" would have the same meaning as in Section 498-A IPC. Accordingly, if the degree of cruelty is such as to warrant a conviction under Section 498-A IPC, the same may be sufficient for a presumption to be drawn under Section 113-A of the Evidence Act in harmony with the provisions of Section 107 IPC
>
> 27. All the decisions on the point cited by Dr. Pandey, deal with the differences in relation to the provisions of Section 498-A and Section 306 IPC, except in Sushil Kumar Sharma case, where the provisions of Section 498-A IPC had been considered in the context of Section 304-B IPC. In that context, it was sought to be explained that the big difference between Sections 306 and 498-A IPC is that of intention. The provisions of Section 113-A of the Evidence Act or its impact on an offence under Section 498-A IPC or Section 306 IPC vis-à-vis Section 107 IPC was not considered in any of these decisions."

16. In the light of the above conclusion of ours, we do not find any merit in this appeal and the same is dismissed.

B.B.B. Appeal dismissed.

FAIZA CHOUDHARY
v.
STATE OF JAMMU AND KASHMIR AND ANR.
(Civil Appeal No. 6346 of 2012)

SEPTEMBER 6, 2012

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

Education - Admission - MBBS course - Government Medical colleges in the State of Jammu & Kashmir - Seats under the Scheduled Tribe Gujjar Bakerwal (STGB) category - Carry forward of unfilled seat - If permissible - Whether the MBBS seat which fell vacant in the year 2010 could be carried forward to the year 2012 so as to accommodate the appellant who was in the merit list published in the year 2010 - Held: On law as well as on facts, the appellant had no right to make any claim for the vacant MBBS seat of the year 2010 in the year 2011 or subsequent years - A medical seat has life only in the year it falls that too only till the cut-off date fixed by Supreme Court i.e. 30th September in the respective year - Carry forward principle is unknown to professional courses like medical, engineering, dental etc. - If the authorized Board or the Court indulges in such an exercise, in the absence of any rule or regulation, that will be at the expense of other meritorious candidates waiting for admission in the succeeding years - A seat which fell vacant in a particular year cannot be carried forward or created in a succeeding year, in the absence of any rule or regulation to that effect - Medical Council of India Act - ss.10A and 11(2) - J & K Board of Professional Entrance Examination Act, 2002 - Jammu & Kashmir Reservation Act, 2004 - s.9.

In the academic year 2010, 249 seats for MBBS courses in various Government Medical Colleges of Jammu & Kashmir State had to be filled up. The Jammu

& Kashmir Board of Professional Entrance Examination [constituted under the J & K Board of Professional Entrance Examination Act, 2002] initiated steps for selection of meritorious candidates against the above mentioned seats. In terms of Section 9 of the Jammu & Kashmir Reservation Act, 2004, 50% of the total number of seats had to be filled up from amongst female candidates in both open merit and reserved category. The Scheduled Tribe Gujjar Bakerwal ('STGB') category was allotted 15 seats. Out of 15 seats allotted to STGB category, 7 seats each were allotted to male and female candidates respectively. The Board had taken a decision that the 15th odd seat in the year 2010 was to be allotted to a female candidate by way of rotation as prior to that, that seat was allotted to a male candidate. Appellant, a female candidate, was also in the merit under STGB category, but she had secured lesser marks than four other female candidates. 'NR', the first of the said four female candidates, had secured 121 marks. However, one 'AN', a male candidate, who had secured 146 marks, much more than the female candidates, filed a writ petition before the High Court raising a claim over the 15th odd seat stating that there could be no discrimination between male and female candidates. In that writ petition, 'NR' and one other candidate were also impleaded as parties. The High Court vide an interim order initially restrained the Board from taking any decision regarding selection against the said seat under the STGB category till 18-8-2010 , however, it ultimately dismissed the writ petition on 8-7-2011 since by that time 'AN', the petitioner therein had got admission in the subsequent selection process. Therefore, the said 15th odd seat which arose in the year 2010 remained unfilled.

The appellant thereafter submitted representation in the year 2011 before the Board seeking admission in that seat which fell vacant in the year 2010 under the STGB

category. Since no decision was taken on that representation, appellant filed writ petition on 25-7-2011 seeking a direction to the Board to offer that seat to her. A single Judge of the High Court allowed the petition holding that the appellant was entitled to get admission to that unfilled MBBS of the year 2010. The single Judge also gave direction to the Board to seek extension of the time schedule, laid down in Mridul Dhar case* and further directed that in the event the time schedule was not extended, the appellant should be granted admission for the MBBS course in the year 2012. Aggrieved, the Board filed LPA before the Division Bench which held that since merit was the guiding criterion for making for selection to the professional courses, more particularly for MBBS course, a duty was cast on the Board to allot that seat to 'NR' on the basis of superior merit and that the appellant had no right in law to stake any claim over that unfilled MBBS seat, which arose in the year 2010.The Division Bench further held that an unfilled seat of one academic year could not be filled up after the cut-off date or directed to be filled up in the next academic year and, accordingly, set aside the order of the Single Judge.

In the instant appeal, the question which arose for consideration was whether the MBBS seat which fell vacant in the year 2010 could be carried forward to the year 2012 so as to accommodate the appellant who was in the merit list published in the year 2010.

Dismissing the appeal, the Court

HELD: 1.1. On law as well as on facts, the appellant has no right to make any claim for the vacant MBBS seat of the year 2010 in the year 2011 or subsequent years. The Board should have allotted that seat to another female candidate that is 'NR' who had secured 121 marks. Since litigation was on she could not have waited

indefinitely for that seat and hence she had accepted the BDS seat. Next two candidates in line of merit, who had secured 118 marks each, however got admission to the MBBS course. Another candidate ranked above the appellant had to satisfy herself with a BDS seat because of the then ongoing litigation, lest, she might lose that seat as well. Appellant, never got herself impleaded in the writ petition filed by 'AN'. Only when the writ petition filed by 'AN' was dismissed on 08.07.2011, for the first time, she had filed a representation in the year 2011 raising a claim over that 2010 unfilled seat, by that time the cut-off date fixed by this Court i.e. 30th September for 2010 for admission was over. Further, few female candidates who had secured more marks than appellant had to contend with BDS seats. If that 2010 unfilled MBBS seat is offered to the appellant in the year 2012, that will be a great injustice to candidates who were ranked above the appellant. The appellant did not claim that seat in the year 2010 but only in the year 2011, by filing OWP No. 1010 of 2011 on 25.7.2011 claiming an unfilled seat of the year 2010. [Para 11] [538-D-H; 539-A]

1.2. A medical seat has life only in the year it falls that too only till the cut-off date fixed by this Court i.e. 30th September in the respective year. Carry forward principle is unknown to the professional courses like medical, engineering, dental etc. No rule or regulation has been brought to the knowledge of this Court conferring power on the Board to carry forward a vacant seat to a succeeding year. If the Board or the Court indulges in such an exercise, in the absence of any rule or regulation, that will be at the expense of other meritorious candidates waiting for admission in the succeeding years. [Para 12] [539-B-D]

1.3. The Medical Council of India Act provides that admission can be made by the medical colleges only

within the sanctioned capacity for which permission under Section 10A/recognition under Section 11(2) has been granted. The High Court or the Supreme Court cannot be generous or liberal in issuing such directions which in substance amount to directing authorities concerned to violate their own statutory rules and regulations, in respect of admissions of students. The number of students admitted cannot be over and above that fixed by the Medical Council as per the Regulations. There cannot be telescoping of unfilled seats of one year with permitted seats of the subsequent year. It would not be possible to increase seats at the expense of candidates waiting for admission in the succeeding years. [Para 13] [539-D-H; 540-A]

1.4. Though the counsel for the appellant referred to few judgments of this Court stating that this Court had previously given certain directions to accommodate candidates in the succeeding years, but that was done only in extraordinary circumstances and issued in view of the mandate contained in Article 141 of the Constitution which cannot be treated as a precedent for this Court or the High Courts to follow. It is, therefore, held that a seat which fell vacant in a particular year cannot be carried forward or created in a succeeding year, in the absence of any rule or regulation to that effect. The Division Bench of the High Court rightly dismissed the claim made by the appellant. [Paras 14, 15] [540-B-D]

State of Punjab and Others v. Renuka Single and Others **(1994) 1 SCC 175: 1993 (3) Suppl. SCR 866;** *Medical Council of India v. State of Karnataka* **(1988) 6 SCC 131;** *Medical Council of India v. Madhu Singh and Others* **(2002) 7 SCC 255 and** *Satyaprata Sahoo and Others v. State of Orissa and Others* **JT 2012 (7) 500 - relied on.**

** Mridul Dhar (Minor) and Another v. Union of India and Others* **(2005) 2 SCC 65: 2005 (1) SCR 380 - referred to.**

Neelima Shangla v. State of Haryana and Others **(1986) 4 SCC 268: 1986 (3) SCR 785;** *Haryana Urban Development Authority v. Sunita Rekhi* **(1989) Suppl. 2 SCC 169;** *Anil Kumar Gupta and Others v. State of Uttar Pradesh and Others* **(1995) 5 SCC 173: 1995 (2) Suppl. SCR 396;** *Dolly Chhanda v. Chairman, JEE and Others* **(2005) 9 SCC 779: 2004 (5) Suppl. SCR 79;** *Vijay Jamini v. Medical Council of India and Others* **(2005) 13 SCC 461;** *Mridul Dhar (Minor) and Another v. Union of India and Others* **(2008) 17 SCC 435 and** *Medical Council of India v. Manas Ranjan Behera and Others* **(2010) 1 SCC 173: 2009 (15) SCR 450 - cited.**

Case Law Reference:

2005 (1) SCR 380	**referred to**	**Para 5**
1986 (3) SCR 785	**cited**	**Para 8**
(1989) Suppl. 2 SCC 169	**cited**	**Para 8**
1995 (2) Suppl. SCR 396	**cited**	**Para 8**
2004 (5) Suppl. SCR 79	**cited**	**Para 8**
(2005) 13 SCC 461	**cited**	**Para 8**
(2008) 17 SCC 435	**cited**	**Para 8**
2009 (15) SCR 450	**cited**	**Para 8**
1993 (3) Suppl. SCR 866	**relied on**	**Para 13**
(1988) 6 SCC 131	**relied on**	**Para 13**
(2002) 7 SCC 255	**relied on**	**Para 13**
JT 2012 (7) 500	**relied on**	**Para 13**

CIVIL APPEALLATE JURISDICTION : Civil Appeal No. 6346 of 2012.

From the Judgment and Order dated 04.07.2012 of the High Court of Jammu and Kashmir at Jammu in LPAOW No. 29 of 2012.

Prof. Bhim Singh, Dinesh Kumar Garg, B.S. Billowrig, Meha Aggarwal, Abhishek Garg for the Appellant.

Sunil Fernadez, Vernika Tomar, Astha Sharma, Shashank K. Lal. Amit Kumar, Atul Kumar, Ashish Kumar for the Respondents.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Leave granted.

2. We are, in this case, concerned with the question whether an MBBS seat which fell vacant in the year 2010 could be carried forward to the year 2012 so as to accommodate a candidate who was in the merit list published in the year 2010.

3. We may, for answering the above question, refer to few relevant facts. Admissions to various professional courses like medical, engineering, dental etc. are being made by the Jammu & Kashmir Board of Professional Entrance Examination (for short 'Board'), which was constituted under the J & K Board of Professional Entrance Examination Act 2002. The Board is vested with the statutory duty of conducting common entrance test for selecting meritorious candidates for admission to the various professional courses in the State of Jammu & Kashmir. In the academic year 2010, 249 seats for MBBS courses in various Government Medical Colleges of Jammu & Kashmir State had to be filled up. The Board initiated steps for making selection for the meritorious candidates against the above mentioned seats. In terms of Section 9 of the Jammu & Kashmir Reservation Act, 2004, 50% of the total number of seats had to be filled up from amongst female candidates in both open merit and reserved category. The Scheduled Tribe Gujjar Bakerwal (for short 'STGB') category was allotted 15 seats. Out of 15 seats allotted to STGB category, 7 seats each were

allotted to male and female candidates respectively. The Board had taken a decision that the 15th odd seat in the year 2010 was to be allotted to a female candidate by way of rotation as prior to that, that seat was allotted to a male candidate. Appellant was also subjected to that selection process initiated by the Board. She was also in the merit under STGB category, but lower in merit. Details of candidates who had secured more marks than the appellant are given below:

S. No.	Roll No.	Name of the Candidate	Sex	Cate-gory	Mark	Rank
1	312173	Nusrat Rashid	F	STGB	121	1817
2	301491	Mehrul-Nisa	F	STGB	118	2081
3	302510	Farah Chowan	F	STGB	118	2200
4	302178	Abida Parveen	F	STGB	117	2208

All the above mentioned candidates were female candidates and, as per merit, the first female candidate Nusrat Rashid should have got that 15th odd seat. One Azhar Navid, a male candidate, who had secured 146 marks, much more than the female candidates, filed a writ petition No. OWP No. 806 of 2010 before the Jammu & Kashmir High Court raising a claim over that seat stating that there could be no discrimination between male and female candidates. In that writ petition, beside one Rehana Bashir, Nusrat Rashid who had secured 121 marks, was also impleaded as a party. All of them had claimed that seat in MBBS course under the STGB category in the year 2010.

4. The Court vide its order dated 4.8.2010 restrained the Board from taking any decision regarding the selection against that seat under the STGB category till 18th August, 2010. Writ petition was however dismissed by the Court on 8.7.2011 since Azhar Navid, the petitioner therein by the time got admission in the subsequent selection process. Therefore, that 15th odd

seat which arose in the year 2010 remained unfilled.

5. Appellant though lower in marks than the candidates mentioned in the above chart submitted a representation in the year 2011 before the Board seeking admission in that seat which fell vacant in the year 2010 under the STGB category. Since no decision was taken on that representation, appellant filed OWP No. 1010 of 2011 on 25.7.2011 seeking a direction to the Board to offer that seat to her. Writ petition came up for hearing before a learned single Judge of the High Court on 19.3.2012, and the Court allowed the same holding that the appellant was entitled to get admission to that unfilled MBBS of the year 2010. Learned single Judge also gave a direction to the Board to seek extension of the time schedule, laid down in *Mridul Dhar (Minor) and Another v. Union of India and Others* (2005) 2 SCC 65. Learned single Judge further directed that in the event time schedule was not extended, the appellant should be granted admission for the MBBS course in the year 2012.

6. The Board, aggrieved by the judgment of the learned single Judge, filed an appeal LPAOW No. 29 of 2012, before the Division Bench of the High Court. Appeal was allowed by the Division Bench taking the view that since the merit was the guiding criterion for making for selection to the professional courses, more particularly for MBBS course, a duty was cast on the Board to allot that seat to Nusrat Rashid on the basis of superior merit. It was held that the appellant had no right in law to stake any claim over that unfilled MBBS seat, which arose in the year 2010 in the year 2011. The Court also took the view that an unfilled seat of one academic year could not be filled up after the cut-off date or directed to be filled up in the next academic year. The Division Bench, accordingly, allowed the appeal, against which this appeal has been preferred.

7. Shri Bhim Singh, learned senior counsel appearing for the appellant, submitted that it was the appellant and appellant alone who had submitted a representation before the Board

raising claim over that unfilled seat of the year 2010, after the dismissal of writ petition No. OWP No. 806 of 2010 filed by Azhar Navid. Other candidates who had acquired more marks than the appellant, by that time, had got admission either for MBBS or BDS courses and were not interested in that seat which fell vacant in the year 2010. Learned senior counsel referred to the Judgments of this Court in *Neelima Shangla v. State of Haryana and Others* (1986) 4 SCC 268, *Haryana Urban Development Authority v. Sunita Rekhi* (1989) Suppl. 2 SCC 169 and submitted that persons who had agitated the rights at the appropriate time are entitled to get reliefs from this Court and not those who had slept over their rights.

8. Learned senior counsel also submitted that the appellant had been waiting for the outcome of the writ petition filed by Azhar Navid, otherwise, she would have got admission for the BDS course. Learned senior counsel submitted that the learned single Judge of the High Court had rightly found that the appellant could stake her claim for the vacant seat and that, in appropriate cases, this Court can extend the time limit fixed for admission to the professional courses. Learned senior counsel in support of his contention referred to the various judgments of this Court such as *Anil Kumar Gupta and Others v. State of Uttar Pradesh and Others* (1995) 5 SCC 173, *Dolly Chhanda v. Chairman, JEE and Others* (2005) 9 SCC 779, *Vijay Jamini v. Medical Council of India and Others* (2005) 13 SCC 461, *Mridul Dhar (Minor) and Another v. Union of India and Others* (2008) 17 SCC 435 and *Medical Council of India v. Manas Ranjan Behera and Others* (2010) 1 SCC 173.

9. Shri Sunil Fernadez, learned counsel appearing for the Board, submitted that the appellant has no legal right to raise a claim for admission in that vacant MBBS seat of the year 2010, especially when she had secured only 117 marks, while there were four other female candidates who had secured more marks than the appellant. Those female candidates did not make any claim for that MBBS seat since there was a stay of

filling up of that seat and if they had not accepted BDS seats, they would have lost those seats as well. Learned counsel submitted that the Division Bench of the High Court was justified in dismissing the appellant's claim for that vacant seat which fell vacant in the year 2010.

10. Shri Amit Kumar, learned counsel appearing for the Medical Council of India, submitted that it would not be possible to reserve an MBBS seat for the appellant for the year 2012 at the expense of other meritorious candidates. Even otherwise, learned counsel submitted that this Court in several judgments held that this Court cannot be generous or liberal in issuing directions to Medical Council of India to enhance seats for the MBBS course.

11. We have heard learned counsel on either side. We are of the view, on law as well as on facts, that the appellant has no right to make any claim for the vacant MBBS seat of the year 2010 in the year 2011 or subsequent years. The Board should have allotted that seat to another female candidate that is Nusrat Rashid who had secured 121 marks. Since litigation was on she could not have waited indefinitely for that seat and hence she had accepted the BDS seat. Next two candidates in line of merit were Mehrul-Nisa and Farah Chowan, who had secured 118 marks each, however got admission to the MBBS course. Another candidate Abida Parveen ranked above the appellant had to satisfy herself with a BDS seat because of the then ongoing litigation, lest, she might lose that seat as well. Appellant, never got herself impleaded in the writ petition filed by Azhar Navid, raised any claim over that seat in the year 2010. Only when the writ petition filed by Azhar Navid was dismissed on 08.07.2011, for the first time, she had filed a representation in the year 2011 raising a claim over that 2010 unfilled seat, by that time the cut-off date fixed by this Court i.e. 30th September for 2010 for admission was over. Further, few female candidates who had secured more marks than appellant had to contend with BDS seats. If that 2010 unfilled MBBS seat

is offered to the appellant in the year 2012, that will be a great injustice to candidates who were ranked above the appellant. The appellant did not claim that seat in the year 2010 but only in the year 2011, by filing OWP No. 1010 of 2011 on 25.7.2011 claiming an unfilled seat of the year 2010.

12. A medical seat has life only in the year it falls that too only till the cut-off date fixed by this Court i.e. 30th September in the respective year. Carry forward principle is unknown to the professional courses like medical, engineering, dental etc. No rule or regulation has been brought to our knowledge conferring power on the Board to carry forward a vacant seat to a succeeding year. If the Board or the Court indulges in such an exercise, in the absence of any rule or regulation, that will be at the expense of other meritorious candidates waiting for admission in the succeeding years.

13. The Medical Council of India Act provides that admission can be made by the medical colleges only within the sanctioned capacity for which permission under Section 10A/ recognition under Section 11(2) has been granted. This Court in *State of Punjab and Others v. Renuka Single and Others* (1994) 1 SCC 175, held that the High Court or the Supreme Court cannot be generous or liberal in issuing such directions which in substance amount to directing authorities concerned to violate their own statutory rules and regulations, in respect of admissions of students. In *Medical Council of India v. State of Karnataka* (1988) 6 SCC 131, this Court held that the number of students admitted cannot be over and above that fixed by the Medical Council as per the Regulations and that seats in the medical colleges cannot be increased indiscriminately without regard to proper infrastructure as per the regulations of the Medical Council. In *Medical Council of India v. Madhu Singh and Others* (2002) 7 SCC 255, this Court held that there cannot be telescoping of unfilled seats of one year with permitted seats of the subsequent year. Recently, this Court in *Satyaprata Sahoo and Others v. State of Orissa and Others*

JT 2012 (7) 500 has reiterated that it would not be possible to increase seats at the expense of candidates waiting for admission in the succeeding years.

14. Learned senior counsel appearing for the appellant referred to few judgments of this Court stating that this Court had previously given certain directions to accommodate candidates in the succeeding years, but that was done in our view only in extraordinary circumstances and issued in view of the mandate contained in Article 141 of the Constitution which cannot be treated as a precedent for this Court or the High Courts to follow. We, therefore, hold that a seat which fell vacant in a particular year cannot be carried forward or created in a succeeding year, in the absence of any rule or regulation to that effect.

15. We are, therefore of the view that the Division Bench of the High Court has rightly dismissed the claim made by the appellant. The appeal is, therefore, dismissed. There will be no order as to costs.

B.B.B. Appeal dismissed.

DARBARA SINGH
v.
STATE OF PUNJAB
(Criminal Appeal No. 404 of 2010)

SEPTEMBER 12, 2012

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

Criminal trial - Evidence - Inconsistency between medical evidence and ocular evidence - Effect of - Conviction of appellant u/s.302 IPC - Challenge to - Defence plea that the manner in which appellant had been accused of causing injury to the deceased was not at all possible because the medical evidence was not in consonance with the ocular evidence - Held: Not tenable - In the event of contradictions between medical and ocular evidence, the ocular testimony of a witness will have greater evidentiary value vis-à-vis medical evidence and when medical evidence makes the oral testimony improbable, the same becomes a relevant factor in the process of evaluation of such evidence - It is only when the contradiction between the two is so extreme that the medical evidence completely rules out all possibilities of the ocular evidence being true at all, that the ocular evidence is liable to be disbelieved - In the instant case, the prosecution case was that upon seeing the accused, the deceased started running and injuries were inflicted upon him by appellant and another accused - If the entire evidence with respect to the method and manner of causing injuries, is conjointly read, it is clear that the ocular evidence was in conformity and in consonance with the available medical evidence - The deceased attempted to run upon the apprehension that, he would be attacked, and it was exactly at this time that the appellant caused injury to his head using a Kirpan - This explains the reason for the direction of such injury extending

from the upper to the lower part of the back of the deceased - Had it been the case that the deceased was not running at the said time, the direction of the injury would have in all likelihood been straight - Penal Code, 1860 - s.302.

Criminal trial - Motive - Relevance of - Held: Motive has great significance in a case involving circumstantial evidence, but where direct evidence is available, which is worth relying upon, motive loses its significance - In a case where direct evidence of witnesses can be relied upon, the absence of motive cannot be a ground to reject the case.

Criminal trial - Defect in framing of charges - Effect - Conviction of appellant u/s.302 IPC - Challenge to - Defence plea that as appellant was never charged u/s.302 r/w 34 IPC, unless it was established that the injury caused by the appellant on the head of the deceased, was sufficient to cause death, he ought not to have been convicted u/s.302 IPC simplicitor - Held: Not tenable - The defect in framing of the charges must be so serious that it cannot be covered u/ss.464/465 Cr.P.C., which provide that, an order of sentence or conviction shall not be deemed to be invalid only on the ground that no charge was framed, or that there was some irregularity or omission or misjoinder of charges, unless the court comes to the conclusion that there was also, as a consequence, a failure of justice - The plea of prejudice has to be in relation to investigation or trial, and not with respect to matters falling outside their scope - Once the accused is able to show that there has been serious prejudice caused to him, with respect to either of these aspects, and that the same has defeated the rights available to him under jurisprudence, then the accused can seek benefit under the orders of the Court - In the instant case, the appellant was unable to show what prejudice, if any, was caused to him, even if charge under s.302 r/w 34 IPC was not framed against him - He was always fully aware of all the facts and he had, in fact, gone alongwith two other accused with an intention to kill the

deceased - Appellant caused grievous injury on the deceased's head (a vital part of the body) with a kirpan - He clearly shared a common intention with the co-accused to kill the deceased - Code of Criminal Procedure, 1973 - ss.464 and 465.

The prosecution case was that accused 'K' and 'H' had gotten into a verbal feud with 'M' upon his refusal to give them liquor on credit basis, and that 15-20 minutes thereafter 'K' and 'H' returned alongwith the accused-appellant and upon instigation by 'H', the appellant hit 'M' on the head with a Kirpan, while 'K' hit him on the chest with a Kirpan, as a result of which, 'M' died instantly. The trial court convicted appellant and 'K' under Section 302 IPC but acquitted 'H'. The appeal filed by appellant and 'K' before the High Court was dismissed.

In the instant appeal, the appellant challenged his conviction on various grounds, viz. 1) that the manner in which the appellant had been accused of causing injury was not at all possible because the medical evidence was not in consonance with the ocular evidence; 2) that the appellant did not have any proximity with the co-accused 'K'; in fact, on the contrary, his family had a rather strained equation with the family of 'K' as one person from the family of the appellant had in the past (20 years ago), been prosecuted and convicted for the offence of committing rape upon a relative of 'K'; 3) that the appellant had not been charged under Section 302 r/w 34 IPC, and that even if it is assumed that he had also participated in causing injury to the deceased 'M', he should not be held responsible for the offence punishable under Section 302 IPC, as the said injury was not proved to be fatal and 4) that in fact, on refusal to give liquor on credit, 'K', 'P' and 'B' had teased the deceased who caused injuries to them and that the appellant had intervened in the scuffle and that thereafter, when PW1, the brother of the deceased, asked the appellant to be a

witness for them, the appellant had refused, on a result of which, he was falsely enroped in the crime.

Dismissing the appeal, the Court

HELD: 1. The facts of the instant appeal do not warrant review of the findings recorded by the courts below. [Para 19] [559-G]

<u>Plea of inconsistency between medical evidence and ocular evidence</u>

2.1. The law is well settled that, unless the oral evidence available is totally irreconcilable with the medical evidence, the oral evidence would have primacy. In the event of contradictions between medical and ocular evidence, the ocular testimony of a witness will have greater evidentiary value vis-à-vis medical evidence and when medical evidence makes the oral testimony improbable, the same becomes a relevant factor in the process of evaluation of such evidence. It is only when the contradiction between the two is so extreme that the medical evidence completely rules out all possibilities of the ocular evidence being true at all, that the ocular evidence is liable to be disbelieved. [Para 5] [552-F-H; 553-A]

2.2. In the instant appeal, the prosecution case was that upon seeing the assailants, the deceased started running and that 2 injuries were inflicted upon him by the appellant and 'K'. The ocular evidence as regards the injuries was given by PW1. The post-mortem report revealed two major incised wounds on the person of the deceased. PW11, who conducted the post-mortem, explained that injury no.1 would have been impossible to inflict, if the deceased was running and the assailant was chasing him. If the entire evidence with respect to the method and manner of causing injuries 1 and 2, is

conjointly read, it becomes crystal clear that the ocular evidence is in conformity and in consonance with the available medical evidence. In fact, 'M', the deceased, attempted to run upon the apprehension that he would be attacked, and it was exactly at this time that the appellant caused injury to his head using a Kirpan. This explains the reason for the direction of injury No.1 extending from the upper to the lower part of the back of the deceased. Had it been the case that the deceased 'M' was not running at the said time, the direction of the injury would have in all likelihood been straight. [Paras 6, 7 and 8] [553-E-H; 554-A-C, E]

State of U.P. v. Hari **(2009) 13 SCC 542: 2009 (7) SCR 149 and** *Bhajan Singh @ Harbhajan Singh & Ors. v. State of Haryana* **(2011) 7 SCC 421: 2011 (7) SCR 1 - relied on.**

Issue of motive

3.1. Motive has great significance in a case involving circumstantial evidence, but where direct evidence is available, which is worth relying upon, motive loses its significance. In the instant case, firstly, there is nothing on record to reveal the identity of the person who was convicted for rape. There is also nothing to reveal the status of his relationship with the appellant and further, there is nothing on record to determine the identity of this girl or her relationship with the co-accused 'K'. More so, the conviction took place 20 years prior to the incident. No independent witness has been examined to prove the factum that the appellant was not on talking terms with 'K'. In a case where there is direct evidence of witnesses which can be relied upon, the absence of motive cannot be a ground to reject the case. Under no circumstances, can motive take the place of the direct evidence available as proof, and in a case like this, proof of motive is not relevant at all. [Para 9] [554-G-H; 555-A-C]

3.2. Motive in criminal cases based solely on the positive, clear, cogent and reliable ocular testimony of witnesses is not at all relevant. In such a fact-situation, the mere absence of a strong motive to commit the crime, cannot be of any assistance to the accused. The motive behind a crime is a relevant fact regarding which evidence may be led. The absence of motive is also a circumstance which may be relevant for assessing evidence. [Para 10] [555-C-E]

Gurcharan Singh & Anr. v. State of Punjab **AIR 1956 SC 460;** *Rajinder Kumar & Anr. v. State of Punjab* **AIR 1966 SC 1322: 1963 SCR 281;** *Datar Singh v. State of Punjab* **AIR 1974 SC 1193: 1974 (2) SCR 808;** *Rajesh Govind Jagesha v. State of Maharashtra* **AIR 2000 SC 160: 1999 (4) Suppl. SCR 277 and** *Sheo Shankar Singh v. State of Jharkhand & Anr.* **AIR 2011 SC 1403: 2011 (4) SCR 312 - relied on.**

Non-framing of charges under Section 302 r/w Section 34 IPC

4.1. The defect in framing of the charges must be so serious that it cannot be covered under Sections 464/465 Cr.P.C., which provide that, an order of sentence or conviction shall not be deemed to be invalid only on the ground that no charge was framed, or that there was some irregularity or omission or misjoinder of charges, unless the court comes to the conclusion that there was also, as a consequence, a failure of justice. In determining whether any error, omission or irregularity in framing the relevant charges, has led to a failure of justice, the court must have regard to whether an objection could have been raised at an earlier stage, during the proceedings or not. While judging the question of prejudice or guilt, the court must bear in mind that every accused has a right to a fair trial, where he is aware of what he is being tried for and where the facts sought to be established against him, are explained to him fairly and clearly, and

further, where he is given a full and fair chance to defend himself against the said charge(s). [Para 14] [557-D-G]

4.2. The expression, 'failure of justice' is an extremely pliable or facile expression, which can be made to fit into any situation in any case. The court must endeavour to determine find the truth. There would be a 'failure of justice'; not only by unjust conviction, but also by acquittal of the guilty, as a result of unjust failure to produce requisite evidence. Of course, the rights of the accused have to be kept in mind and also safeguarded, but they should not be over emphasised to the extent of forgetting that the victims also have rights. It has to be shown that the accused has suffered some disability or detriment in respect of the protections available to him under Indian Criminal Jurisprudence. 'Prejudice', is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial, and not with respect to matters falling outside their scope. Once the accused is able to show that serious prejudice has been caused to him, with respect to either of these aspects, and that the same has defeated the rights available to him under jurisprudence, then the accused can seek benefit under the orders of the Court. [Para 15] [557-H; 558-A-D]

4.3. The appellant has been unable to show what prejudice, if any, has been caused to him, even if the said charge under Section 302 r/w Section 34 IPC was not framed against him. He was always fully aware of all the facts and he had, in fact, gone alongwith 'K' and 'H' with an intention to kill the deceased. The appellant has further been found guilty of causing grievous injury on the head of the deceased being a vital part of the body. It cannot be said that there is nothing on record to show that the appellant had a common intention alongwith one co-accused to kill the deceased and therefore the

appellant could not have been convicted as such. The manner in which injury no.1 has been caused clearly suggests that the accused persons acted in furtherance of a common intention. [Paras 12, 16, 17] [556-E-H; 557-A; 558-F; 559-A]

Sanichar Sahni v. State of Bihar **AIR 2010 SC 3786: 2009 (10) SCR 112;** *Rafiq Ahmed @ Rafi v. State of U.P.* **AIR 2011 SC 3114: 2011 (11) SCR 907;** *Rattiram & Ors. v. State of M.P. through Inspector of Police* **AIR 2012 SC 1485: 2012 (4) SCC 516 and** *Bhimanna v. State of Karnataka)* **decided by Supreme Court on 4th September, 2012 - relied on.**

Dhanna v. State of M.P. **(1996) 10 SCC 79: 1996 (4) Suppl. SCR 28 - referred to.**

5. As regards the further submission of the appellant that the investigation conducted by the police was tainted, favouring the complainant, as the Investigating Officer (PW.9) himself admitted in his cross-examination that, he had recorded the statement of one 'B' to the effect that, the appellant was the only witness and had seen 'B' and others being attacked and injured by the deceased on being teased, it is clear from the facts and circumstances that the case put forward by the defence was clearly a false story, and there was absolutely no material whatsoever on record to show that 'B'or any other accused had received any injury in the course of the said incident. [Para 18] [559-B-C, F]

Case Law Reference:

2009 (7) SCR 149	**relied on**	**Para 5**
2011 (7) SCR 1	**relied on**	**Para 5**
AIR 1956 SC 460	**relied on**	**Para 10**
1963 SCR 281	**relied on**	**Para 10**

1974 (2) SCR 808	**relied on**	**Para 10**
1999 (4) Suppl. SCR 277	**relied on**	**Para 10**
2011 (4) SCR 312	**relied on**	**Para 11**
2009 (10) SCR 112	**relied on**	**Para 13**
2011 (11) SCR 907	**relied on**	**Para 15**
2012 (4) SCC 516	**relied on**	**Para 15**
1996 (4) Suppl. SCR 28	**referred to**	**Para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 404 of 2010.

From the Judgment & Order dated 06.02.2008 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 248-SB of 1998.

Rohit Sharma, Amarjeet Singh, Abhijat P. Medh for the Appellant.

V. Madhukar, AAG, Kuldip Singh for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the judgment and order dated 6.2.2008 passed by the Punjab and Haryana High Court at Chandigarh in Criminal Appeal No.248-DB of 1998, by which the High Court affirmed the judgment and order dated 7.4.1998 passed by The Additional Sessions Judge, Ferozepur in Sessions Case No.11 of 1996, by which the appellant stood convicted under Section 302 of the Indian Penal Code, 1860 (hereinafter called 'IPC') and was awarded the imprisonment for life and a fine of Rs.5,000/- was imposed upon him. In default of payment of fine, he was further ordered to undergo rigorous imprisonment for 2 years. Co-accused Kashmir Singh @ Malla Singh @ Malli was also similarly convicted and sentenced.

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

A. On 28.10.1995, FIR No.150/95 was registered under Section 302 IPC at Police Station Dharamkot, alleging that Kashmir Singh and Hira Singh had gotten into a verbal feud with Mukhtiar Singh over the sale of country liquor on credit. Upon Mukhtiar Singh's refusal to give them liquor on credit basis, they threatened to teach him a lesson. Kashmir Singh and Hira Singh returned after 15-20 minutes alongwith Darbara Singh, the appellant herein. Upon instigation by Hira Singh, the appellant hit Mukhtiar Singh on the head with a Kirpan, while co-accused Kashmir Singh hit him on the chest with a Kirpan, as a result of which, Mukhtiar Singh died instantly.

B. On the basis of the aforesaid FIR, investigation ensued and the dead body of Mukhtiar Singh was recovered and sent for post-mortem, which was conducted by Dr. Charanjit Singh (PW.11) on 29.10.1995. After the conclusion of the investigation, the police submitted the final report under Section 173 of the Criminal Procedure Code, 1973 (hereinafter referred to as 'Cr.P.C.') against all 3 accused named in the FIR including the appellant. The case was thereafter committed to the Sessions Judge, Ferozepur for trial. The appellant as well as the other co-accused pleaded innocence and claimed trial. Thus, the appellant Darbara Singh and Kashmir Singh were charged under Section 302 IPC while the co-accused Hira Singh was charged under Section 302 r/w Section 34 IPC. During the course of the trial, the prosecution examined Amrik Singh (PW.1) and Gurdial Singh (PW.2) as eye-witnesses. They also examined other witnesses including Dr. Charanjit Singh (PW.11) and Investigating Officer Sukhwinder Singh, S.I. (PW.9).

C. In their statements under Section 313 Cr.P.C., the accused denied their involvement in the incident and also examined 2 witnesses in their defence included Dr. Rachhpal Singh Rathor (DW.2) who had examined Bohar Singh, Kashmir

Singh and Paramjit Singh in the hospital on the night of 28/29.10.1995.

D. The learned Trial Court after appreciating the evidence on record and considering the arguments raised on behalf of the prosecution as well as the accused, convicted the appellant and Kashmir Singh, for the said offence while Hira Singh was acquitted vide judgment and order dated 7.4.1998.

E. Aggrieved, the appellant and Kashmir Singh preferred

Criminal Appeal No. 248-DB/98 before the High Court which was dismissed vide impugned judgment and order dated 6.2.2008.

Hence, this appeal.

3. Shri Rohit Sharma, learned counsel appearing for the appellant has submitted that the appellant has falsely been enroped and that he did not have any proximity with Kashmir Singh. In fact, on the contrary, his family had a rather strained equation with the family of Kashmir Singh as one person from the family of the appellant had in the past (20 years ago), been prosecuted and convicted for the offence of committing rape upon Kashmir Kaur, a relative of Kashmir Singh. In fact, on refusal to give liquor on credit, Kashmir Singh, Paramjit Singh and Bohar Singh had teased Mukhtiar Singh, deceased. Mukhtiar Singh caused injuries to them and the appellant intervened in the scuffle. Thereafter, when brother of the deceased, namely Amrik Singh asked the appellant to be a witness for them, the appellant refused, thus the appellant has falsely been enroped in the crime. The manner in which the appellant has been accused of causing injury is not in fact at all possible because the medical evidence is not in consonance with the ocular evidence. The appellant had not been charged under Section 302 r/w Section 34 IPC, and even if it is assumed that the appellant had also participated in causing injury to the deceased Mukhtiar Singh, he should not be held

responsible for the offence punishable under Section 302 IPC, as the said injury could not be proved to be fatal. No independent witness has been examined even though the incident occurred at 5 p.m., at a liquor vending shop, where a few persons can reasonably be expected to be present at that time. The appellant has served more than 8 years. Thus, the appeal deserves to be allowed.

4. On the contrary, Shri V. Madhukar, learned AAG, Punjab has vehemently opposed the appeal contending that the appellant had in fact, participated in the incident and as a result, caused grievous injury to the vital part of the body of the deceased Mukhtiar Singh. He should not be allowed to take the benefit of technicalities in the law. Thus, even if the charge for offence under Section 302 r/w Section 34 IPC has not been framed against the appellant, no prejudice would be caused to him. The co-accused Kashmir Singh, who was convicted by the trial court as well as by the High Court alongwith the appellant had filed a special leave petition against this very impugned judgment, which has also been dismissed by this court. The appeal is, hence, liable to be dismissed.

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

So far as the question of inconsistency between medical evidence and ocular evidence is concerned, the law is well settled that, unless the oral evidence available is totally irreconcilable with the medical evidence, the oral evidence would have primacy. In the event of contradictions between medical and ocular evidence, the ocular testimony of a witness will have greater evidentiary value vis-à-vis medical evidence and when medical evidence makes the oral testimony improbable, the same becomes a relevant factor in the process of evaluation of such evidence. It is only when the contradiction between the two is so extreme that the medical evidence completely rules out all possibilities of the ocular evidence being true at all, that the ocular evidence is liable to be

disbelieved. (Vide: *State of U.P. v. Hari,* (2009) 13 SCC 542; and *Bhajan Singh @ Harbhajan Singh & Ors. v. State of Haryana,* (2011) 7 SCC 421).

6. In the post-mortem report, the following injuries were found on the person of the deceased:

(i) An incised wound 3 cm x 1.5 cm on the left parietal region of the head obliquely placed 12 cm above the left ear pinna and 1.5 cm from mid line & 6 cm behind the anterior hair line.

(ii) An incised penetrating elliptical shaped wound 6 cm x 1.5 cm on front aspect of left side of chest 4 cm below the nipple & 5 cm from midline. Clotted blood is present.

Dr. Charanjit Singh (PW.11), who conducted the post-mortem further opined that the cause of death was haemorrhage and shock as a result of injury to vital organs i.e. lung & heart, which was sufficient to cause death in the ordinary course of nature.

Dr. Charanjit Singh (PW.11), in his cross-examination explained that injury No.1 would have been impossible to inflict, if the deceased was running and the assailant was chasing him. Injury No.1 was caused by a sharp edged instrument like a *Kirpan from the upper to the lower part of the back* of the deceased. The ocular evidence so far as the injuries are concerned, has been by Amrik Singh (PW.1), who deposed that after 15-20 minutes of the first part of the incident the assailants turned up. Darbara Singh inflicted a blow, using a Kirpan, to the head of Mukhtiar Singh and, thus, he attempted to run towards Fatehgarh. Kashmir Singh then thrusted a Kirpan, which hit the left flank of Mukhtiar Singh. After receiving these injuries Mukhtiar Singh fell down.

7. In fact, Mukhtiar Singh, deceased attempted to run upon the apprehension that, he would be attacked, and it was exactly

at this time that the appellant, Darbara Singh caused injury to his head using a Kirpan. This explains the reason for the direction of injury No.1 extending from the upper to the lower part of the back of the deceased. Had it been the case that the deceased Mukhtiar Singh was not running at the said time, the direction of the injury would have in all likelihood been straight. If the entire evidence with respect to the method and manner of causing injuries 1 and 2, is conjointly read, it becomes crystal clear that the ocular evidence is in conformity and in consonance with the available medical evidence.

In view of the above, we do not find any force in this submission.

8. Learned counsel for the appellant would submit that as Dr. Charanjit Singh (PW.11), undoubtedly deposed in the cross-examination that the shirt worn by the deceased was torn in several places, it clearly suggests that there was in fact, a scuffle between the deceased and the assailant, and, therefore, in the light of the same, the case of the prosecution becomes doubtful. The case of the prosecution has been that upon seeing the assailants, the deceased started running and 2 injuries were inflicted upon him by the appellant and Kashmir Singh. None of the prosecution witnesses has been asked in the cross-examination to explain the condition of the shirt which was worn by the deceased at the relevant time. More so, no suggestion was ever made by any of them regarding the aforementioned scuffle. In absence thereof, such a statement made by Dr. Charanjit Singh (PW.11) does not in any way point towards the innocence of the appellant.

9. So far as the issue of motive is concerned, it is a settled legal proposition that motive has great significance in a case involving circumstantial evidence, but where direct evidence is available, which is worth relying upon, motive loses its significance. In the instant case, firstly, there is nothing on record to reveal the identity of the person who was convicted for rape, there is also nothing to reveal the status of his relationship with

the appellant and further, there is nothing on record to determine the identity of this girl or her relationship to the co-accused Kashmir Singh. More so, the conviction took place 20 years prior to the incident. No independent witness has been examined to prove the factum that the appellant was not on talking terms with Kashmir Singh. In a case where there is direct evidence of witnesses which can be relied upon, the absence of motive cannot be a ground to reject the case. Under no circumstances, can motive take the place of the direct evidence available as proof, and in a case like this, proof of motive is not relevant at all.

10. Motive in criminal cases based solely on the positive, clear, cogent and reliable ocular testimony of witnesses is not at all relevant. In such a fact-situation, the mere absence of a strong motive to commit the crime, cannot be of any assistance to the accused. The motive behind a crime is a relevant fact regarding which evidence may be led. The absence of motive is also a circumstance which may be relevant for assessing evidence. (Vide: *Gurcharan Singh & Anr. v. State of Punjab,* AIR 1956 SC 460; *Rajinder Kumar & Anr. v. State of Punjab,* AIR 1966 SC 1322; *Datar Singh v. State of Punjab,* AIR 1974 SC 1193; and *Rajesh Govind Jagesha v. State of Maharashtra,* AIR 2000 SC 160).

11. In *Sheo Shankar Singh v. State of Jharkhand & Anr.,* AIR 2011 SC 1403, while dealing with the issue of motive, this Court held as under:

> *"Proof of motive, however, recedes into the background in cases where the prosecution relies upon an eye-witness account of the occurrence. That is because if the court upon a proper appraisal of the deposition of the eye-witnesses comes to the conclusion that the version given by them is credible, absence of evidence to prove the motive is rendered inconsequential. Conversely even if prosecution succeeds in establishing a strong motive for the commission of the offence, but the evidence of the*

> *eye-witnesses is found unreliable or unworthy of credit, existence of a motive does not by itself provide a safe basis for convicting the accused. That does not, however, mean that proof of motive even in a case which rests on an eye-witness account does not lend strength to the prosecution case or fortify the court in its ultimate conclusion. Proof of motive in such a situation certainly helps the prosecution and supports the eye witnesses.* (See: *Shivaji Genu Mohite v. The State of Maharashtra,* AIR 1973 SC 55; *Hari Shanker v. State of U .P.* (1996) 9 SCC; and *State of Uttar Pradesh v. Kishanpal and Ors.,* (2008) 16 SCC 73)".

In view of the above, the argument advanced by the learned counsel for the appellant does not merit consideration.

12. It has further been submitted on behalf of the appellant that, as the appellant was never charged under Section 302 r/w Section 34 IPC, unless it is established that the injury caused by the appellant on the head of the deceased, was sufficient to cause death, the appellant ought not to have been convicted under Section 302 IPC simplicitor. The submission so advanced is not worth consideration for the simple reason that the learned counsel for the appellant has been unable to show what prejudice, if any, has been caused to the appellant, even if such charge has not been framed against him. He was always fully aware of all the facts and he had, in fact, gone alongwith Kashmir Singh and Hira Singh with an intention to kill the deceased. Both of them have undoubtedly inflicted injuries on the deceased Mukhtiar Singh. The appellant has further been found guilty of

causing grievous injury on the head of the deceased being a vital part of the body. Therefore, in the light of the facts and circumstances of the said case, the submission so advanced does not merit acceptance.

13. In Sanichar Sahni v. State of Bihar, AIR 2010 SC 3786, this Court dealt with the aforementioned issue elaborately, and upon consideration of a large number of earlier judgments, held as under:

> *"Therefore,…… unless the convict is able to establish that defect in framing the charges has caused real prejudice to him and that he was not informed as to what was the real case against him and that he could not defend himself properly, no interference is required on mere technicalities. Conviction order in fact is to be tested on the touchstone of prejudice theory."*

14. The defect in framing of the charges must be so serious that it cannot be covered under Sections 464/465 Cr.P.C., which provide that, an order of sentence or conviction shall not be deemed to be invalid only on the ground that no charge was framed, or that there was some irregularity or omission or misjoinder of charges, unless the court comes to the conclusion that there was also, as a consequence, a failure of justice. In determining whether any error, omission or irregularity in framing the relevant charges, has led to a failure of justice, the court must have regard to whether an objection could have been raised at an earlier stage, during the proceedings or not. While judging the question of prejudice or guilt, the court must bear in mind that every accused has a right to a fair trial, where he is aware of what he is being tried for and where the facts sought to be established against him, are explained to him fairly and clearly, and further, where he is given a full and fair chance to defend himself against the said charge(s).

15. The 'failure of justice' is an extremely pliable or facile

expression, which can be made to fit into any situation in any case. The court must endeavour to find the truth. There would be 'failure of justice'; not only by unjust conviction, but also by acquittal of the guilty, as a result of unjust failure to produce requisite evidence. Of course, the rights of the accused have to be kept in mind and also safeguarded, but they should not be over emphasised to the extent of forgetting that the victims also have rights. It has to be shown that the accused has suffered some disability or detriment in respect of the protections available to him under Indian Criminal Jurisprudence. 'Prejudice', is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial, and not with respect to matters falling outside their scope. Once the accused is able to show that there has been serious prejudice caused to him, with respect to either of these aspects, and that the same has defeated the rights available to him under jurisprudence, then the accused can seek benefit under the orders of the Court. (Vide: *Rafiq Ahmed @ Rafi v. State of U.P.,* AIR 2011 SC 3114; *Rattiram & Ors. v. State of M.P. through Inspector of Police,* AIR 2012 SC 1485; and Criminal Appeal No.46 of 2005 (*Bhimanna v. State of Karnataka*) decided on 4th September, 2012).

16. Learned counsel for the appellant has submitted that there is nothing on record to show that the appellant had a common intention with co-accused to kill the deceased and therefore the appellant could not have been convicted as such. In order to fortify his submission, he placed heavy reliance on the judgment of this Court in *Dhanna v. State of M.P.,* (1996) 10 SCC 79, wherein this Court held as under:

> *"It is, therefore, open to the Court to make recourse to Section 34 IPC even if the said section was not specifically mentioned the charge ……. Of course a finding that the assailant concerned had a common intention with the other accused is necessary for resorting to such a course."*

17. Even this submission does not tilt the balance in favour of the appellant. The manner in which injury no.1 has been caused clearly suggests that both the accused persons acted in furtherance of a common intention. Thus, we do not find any force in the aforesaid submission.

18. Learned counsel for the appellant further submitted that investigation conducted by the police was tainted, favouring the complainant, as the Investigating Officer (PW.9) himself admitted in his cross-examination that, he had recorded the statement of one Bohar Singh to the effect that, the appellant was the only witness and had seen Bohar Singh and others being attacked and injured by the deceased on being teased. Bohar Singh had also been medically examined and injuries were found on his person. However, his statement regarding such facts has not been produced before the court.

The trial court dealt with the said issue elaborately, and held that the story that the reason that Bohar Singh and the other co-accused went to Civil Hospital, Zira, a far away place, and got themselves medically examined there and not in a nearby hospital, was in order to avoid conflict with the complainant party as the police would have taken the body of the deceased there for post-mortem examination, for which the complainant party would also be present, was a concocted story. In fact, the dead body of Mukhtiar Singh was taken to Civil Hospital, Zira itself for post-mortem and, therefore, the case put forward by defence was clearly a false story, and there was absolutely no material whatsoever on record to show that Bohar Singh or any other accused had received any injury in the said incident.

19. In view of the above, we do not find any force in the said appeal. Facts of the appeal do not warrant review of the findings recorded by the courts below. Appeal lacks merit and is dismissed accordingly.

B.B.B. Appeal dismissed.

MUSTAFA SHAHADAL SHAIKH
v.
THE STATE OF MAHARASHTRA
(Criminal Appeal No. 1406 of 2008)

SEPTEMBER 14, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Penal Code, 1860:

ss.304B and 498A r/w s.34 - Dowry death - Cruelty by husband -Appellant's wife committed suicide at her matrimonial home - Death occurred within seven months of marriage - On the date of death, appellant and his parents alone were in the house - Conviction of appellant u/ss.304B and 498A r/w s.34 - Challenge to - Held: The evidence of PWs 4, 6, 7 and 9 (grand-father, father, mother and brother of the deceased) clearly proved torture, harassment, and demand of dowry, at the hands of the accused including the appellant - Even 5 days prior to her death, deceased had told PW6 about the harassment and torture meted out to her which clearly satisfies the expression "soon before her death" used in s.304B IPC and s.113B of the Evidence Act - From the materials on record, it is clear that the prosecution established the offence u/s.304B IPC - The prosecution evidence also clearly proved the ingredients of cruelty (i.e. 498A) - Conviction of appellant accordingly sustained - Evidence Act, 1872 - s.113B - Dowry Prohibition Act, 1961 - s.2.

s.304B - Dowry death - Presumption - Burden of proof that the harassment or cruelty was related to demand for dowry and was caused "soon before her death" - Expression "soon before her death" - Meaning of - Held: To attract the provisions of s.304B, one of the main ingredients of the offence which is required to be established is that "soon before her death" the victim was subjected to cruelty or harassment

"for, or in connection with the demand for dowry" - The expression "soon before her death" used in s.304B IPC and s.113B of the Evidence Act is present with the idea of proximity test - Determination of the period which can come within the term "soon before her death" is to be determined by the courts, depending upon the facts and circumstances of each case - However, the said expression would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question - If the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence - Evidence Act, 1872 - s.113B.

s.304B - Conviction under - Prayer of convict for leniency in sentence considering his young age and that he was the only earning member in his family - Held: On facts, not acceptable - These aspects were duly considered by the trial court while awarding punishment - Further s.304B itself mandates that in the case of conviction in terms of sub-section (1) the imprisonment shall not be less than 7 years but which may extend to imprisonment for life - In view of the fact that the prosecution had established its case beyond reasonable doubt by placing acceptable evidence and of the fact that minimum sentence of seven years was prescribed by the courts below, it is not possible to award sentence less than 7 years - Moreso, when these aspects were also considered by the High Court - Sentence / Sentencing.

Crime against Women - Death of married woman - Conviction of accused-husband - Challenge to - Plea of accused that the witnesses relied upon by the prosecution were close relatives of the deceased and no outsider was examined to prove the prosecution case - Held: Not tenable - In a case of this nature i.e. matrimonial death, one cannot expect outsiders to come and depose what had happened in the family of the deceased.

The wife of appellant/A1 committed suicide by consuming poison while she was at her matrimonial home. The appellant and his parents informed about her death to her family members. On the same day, PW-4, the grand-father of the deceased lodged an F.I.R. alleging torture and harassment faced by the deceased on account of demand for dowry. On the basis of the said report, a case was registered against the appellant and his family members under Sections 306, 304-B and 498-A read with Section 34 of IPC. In support of the charges, the prosecution heavily relied on the complaint (Exh. 20), the evidence of PWs 4, 6, 7 and 9 and other relevant circumstance, viz., the death occurred within 7 months from the date of marriage. The trial court, while acquitting A-4, the sister of the appellant, convicted the appellant and his parents (A-2 and A-3) under Sections 498-A and 304-B read with Section 34 of IPC. The appellant and his parents (A-2 and A-3) preferred appeal before the High Court. During pendency of the appeal, A-2 and A-3 expired and the appeal against them stood abated. By the impugned judgment, the High Court confirmed the conviction of appellant.

In the instant appeal, the only point for consideration was whether the prosecution had made out a case in respect of the charges leveled against the appellant relating to Section 304B and 498A IPC.

Dismissing the appeal, the Court

HELD: 1.1. Section 304B IPC relates to dowry death. In order to convict an accused for offence punishable under Section 304B IPC, the following essentials must be satisfied: i) the death of a woman must have been caused by burns or bodily injury or otherwise than under normal circumstances; ii) such death must have occurred within seven years of her marriage; iii) soon before her death,

the woman must have been subjected to cruelty or harassment by her husband or any relatives of her husband; iv) such cruelty or harassment must be for, or in connection with, demand for dowry. When the above ingredients are established by reliable and acceptable evidence, such death shall be called dowry death and such husband or his relatives shall be deemed to have caused her death. If the above-mentioned ingredients attract in view of the special provision, the court shall presume and it shall record such fact as proved unless and until it is disproved by the accused. However, it is open to the accused to adduce evidence for disproving such compulsory presumption as the burden is unmistakably on him to do so and he can discharge such burden by getting an answer through cross-examination of prosecution witnesses or by adducing evidence on the defence side. [Para 6] [568-G; 569-D-H; 570-A-B]

1.2. Section 113B of the Indian Evidence Act, 1872 speaks about presumption as to dowry death. The prosecution under Section 304B of IPC cannot escape from the burden of proof that the harassment or cruelty was related to the demand for dowry and such was caused "soon before her death". In view of the explanation to the said section, the word "dowry" has to be understood as defined in Section 2 of the Dowry Prohibition Act, 1961. [Para 7] [570-C; F-G]

1.3. To attract the provisions of Section 304B, one of the main ingredients of the offence which is required to be established is that "soon before her death" she was subjected to cruelty or harassment "for, or in connection with the demand for dowry". The expression "soon before her death" used in Section 304B IPC and Section 113B of the Evidence Act is present with the idea of proximity test. Though the language used "soon before her death", no definite period has been enacted and the

expression "soon before her death" has not been defined in both the enactments. Accordingly, the determination of the period which can come within the term "soon before her death" is to be determined by the courts, depending upon the facts and circumstances of each case. However, the said expression would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. In other words, there must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the concerned death. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence. [Para 8] [571-C-G]

Kaliyaperumal v. State of Tamil Nadu **AIR (2003) SC 3828: 2003 (3) Suppl. SCR 1 and** *Yashoda v. State of Madhya Pradesh* **(2004) 3 SCC 98- relied on.**

2.1. PW-4, aged about 65 years at the time of the incident deposed that the deceased was his grand-daughter. His evidence clearly prove the torture, harassment, and demand of dowry at the hands of the accused including the appellant. The evidence of PW-6 - the father of the deceased also proves the torture and harassment for the settlement for the payment of money and, in fact, this was narrated just 5 days prior to the date of her death. It very clearly satisfies the expression "soon before her death". PW-7, the mother of the deceased, also narrated similar to PWs 4 and 6. From her evidence also, it is clear that the accused tortured and harassed her daughter for money. The other witness relied on by the prosecution is PW-9 the brother of the deceased. Like PWs 4, 6 and 7, he also highlighted that his sister used to inform that her husband, sister-in-law, father-in-law and mother-in-law tortured her on many occasions for the

payment of money and gold ornaments. A perusal of his entire evidence also corroborates with the similar claim made by PWs 4, 6 and 7. [Paras 9,10,11 and 12] [572-A-B; 573-A-B-E-H; 574-A]

2.2. Though the appellant contended that all the witnesses relied on by the prosecution were close relatives and no outsider was examined to prove their case, in a case of this nature i.e. matrimonial death, one cannot expect outsiders to come and depose what had happened in the family of the deceased. The death occurred within a period of 7 months from the date of the marriage and she died at her matrimonial home. It has also come in evidence from the prosecution witnesses that on the date of the death, the appellant and his parents alone were in the house. In such circumstances, the contention raised by the appellant is liable to be rejected. [Para 13] [574-B-D]

2.3. Apart from the above witnesses, the doctor who conducted the post mortem was examined as PW-5. In the post mortem report, he opined that death of appellant's wife was due to poisoning. He further explained that poison was petroleum hydrocarbons. He also deposed that the said poison was sufficient to cause death of a human being. [Para 14] [574-D-E]

2.4. From the materials on record, it is clear that the prosecution has clearly established the offence under Section 304B IPC and the same has been rightly accepted by the trial Court and confirmed by the High Court. [Para 15] [574-F]

2.5. Section 498A speaks about cruelty by husband or relatives of husband. The object of inserting the above section was to punish the husband or his relatives who harass or torture the wife to coerce her or her relatives to satisfy unlawful demands of dowry. The prosecution

evidence clearly prove the ingredients of cruelty and no further elaboration is required, on the other hand, the conclusion arrived at by the trial Court as affirmed by the High Court is correct. [Para 16] [574-G; 575-D-F]

2.6. Though the appellant pleaded for reduction of his sentence considering his age, viz., 23 years at the time of occurrence and that he was the only earning member in his family, these aspects were duly considered by the trial court while awarding punishment. Further Section 304B itself mandates that in the case of conviction in terms of sub-section (1) the imprisonment shall not be less than 7 years but which may extend to imprisonment for life. In view of the fact that the prosecution has established its case beyond reasonable doubt by placing acceptable evidence and of the fact that minimum sentence of seven years has been prescribed (by the courts below), it cannot be possible to award sentence less than 7 years. These aspects were also considered by the High Court. Accordingly, the similar request made by the appellant is rejected. [Para 17] [575-F-H; 576-A-B]

Case Law Reference:

2003 (3) Suppl. SCR 1	**relied on**	**Para 8**
(2004) 3 SCC 98	**relied on**	**Para 8**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1406 of 2008.

From the Judgment & Order dated 28.11.2007 of the Hon'ble High Court of Bombay in Criminal Appeal No. 891/ 1990.

Sudhanhu S. Choudhari for the Appellant.

Sachin J. Patil, Asha Gopalan Nair for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. This appeal is directed against the judgment and order dated 28.11.2007 passed by the High Court of Judicature of Bombay in Criminal Appeal No. 891 of 1990 whereby the High Court confirmed the order of conviction and sentence dated 07.12.1990 passed by the 4th Additional Sessions Judge at Kolhapur against the appellant herein.

2. The facts and circumstances giving rise to this appeal are as under :

(a) On 26.01.1989, Mustafa Shahadal Shaikh (A1) - the appellant-accused married one Hasina Mustafa Shaikh (since deceased) at Tembalalwadi, Dist. Kolhapur, Maharashtra. After marriage, Hasina was staying with the appellant in her matrimonial home at Ujalawadi Taluka Karveer, Dist. Kolhapur, Maharashtra. On 23.08.1989, when she was at her matrimonial home, she committed suicide by consuming poison. She was taken to CPR Hospital at Kolhapur where the doctor declared that she was brought dead. The appellant and his parents informed about her death to her family members.

(b) On the same day, Abdul Rahim Shaikh (PW-4) the grand-father of the deceased lodged an F.I.R. at Karveer Police Station, Kohlapur alleging torture and harassment faced by the deceased on account of demand for dowry. On the basis of the said report, C.P. No. 186/89 (Exh.20) was registered against the appellant and his family members for the offence punishable under Sections 306, 304-B and 498-A read with Section 34 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC").

(c) The case was committed to the Court of Sessions and numbered as Sessions Case No. 7 of 1990 and A-1 Husband, A-2 Father, A-3 Mother, A-4 sister-in-law were arrayed as accused nos. 1 to 4. During the trial, prosecution examined 12 witnesses and marked several documents. By order dated 07.12.1990, the 4th Additional Sessions Judge, while acquitting the sister (A-4) of the appellant herein, convicted the appellant and his parents for the offence punishable under Sections 498-

A and 304-B read with Section 34 of IPC and sentenced them to suffer RI for 1 year along with a fine of Rs.1,000/-, in default, to further under RI for 6 months and RI for 7 years respectively.

(d) Being aggrieved, the appellant and his parents preferred Criminal Appeal No. 891 of 1990 before the High Court of Bombay. During the pendency of the appeal before the High Court, the parents (A-2 and A-3) of the appellant expired and the appeal against them stood abated. By the impugned judgment dated 28.11.2007, the High Court dismissed the appeal while confirming the conviction and sentence imposed by the trial Court against the appellant.

(e) Aggrieved by the said judgment, the appellant has preferred this appeal by way of special leave before this Court.

3. Heard Mr. Sudhanshu S. Choudhari, learned counsel for the appellant-accused and Mr. Sachin J. Patil, learned counsel for the respondent-State.

Discussion:

4. The only point for consideration in this appeal is whether the prosecution has made out a case in respect of the charges leveled against the appellant relating to Section 304B and 498A IPC.

5. In support of the above charges, the prosecution heavily relied on the complaint (Exh. 20), the evidence of PWs 4, 6, 7 and 9 and other relevant circumstance, viz., the death occurred on 23.08.1989 i.e. within a period of 7 months from the date of marriage i.e. 26.01.1989.

6. Before considering the prosecution case as well as the defence pleaded, it is desirable to extract the relevant provisions of Section 304B which relates to Dowry death.

"304B. Dowry death. - (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise

than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

Explanation- For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961)

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment of life"

The above provision was inserted by Act 43 of 1986 and came into force w.e.f. 19.11.1986. There is no dispute about the applicability of the above provision since the marriage and the death occurred in 1989. In order to convict an accused for offence punishable under Section 304B of IPC, the following *essentials* must be satisfied:

i) the death of a woman must have been caused by burns or bodily injury or otherwise than under normal circumstances;

ii) such death must have occurred within seven years of her marriage;

iii) soon before her death, the woman must have been subjected to cruelty or harassment by her husband or any relatives of her husband;

iv) such cruelty or harassment must be for, or in connection with, demand for dowry.

When the above ingredients are established by reliable and acceptable evidence, such death shall be called dowry death and such husband or his relatives shall be deemed to have

caused her death. If the above-mentioned ingredients attract in view of the special provision, the court shall presume and it shall record such fact as proved unless and until it is disproved by the accused. However, it is open to the accused to adduce such evidence for disproving such compulsory presumption as the burden is unmistakably on him to do so and he can discharge such burden by getting an answer through cross-examination of prosecution witnesses or by adducing evidence on the defence side.

7. Section 113B of the Indian Evidence Act, 1872 speaks about presumption as to dowry death which reads as under:-

"113B. Presumption as to dowry death- When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has 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.

Explanation.- For the purposes of this section, "dowry death" shall have the same meaning as in section 304B of the Indian Penal Code (45 of 1860)."

As stated earlier, the prosecution under Section 304B of IPC cannot escape from the burden of proof that the harassment or cruelty was related to the demand for dowry and such was caused "soon before her death". In view of the explanation to the said section, the word "dowry" has to be understood as defined in Section 2 of the Dowry Prohibition Act, 1961 which 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 a other person, to either party to the marriage or to any other person; at or before or after the marriage us consideration for 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."

8. To attract the provisions of Section 304B, one of the main ingredients of the offence which is required to be established is that "soon before her death" she was subjected to cruelty or harassment "for, or in connection with the demand for dowry". The expression "soon before her death" used in Section 304B IPC and Section 113B of the Evidence Act is present with the idea of proximity test. In fact, learned counsel appearing for the appellant submitted that there is no proximity for the alleged demand of dowry and harassment. With regard to the said claim, we shall advert to the same while considering the evidence led in by the prosecution. Though the language used "soon before her death", no definite period has been enacted and the expression "soon before her death" has not been defined in both the enactments. Accordingly, the determination of the period which can come within the term "soon before her death" is to be determined by the courts, depending upon the facts and circumstances of each case. However, the said expression would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. In other words, there must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the concerned death. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence. These principles have been reiterated in *Kaliyaperumal vs. State of Tamil Nadu,* AIR 2003 SC 3828 and *Yashoda vs. State of Madhya Pradesh,* (2004) 3 SCC 98.

9. With these principles in mind, let us analyze the evidence led in by the prosecution. Abdul Rahim Shaikh, PW-4, aged about 65 years at the time of the incident deposed that the deceased - Hasina was his grand daughter. Hasina was daughter of his daughter Chandbi and her husband's name is Dilawar Khan. According to him, after her marriage on 26.01.1989, she went to reside in the house of the appellant-accused at Ujalawadi. She stayed there for 5 days and returned to their house and stayed for 15 days. Thereafter, she again went to her in-laws house. At the time of Bakrid, Hasina, her husband Mustafa (A1) - the appellant accused and Hasina's brother Ayub had gone to Panaji. After 4 days, Ayub and Mustafa returned from Panaji and she stayed there for 15 days. Hasina narrated all her sufferings to her mother Chandbi (PW-7) daughter of PW-4 as to how the accused were torturing, beating and abusing her for the demand of Rs.5,000/- and a gold ring and a chain. When the appellant and his mother visited his house, he explained to them that they had already spent Rs.6,000/- for marriage and he was ready to get employment for the appellant. He further deposed that after 5-6 days, he had gone to the house of Abubakhar Nimshikari PW-10 - the mediator to the said marriage and informed him about the cruelty and harassment meted out to the deceased in order to fulfill the demand of dowry. He also deposed that when he had gone to the house of the accused about 2-4 days prior to her death, she took him to a room and narrated how the accused began to torture her more for their demand for money and gold chain and she also asked him to do something with regard to the same. He also explained that 4 days thereafter, father-in-law and mother-in-law of Hasina came to their house and told him that Hasina had consumed poison and she had been admitted in CPR Hospital. They also showed the bottle to him. Thereafter, PW-4 and his wife rushed to CPR Hospital. When they reached the Hospital, the Doctor informed that she was brought dead. Nobody was present near the dead body from the house of the accused. Thereafter, he went to Kharvi P.S and lodged a report which is Exh. 20. In fact, while

recording his evidence, the trial Judge has noted that PW-4 - grandfather of the deceased became over emotional and began to weep in the witness box. His evidence, who is an elderly person and affectionate to the deceased - Hasina, clearly prove the torture, harassment, and demand of dowry at the hands of the accused including the appellant.

10. The next witness examined on the side of the prosecution is Dilawarkhan PW-6 - father of the deceased. In his evidence, he also explained that his daughter told him that her in-laws used to torture her by beating and keeping her starved. He subsequently mentioned that on 18.08.1989, he himself and his wife had visited the house of his father-in-law, namely, PW-4 at Tembalwadi and, thereafter, they had gone to the house of accused at Ujalawadi. There itself Hasina explained the harassment and torture meted out to her. She started weeping and told PW-6 that her husband - appellant herein tortured her more. On the next day, when the appellant and his mother came to their house, PW-6 told them that he would get employment for the appellant accused and he should not harass her daughter. However, he did not listen to him and left his house. The evidence of PW-6 - the father of the deceased also proves the torture and harassment for the settlement for the payment of money and, in fact, this was narrated on 18.08.1989 i.e. just 5 days prior to the date of her death. It very clearly satisfies the expression "soon before her death".

11. The next witness relied on by the prosecution is Chandbi PW-7 the mother of the deceased. She also narrated similar to PWs 4 and 6. From her evidence also, it is clear that the accused tortured and harassed her daughter for money.

12. The other witness relied on by the prosecution is Ayubkhan (PW-9) the brother of the deceased. Like PWs 4, 6 and 7, he also highlighted that his sister used to inform that her husband, sister-in-law, father-in-law and mother-in-law tortured her on many occasions for the payment of money and gold

ornaments. A perusal of his entire evidence also corroborates with the similar claim made by PWs 4, 6 and 7.

13. Though learned counsel for the appellant contended that all the witnesses relied on by the prosecution are close relatives and no outsider has been examined to prove their case, we are of the view that in a case of this nature i.e. matrimonial death, we cannot expect outsiders to come and depose what had happened in the family of the deceased. We have already highlighted that the death occurred within a period of 7 months from the date of the marriage and she died at her matrimonial home. It has also come in evidence from the prosecution witnesses that on the date of the death, the appellant and his parents alone were in the house. In such circumstances, we reject the contention raised by the counsel for the appellant.

14. Apart from the above witnesses, Dr. Ramdas - the doctor who conducted the post mortem was examined as PW-5. In the post mortem report, he opined that death of Hasina was due to poisoning. He further explained that poison was petroleum hydrocarbons. He also deposed that the said poison was sufficient to cause death of a human being.

15. From these materials, we are satisfied that the prosecution has clearly established the offence under Section 304B IPC and the same has been rightly accepted by the trial Court and confirmed by the High Court.

16. Coming to Section 498A which speaks about cruelty by husband or relatives of husband. It is useful to extract the said provision:-

> *"498A. Husband or relative of husband of a woman subjecting her to cruelty.-* Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for

a term which may extend to three years and shall also be liable to fine.

Explanation- For the purpose of this section, "cruelty" means-

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand."

The object of inserting the above section by Act 46 of 1983 which came into force w.e.f. 25.12.1983 was with a view to punish the husband or his relatives who harass or torture the wife to coerce her or her relatives to satisfy unlawful demands of dowry. The prosecution evidence, which we have already discussed, clearly prove the ingredients of cruelty and no further elaboration is required, on the other hand, we fully agree with the conclusion arrived at by the trial Court as affirmed by the High Court.

17. Finally, faint argument was advanced by the counsel for the appellant for reduction of the sentence of appellant-accused considering his age, viz., 23 years at the time of occurrence. It is also pleaded that he is the only earning member in his family and prayed for leniency. These aspects were duly considered by the trial court while awarding punishment. Further Section 304B itself mandates that in the case of conviction in terms of sub-section (1) the imprisonment shall not be less than 7 years but which may extend to imprisonment for life. In view of the fact that the prosecution

has established its case beyond reasonable doubt by placing acceptable evidence and of the fact that minimum sentence of seven years has been prescribed, it cannot be possible to award sentence less than 7 years. These aspects were also considered by the High Court. Accordingly, we reject the similar request made by the counsel for the appellant.

18. In the light of what is stated above, we fully concur with the conclusion arrived at by the trial Court and the High Court. Consequently, the appeal fails and accordingly dismissed.

B.B.B. Appeal dismissed.

BALAJI GUNTHU DHULE

v.

STATE OF MAHARASHTRA

(Criminal Appeal No. 784 of 2008)

SEPTEMBER 19, 2012

[H.L. DATTU AND CHANDRAMAULI KR. PRASAD, JJ.]

Penal Code, 1860 - s.302 - Conviction under - Challenge to - Death of one person in course of a quarrel - Trial court convicted accused-appellant and two other accused u/s.302 r/w s.34 based on the evidence of PWs 4,5,7,8 and 10 - High Court acquitted the other two accused but convicted the appellant u/s.302 - High Court rejected the evidence of PWs 4,5,7 and 8, but confirmed the order of trial court primarily based on the evidence of PW10 - High Court came to the conclusion that since PW10 had taken the deceased to the hospital, he could have been present at least after the incident - To come to a conclusion that PW10 was present at the time of the incident, the High Court relied upon the statement made by appellant u/s.313 CrPC - Held: The statement of the accused recorded u/s.313 CrPC cannot be put against the accused person -The statement made under this Section should not be considered in isolation but in conjunction with evidence adduced by the prosecution - In the instant case, the appellant in his statement u/s.313 CrPC admitted that there was a quarrel between accused 'S' and PW10 and while rushing to the spot of quarrel the deceased involuntarily fell on a cement concrete platform and thereby suffered the fatal injury - The prosecution story, however, was that a quarrel between the deceased and accused 'S' in fact took place, however, the fatal injury was caused by a deliberate blow by the appellant on the deceased - There is absolute contradiction in the statement made by the appellant in his statement u/s.313 CrPC and that statement could not have

been put against the accused in concluding that PW10 was present at the place of incident at or immediately after the occurrence of the incident - Therefore, the said witness cannot be considered as eye-witness to the incident as such - The High Court also relied upon the postmortem report of the Doctor - Since the entire evidence of the eye-witnesses was not accepted by the High Court, it could not have merely relied upon the postmortem report to convict the appellant for an offence u/s.302 IPC - Further, the postmortem report should be in corroboration with the evidence of eye-witnesses and cannot be an evidence sufficient to reach the conclusion for convicting the appellant - Appellant-accused accordingly acquitted - Code of Criminal Procedure, 1973 - s.313.

Manu Sao v. State of Bihar **(2010) 12 SCC 310: 2010 (8) SCR 811 - referred to.**

Case Law Reference:

2010 (8) SCR 811	**referred to**	**Para 7**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 784 of 2008.

From the Judgment & Order dated 19.10.2005 of the High Court of Judicature at Bombay Bench at Aurangabad in Criminal Appeal No. 108 of 2004.

Minakshi Vij for the Appellant.

Asha Gopalan Nair for the Respondent.

The Order of the Court was delivered

O R D E R

1. This appeal by special leave is directed against the judgment and order passed by the High Court of Judicature at Bombay, Bench at Aurangabad in Criminal Appeal No.108 of 2004 dated 19.10.2005.

2. The appellant, before us is convicted under Section 302 read with Section 34 of the Indian Penal Code, 1860 ("IPC" for short) and sentenced to imprisonment for life, by the Trial Court, on the allegation that he has caused the death of one Ranga Rao in a quarrel which ensued between Ranga Rao and one Smt. Shantabai (other accused who expired during the trial). The Prosecution, in support of its case, had examined several witnesses, including six eye-witnesses- P.Ws. 4, 5, 6, 7, 8 and 10. The Trial Court, taking into consideration the evidence of P.Ws. 4, 5, 7, 8 and 10, has convicted and sentenced the appellant and two others, as mentioned earlier. Aggrieved by the said judgment and order passed by the Trial Court, the appellant and two others were before the High Court in an appeal filed under Section 374(2) of the Code of Criminal Procedure,1973 ("the Code" for short).

3. The High Court, after re-appreciation of the evidence on record, has acquitted the two other accused, but has convicted the appellant only for an offence under Section 302 of the I.P.C. It is the correctness or otherwise of the said order which is called in question by the appellant before us.

4. We have heard learned counsel for the parties to the lis.

5. Learned counsel appearing for the appellant has taken us through the judgment and order passed by the High Court. We gather on perusal of the judgment that the High Court after detailed consideration of the evidence of P.Ws. 4, 5, 7 and 8 has rejected the same for the reasons assigned in the judgment. However, it has confirmed the order of the Trial Court primarily based on the evidence of PW-10, that too by drawing a distinction based on the analysis of the question: "whether P.W.10 was present at the time of the incident or at least after the incident." The High Court comes to the conclusion and records that since P.W.10 had taken the deceased to the hospital, he could have been present at least after the incident.

6. To come to a conclusion that P.W.10 was present at the time of the incident, strangely, in our opinion, the High Court has relied upon the statement made by the accused-appellant under Section 313 of the Code. In our opinion, first and foremost, as the law stands today, the statement of the accused recorded under Section 313 of the Code cannot be put against the accused person. The courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution. The statement made under this Section should not be considered in isolation but in conjunction with evidence adduced by the prosecution.

7. This Court in *Manu Sao v. State of Bihar,* (2010) 12 SCC 310, has examined the vital features of Section 313 of the Code and the principles of law as enunciated by judgments, analysing the guiding factors for proper application and consequences that shall flow from the said provision and has observed :

> "14. The statement of the accused can be used to test the veracity of the exculpatory nature of the admission, if any, made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in the case. The provisions of Section 313(4) explicitly provides that the answers given by the accused may be taken into consideration in such enquiry or trial and put in evidence against the accused in any other enquiry or trial for any other offence for which such answers may tend to show he has committed. In other words, the use is permissible as per the provisions of the Code but has its own limitations. The courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this section should not be considered in isolation but in conjunction with evidence adduced by the prosecution.

15. Another important caution that courts have declared in the pronouncements is that conviction of the accused cannot be based merely on the statement made under Section 313 of the Code as it cannot be regarded as a substantive piece of evidence. In Vijendrajit Ayodhya Prasad Goel v. State of Bombay (AIR) 1953 SC 247, the Court held as under: (AIR p. 248, para 3)

> "3. ... As the appellant admitted that he was in charge of the godown, further evidence was not led on the point. The Magistrate was in this situation fully justified in referring to the statement of the accused under Section 342 as supporting the prosecution case concerning the possession of the godown. The contention that the Magistrate made use of the inculpatory part of the accused's statement and excluded the exculpatory part does not seem to be correct. The statement under Section 342 did not consist of two portions, part inculpatory and part exculpatory. It concerned itself with two facts. The accused admitted that he was in charge of the godown, he denied that the rectified spirit was found in that godown. He alleged that the rectified spirit was found outside it. This part of his statement was proved untrue by the prosecution evidence and had no intimate connection with the statement concerning the possession of the godown."

16. On similar lines reference can be made to a quite recent judgment of this Court in *Ajay Singh v. State of Maharashtra,* (2007) 12 SCC 341, where the Court held as under: (SCC p. 347, paras 11-13)

> "11. So far as the prosecution case that kerosene was found on the accused's dress is concerned, it is to be noted that no question in this regard was put to the accused while he was examined under Section 313 of the Code.

> 12. The purpose of Section 313 of the Code is set out in its opening words - `for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him'. In Hate Singh Bhagat Singh v. State of Madhya Bharat it has been laid down by Bose, J. (AIR p. 469, para 8) that the statements of the accused persons recorded under Section 313 of the Code 'are among the most important matters to be considered at the trial'. It was pointed out that: (AIR p. 470, para 8)
>
> '8. ... The statements of the accused recorded by the committing Magistrate and the Sessions Judge are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness box [and that they] have to be received in evidence and treated as evidence and be duly considered at the trial.'"
>
> This position remains unaltered even after the insertion of Section 315 in the Code and any statement under Section 313 has to be considered in the same way as if Section 315 is not there.
>
> 13. The object of examination under this section is to give the accused an opportunity to explain the case made against him. This statement can be taken into consideration in judging his innocence or guilt. Where there is an onus on the accused to discharge, it depends on the facts and circumstances of the case if such statement discharges the onus."

17. The statement made by the accused is capable of being used in the trial though to a limited extent. But the law also places an obligation upon the court to take into consideration the stand of the accused in his statement and consider the same objectively and in its entirety. This principle of law has been stated by this Court in Hate

Singh *Bhagat Singh v. State of Madhya Bharat.* (AIR) 1953 SC 468."

8. Herein, the appellant in his statement under Section 313 of the Code admits that there was a quarrel between Shantabai (deceased accused) and P.W.1O and while rushing to the spot of quarrel the deceased involuntarily fell on a cement concrete platform - Otta and thereby suffered the fatal injury. The prosecution story was that a quarrel between the deceased and Shantabai in fact took place, however, the fatal injury was caused by a deliberate blow by the appellant on the deceased. In our opinion, there is absolute contradiction in the statement made by the appellant in his statement under Section 313 of the Code and that statement could not have been put against the accused in concluding that P.W.1O was present at the place of incident at or immediately after the occurrence of the incident. Therefore, the said witness, in our opinion, cannot be considered as eye-witness to the incident as such.

9. The High Court has also relied upon the postmortem report of the Doctor. In our opinion, since the entire evidence of the eye-witnesses has not been accepted by the High Court, it could not have merely relied upon the postmortem report to convict the appellant for an offence under Section 302 of the I.P.C. Further, in our view, the postmortem report should be in corroboration with the evidence of eye-witnesses and cannot be an evidence sufficient to reach the conclusion for convicting the appellant. In view of the above, we have no other alternative but to allow this appeal and set aside the judgment and order passed by the High Court convicting the appellant for an offence punishable under Section 302 of the I.P.C.

10. In the result, the appeal is allowed with a direction that the appellant-accused be released forthwith, if he is not required in any other offence/case.

Ordered accordingly.

B.B.B. Appeal allowed.

ASH MOHAMMAD

v.

SHIV RAJ SINGH @ LALLA BABU AND ANR.

(Criminal Appeal No. 1456 of 2012)

SEPTEMBER 20, 2012

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

Bail - Grant of - Duty of the Court - Allegation that on instructions of accused-respondent, two persons abducted the victim under threat whereafter the victim was kept in confinement for eight days and tortured - Respondent was a history-sheeter and a number of criminal cases were pending against him - He was denied bail by the trial court - High Court, however, granted him bail u/s.439 CrPC on certain conditions - On appeal, held: The High Court, in toto, ignored the criminal antecedents of the respondent - What weighed with the High Court was that the respondent had spent seven months in custody - Though period of custody is a relevant factor but simultaneously the totality of circumstances and the criminal antecedents of the respondent could not have been totally ignored - Granting of bail is a matter of discretion for the High Court and the Supreme Court is slow to interfere with such orders -But regard being had to the antecedents of the respondent, the nature of the crime committed and the confinement of the victim for eight days, the order of the High Court is required to be interfered with - The instant appeal was not an appeal for cancellation of bail as cancellation was not sought because of supervening circumstances - It was basically an appeal challenging grant of bail where the High Court failed to take into consideration the relevant material factors which made its order perverse - Societal concern in the case at hand deserved to be given priority over lifting the restriction of liberty of the respondent - Consequently, order passed by the High Court set aside and respondent directed

to surrender to custody forthwith - Code of Criminal Procedure, 1973 - s.439 - Penal Code, 1860 - ss. 364 and 506.

Constitution of India, 1950 - Article 21 - Liberty - Sanctity of - Restrictions imposed by law - Necessity of collective security - Held: Though liberty is a greatly cherished value in the life of an individual, it is a controlled and restricted one and no element in the society can act in a manner by consequence of which the life or liberty of others is jeopardized, for the rational collective does not countenance an anti-social or anti-collective act.

The appellant lodged an FIR alleging that while he was going to his in-laws' place along with 'B', two persons came on a motorcycle and after inquiring about the identity of 'B' told him that they had been asked by the respondent to compel him to accompany them; and that as there was resistance, they threatened to kill him and eventually made 'B' sit in between them on the motorcycle and fled away. Consequently, a case was registered under Section 364 and 506 of IPC against the accused-respondent who was thereafter arrested and taken into custody. The respondent filed bail application before the trial court, which taking note of the allegations in the FIR and the stand put forth in opposition by the prosecution as well as by the victim, and thereafter, taking note of the fact that the respondent was a history-sheeter and involved in number of cases rejected his bail application. Thereafter the respondent filed bail application before the High Court under Section 439 CrPC. The High Court directed his enlargement on bail on certain conditions.

The instant appeal was preferred assailing the legal defensibility of the order passed by the High Court and praying for quashment of the same. The appellant contended that the High Court had absolutely misdirected

itself by not appositely considering the statement recorded under Section 164 of CrPC, the gravity of the offences and criminal antecedents of the respondent and further the affidavit filed by the prosecution bringing number of factors as a consequence of which an illegal order enlarging the appellant on bail had come into existence. The appellant submitted that the non-consideration of the material facts vitiated the order of the High Court and annulment of the same was the judicial warrant.

The question that therefore arose for consideration was whether the order passed by the High Court was legitimately acceptable and legally sustainable within the ambit and sweep of the principles laid down by this Court for grant of regular bail under Section 439 CrPC.

Allowing the appeal, the Court

HELD:1.1. The sacrosanctity of liberty is paramount in a civilized society. However, in a democratic body polity which is wedded to Rule of Law an individual is expected to grow within the social restrictions sanctioned by law. The individual liberty is restricted by larger social interest and its deprivation must have due sanction of law. In an orderly society an individual is expected to live with dignity having respect for law and also giving due respect to others' rights. It is a well accepted principle that the concept of liberty is not in the realm of absolutism but is a restricted one. The cry of the collective for justice, its desire for peace and harmony and its necessity for security cannot be allowed to be trivialized. The life of an individual living in a society governed by Rule of Law has to be regulated and such regulations which are the source in law subserve the social balance and function as a significant instrument for protection of human rights and security of the collective. It is because fundamentally

laws are made for their obedience so that every member of the society lives peacefully in a society to achieve his individual as well as social interest. [Para 19] [598-E-H; 599-A-B]

1.2. The individual liberty cannot be accentuated to such an extent or elevated to such a high pedestal which would bring in anarchy or disorder in the society. The prospect of greater justice requires that law and order should prevail in a civilized milieu. True it is, there can be no arithmetical formula for fixing the parameters in precise exactitude but the adjudication should express not only application of mind but also exercise of jurisdiction on accepted and established norms. It is clear that though liberty is a greatly cherished value in the life of an individual, it is a controlled and restricted one and no element in the society can act in a manner by consequence of which the life or liberty of others is jeopardized, for the rational collective does not countenance an anti-social or anti-collective act. [Paras 20, 21] [599-B-D, F]-

1.3. In the instant case, the prosecution by way of an affidavit had brought to the notice of the High Court about the cases pending against the respondent. The High Court recorded the submission of the complainant that the respondent was involved in 52 cases. On a perusal of the counter-affidavit filed before the High Court it is perceptible that it was categorically stated that the accused-respondent was a history-sheeter; that he was the pivotal force in getting the kidnapping done; that the victim 'B' was in captivity for eight days; and that he escaped under the pretext that he was going to attend the call of nature. The High Court only made a passing reference to the same and took note of period of custody of seven months and held, "considering the facts and circumstances of the case but without expressing any

opinion on the merits of the case, the applicant is entitled to be released on bail". [Para 28] [599-G; 560-A-C]

1.4. Coming to the nature of crime it is perceivable that two persons came on a motorcycle and kidnapped 'B' and kept him in confinement for eight days. The role of the accused-respondent is clearly stated. The High Court, in toto, has ignored the criminal antecedents of the respondent. What weighed with the High Court was that the respondent had spent seven months in custody. That may be one of the factors but that cannot be the whole and the sole factor in every case. It depends upon the nature of the offence, the manner in which it is committed and its impact on the society. It is not that a history-sheeter is never entitled to bail. But, it is a significant factor to be taken note of regard being had to the nature of crime in respect of which he has been booked. In the case at hand, as the prosecution case unfolds, the respondent did not want anyone to speak against his activities. He had sent two persons to kidnap 'B', who remained in confinement for eight days. The victim had been kidnapped under threat, confined and abused. The sole reason for kidnapping is because the victim had shown some courage to speak against the accused-respondent. This may be the purpose for sustaining of authority in the area by the respondent and his criminal antecedents, speak eloquently in that regard. In his plea for bail the respondent had stated that such offences had been registered because of political motivations but the range of offence and their alleged years of occurrence do not lend prima facie acceptance to the same. Thus, in the present case his criminal antecedents could not have been totally ignored. [Para 30] [604-C-F-H; 605-A-C]

1.5. A stage has come that in certain States abduction and kidnapping have been regarded as heroism. The concept of crime in the contextual sense of

kidnapping has really undergone a sea change and has really shattered the spine of the orderly society. When the citizens are scared to lead a peaceful life and this kind of offences usher in an impediment in establishment of orderly society, the duty of the court becomes more pronounced and the burden is heavy. There should have been proper analysis of the criminal antecedents. Imposition of conditions is subsequent to the order admitting an accused to bail. The question should be posed whether the accused deserves to be enlarged on bail or not and only thereafter issue of imposing conditions would arise. Though period of custody is a relevant factor but simultaneously the totality of circumstances and the criminal antecedents are also to be weighed. They are to be weighed in the scale of collective cry and desire. The societal concern has to be kept in view in juxtaposition of individual liberty. In the case at hand, the social concern deserves to be given priority over lifting the restriction of liberty of the accused-respondent. [Paras 31, 32] [605-C-H; 606-A]

1.6. Granting of bail is a matter of discretion for the High Court and this Court is slow to interfere with such orders. But regard being had to the antecedents of the accused-respondent which is also a factor to be taken into consideration as per the pronouncements of this Court and the nature of the crime committed and the confinement of the victim for eight days, this Court is inclined to interfere with the impugned order of High Court. [Para 33] [606-B-C]

1.7. The instant appeal is not an appeal for cancellation of bail as cancellation is not sought because of supervening circumstances. The instant appeal is basically an appeal challenging grant of bail where the High Court failed to take into consideration the relevant material factors which make the order perverse.

Consequently, the order passed by the High Court is set aside and the bail bonds of the respondent are cancelled. The respondent is directed to surrender to custody forthwith failing which it shall be the duty of the investigating agency to take him to custody immediately. [Para 34, 35] [606-D-F]

Ram Govind Upadhyay v. Sudarshan Singh and Others **(2002) 3 SCC 598: 2002 (2) SCR 526;** *Prahlad Singh Bhati v. NCT, Delhi and Another* **(2001) 4 SCC 280: 2001 (2) SCR 684;** *Chaman Lal v. State of U. P. and Another* **(2004) 7 SCC 525: 2004 (3) Suppl. SCR 584;** *Masroor v. State of Uttar Pradesh and another* **(2009) 14 SCC 286: 2009 (6) SCR 1030;** *Prasanta Kumar Sarkar v. Ashis Chatterjee and another* **(2010) 14 SCC 496: 2010 (12) SCR 1165;** *State of U.P. through CBI v. Amarmani Tripathi* **(2005) 8 SCC 21: 2005 (3) Suppl. SCR 454;** *Puran v. Rambilas and another* **(2001) 6 SCC 338: 2001 (3) SCR 432;** *Dr. Narendra K. Amin v. State of Gujarat and another* **2008 (6) SCALE 415;** *Prakash Kadam and others v. Ramprasad Vishwanath Gupta and another* **(2011) 6 SCC 189: 2011 (6) SCR 800;**

Sunil Fulchand Shah v. Union of India and others **(2000) 3 SCC 409: 2000 (1) SCR 945; P.S.R.** *Sadhanantham v. Arunachalam and another* **AIR 1980 SC 856;** *Mrs. Harpreet Kaur Harvinder Singh Bedi v. State of Maharashtra and another* **AIR 1992 SC 979: 1992 (1) SCR 234 and** *T.K. Gopal alias Gopi v. State of Karnataka* **AIR 2000 SC 1669: 2000 (3) SCR 1040 - referred to.**

Mogul Steamship Co. v. McGregor Gow & Co. **(1989) 23 QBD 598 - referred to.**

Halsbury's Laws of England, 4th Edition, Volume 11, para 166 **-referred to.**

Case Law Reference:

2002 (2) SCR 526	**referred to**	**Para 10**

2001 (2) SCR 684	**referred to**	**Para 10**
2004 (3) Suppl. SCR 584	**referred to**	**Para 11**
2009 (6) SCR 1030	**referred to**	**Para 12**
2010 (12) SCR 1165	**referred to**	**Para 13**
2005 (3) Suppl. SCR 454	**referred to**	**Para 14**
2001 (3) SCR 432	**referred to**	**Para 15**
2008 (6) SCALE 415	**referred to**	**Para 16**
2011 (6) SCR 800	**referred to**	**Para 17**
2000 (1) SCR 945	**referred to**	**Para 22**
AIR 1980 SC 856	**referred to**	**Para 24**
(1989) 23 QBD 598	**referred to**	**Para 24**
1992 (1) SCR 234	**referred to**	**Para 25**
2000 (3) SCR 1040	**referred to**	**Para 26**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1456 of 2012.

From the Judgment & Order dated 26.04.2012 of the High Court of Judicature at Allhabad in Crl. Misc. Bail Application No. 28461 of 2011.

Abha R. Sharma, Susheel TOmar, D.S. Parmar for the Appellant.

Irshad Ahmed, AAG, Shalini Kumar, Abhisth Kumar for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. The present appeal by special leave has been preferred assailing the legal defensibility of the order dated 26.04.2012 passed in Criminal Application No. 28461 of 2011 by the High Court of Judicature at Allahabad and praying for quashment of the same, and further to cancel the grant of bail to the accused-respondent (hereinafter referred to as 'the accused') in respect of offences punishable under Sections 365/506 of the Indian Penal Code (for short 'the IPC').

3. The facts material for adjudication of this appeal are that an FIR was lodged by the present appellant on 29.05.2011 alleging that while he was going to his in-laws' place in village Samadia, P.S. Patwai along with Bihari Lal near canal of Milk Road from Patwai which leads to Samdia Khurd, two persons came on a motorcycle and after inquiring about the identity of Bihari Lal told him that they had been asked by Lalla Babu @ Shiv Raj Singh to compel him to accompany them. As there was resistance, they threatened to kill him and eventually made Bihari Lal sit in between them on the Hero Honda motorcycle and fled towards Patwai. The incident was witnessed by Munish and Rajbir. In quite promptitude the appellant went to the Patwai Police Station, District Rampur and lodged the FIR as a consequence of which crime No. 770 of 2011 was registered for offences punishable under Section 364 and 506 of the IPC. On the basis of the FIR the criminal law was set in motion and the accused was arrested and taken into custody.

4. The accused Shiv Raj Singh @ Lalla Babu preferred bail Application No. 1268 of 2011 which came to be dealt by the learned Additional Sessions Judge, Rampur who taking note of the allegations in the FIR and the stand put forth in oppugnation by the prosecution as well as by the victim observed as follows:-

> "I have perused the case diary. While confirming his abduction, victim Bihari Lal has stated under Section 164 Cr.P.C. that the abductors took him to the accused. Applicant-accused and his accomplices kept him confined in a room for about 8 days and they also used to assault

him and threaten for life. As per the victim, he escaped from their captivity after about 8 days of abduction under the pretext of nature's call/time. Munish and Rajbir reported as eye-witnesses in the First Information Report stated before the Investigating Officer that the abductors had stated at the time of abduction that the applicant-accused Lalla Babu has send them to mend you."

5. Thereafter, taking note of the fact that the accused is a history-sheeter and involved in number of cases rejected the application for bail.

6. Being unsuccessful to secure bail from the court of Session, the accused preferred a Bail Application No. 28461 of 2011 before the High Court under Section 439 of the Code. The High Court though took note of the statement made under Section 164 CrPC that name of Shiv Raj Singh @ Lalla Babu had figured as allegations were made against him to that effect that victim Bihari Lal was taken by the kidnappers to him, yet observed that he only sat there and offended Bihari Lal. The High Court only mentioned the fact that the accused has a criminal history and is involved in number of cases but considering the factum that he has been in custody since 30.09.2011 directed his enlargement on bail on certain conditions, namely, the accused shall report at the police station concerned on the first day of each English Calendar month, shall not commit any offence similar to the offence which he is accused of, and shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer.

7. Questioning the justifiability of the impugned order Ms. Abha R. Sharma, learned counsel for the petitioner has contended that the High Court has absolutely misdirected itself by not appositely considering the statement recorded under Section 164 of the Code of Criminal Procedure, the gravity of

the offences and criminal antecedents of the accused and further the affidavit filed by the prosecution bringing number of factors as a consequence of which an illegal order enlarging the appellant on bail has come into existence. The learned counsel submitted that the non-consideration of the material facts vitiates the order of the High Court and annulment of the same is the judicial warrant.

8. Per contra, Mr. Irshad Ahmed, learned counsel appearing for the accused contended that the prosecution case is a fabricated, false and malicious one and it has been foisted because of political vendetta. It is urged by him that there is discrepancy between statements recorded under Section 161 Cr.P.C and 164 Cr.P.C and, therefore, the order passed by the High Court cannot be found fault with. It is his further submission that though the accused has been released on bail, yet he has conducted himself and in the absence of any supervening circumstances it would be undesirable to cancel the order granting bail as the sanctity of liberty should be treated with paramount importance. It is also argued that the High Court was absolutely conscious of the cases pending against accused but because of election disputes and constant animosity of the administration which was stand of the accused they were not dwelled upon in detail and an order admitting the accused to bail was passed on imposing stringent conditions. That apart, it is put forth that in the absence of any failure on his part to respect the conditions his liberty should not be put to any jeopardy at the instance of an interested party who is bent upon to harass him.

9. The centripodal issue that emerges for consideration is whether the order passed by the High Court is legitimately acceptable and legally sustainable within the ambit and sweep of the principles laid down by this Court for grant of regular bail under Section 439 of the Code.

10. In *Ram Govind Upadhyay v. Sudarshan Singh and*

Others[1], it has been opined that the grant of bail though involves exercise of discretionary power of the Court, such exercise of discretion has to be made in a judicious manner and not as a matter of course. Heinous nature of the crime warrants more caution and there is greater chance of rejection of bail, though, however dependent on the factual matrix of the matter. In the said case the learned Judges referred to the decision in *Prahlad Singh Bhati v. NCT, Delhi and Another*[2] and stated as follows:-

> "(a) While granting bail the court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.
>
> (b) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the court in the matter of grant of bail.
>
> (c) While it is not expected to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the court in support of the charge.
>
> (d) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail, and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail. "

11. In *Chaman Lal v. State of U. P. and Another*[3] this Court while dealing with an application for bail has stated that certain factors are to be considered for grant of bail, they are;

1. (2002) 3 SCC 598.
2. (2001) 4 SCC 280.
3. (2004) 7 SCC 525.

(i) the nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence; (ii) reasonable apprehension of tampering with the witness or apprehension of threat to the complainant; and (iii) prima facie satisfaction of the court in support of the charge.

12. In *Masroor v. State of Uttar Pradesh and another*[4], while giving emphasis for ascribing reasons for granting of bail, however, brief it may be, a two-Judge Bench observed that there is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case.

13. In *Prasanta Kumar Sarkar v. Ashis Chatterjee and another*[5] it has been observed that normally this Court does not interfere with an order passed by the High Court granting or rejecting the bail of the accused, however, it is equally incumbent upon the High Court to exercise its discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in a plethora of decisions of this Court on the point. Among other circumstances the factors which are to be borne in mind while considering an application for bail are whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; nature and gravity of the accusation; severity of the punishment in the event of conviction; danger of the accused absconding or fleeing, if released on bail; character, behavior, means, position and standing of the accused; likelihood of the offence being repeated; reasonable apprehension of the witnesses being influenced; and danger, of course, of justice being thwarted by grant of bail.

4. (2009) 14 SCC 286.
5. (2010) 14 SCC 496.

14. In *State of U.P. through CBI v. Amarmani Tripathi*[6] it has been ruled that in an appeal against grant of bail all aspects that were relevant under Section 439 read with Section 437 continue to be relevant.

15. In *Puran v. Rambilas and another*[7] it has been noted that the concept of setting aside an unjustified, illegal or perverse order is totally different from the cancelling an order of bail on the ground that the accused had misconducted himself or because of some supervening circumstances warranting such cancellation.

16. In *Dr. Narendra K. Amin v. State of Gujarat and another*[8], a three-Judge Bench has observed that when irrelevant materials have been taken into consideration the same makes the order granting bail vulnerable. If the order is perverse, the same can be set at naught by the superior court.

17. In *Prakash Kadam and others v. Ramprasad Vishwanath Gupta and another*[9], while making a distinction between cancellation of bail and consideration for grant of bail, this Court opined thus: -

> "18. In considering whether to cancel the bail the court has also to consider the gravity and nature of the offence, prima facie case against the accused, the position and standing of the accused, etc. If there are very serious allegations against the accused his bail may be cancelled even if he has not misused the bail granted to him. Moreover, the above principle applies when the same court which granted bail is approached for cancelling the bail. It will not apply when the order granting bail is appealed against before an appellate/Revisional Court.
>
> 19. In our opinion, there is no absolute rule that once bail is granted to the accused then it can only be cancelled if there is likelihood of misuse of the bail. That factor, though no doubt important, is not the only factor. There are several other factors also which may be seen while deciding to cancel the bail."

6. (2005) 8 SCC 21.
7. (2001) 6 SCC 338.
8. 2008 (6) SCALE 415.
9. (2011) 6 SCC 189.

18. We have referred to the above authorities solely for the purpose of reiterating two conceptual principles, namely, factors that are to be taken into consideration while exercising power of admitting an accused to bail when offences are of serious nature, and the distinction between cancellation of bail because of supervening circumstances and exercise of jurisdiction in nullifying an order granting bail in an appeal when the bail order is assailed on the ground that the same is perverse or based on irrelevant considerations or founded on non-consideration of the factors which are relevant.

19. We are absolutely conscious that liberty of a person should not be lightly dealt with, for deprivation of liberty of a person has immense impact on the mind of a person. Incarceration creates a concavity in the personality of an individual. Sometimes it causes a sense of vacuum. Needless to emphasize, the sacrosanctity of liberty is paramount in a civilized society. However, in a democratic body polity which is wedded to Rule of Law an individual is expected to grow within the social restrictions sanctioned by law. The individual liberty is restricted by larger social interest and its deprivation must have due sanction of law. In an orderly society an individual is expected to live with dignity having respect for law and also giving due respect to others' rights. It is a well accepted principle that the concept of liberty is not in the realm of absolutism but is a restricted one. The cry of the collective for justice, its desire for peace and harmony and its necessity for security cannot be allowed to be trivialized. The life of an individual living in a society governed by Rule of Law has to be regulated and such regulations which are the source in law subserve the social balance and function as a significant

instrument for protection of human rights and security of the collective. It is because fundamentally laws are made for their obedience so that every member of the society lives peacefully in a society to achieve his individual as well as social interest. That is why Edmond Burke while discussing about liberty opined, "it is regulated freedom".

20. It is also to be kept in mind that individual liberty cannot be accentuated to such an extent or elevated to such a high pedestal which would bring in anarchy or disorder in the society. The prospect of greater justice requires that law and order should prevail in a civilized milieu. True it is, there can be no arithmetical formula for fixing the parameters in precise exactitude but the adjudication should express not only application of mind but also exercise of jurisdiction on accepted and established norms. Law and order in a society protect the established precepts and see to it that contagious crimes do not become epidemic. In an organized society the concept of liberty basically requires citizens to be responsible and not to disturb the tranquility and safety which every well-meaning person desires. Not for nothing J. Oerter stated:

> "Personal liberty is the right to act without interference within the limits of the law."

21. Thus analyzed, it is clear that though liberty is a greatly cherished value in the life of an individual, it is a controlled and restricted one and no element in the society can act in a manner by consequence of which the life or liberty of others is jeopardized, for the rational collective does not countenance an anti-social or anti-collective act.

22. Having said about the sanctity of liberty and the restrictions imposed by law and the necessity of collective security, we may proceed to state as to what is the connotative concept of bail. In *Halsbury's Laws of England*[10] it has been stated thus: -

10. Halsbury's Laws of England, 4th Edn., Vol .11, para 166

> "The effect of granting bail is not to set the defendant (accused) at liberty but to release him from the custody of law and to entrust him to the custody of his sureties who are bound to produce him to appear at his trial at a specified time and place. The sureties may seize their principal at any time and may discharge themselves by handing him over to the custody of law and he will then be imprisoned."

23. In *Sunil Fulchand Shah v. Union of India and others*[11] Dr. A.S. Anand, learned Chief Justice, in his concurring opinion, observed: -

> "Bail is well understood in criminal jurisprudence and Chapter XXXIII of the Code of Criminal Procedure contains elaborate provisions relating to grant of bail. Bail is granted to a person who has been arrested in a non-bailable offence or has been convicted of an offence after trial. The effect of granting bail is to release the accused from internment though the court would still retain constructive control over him through the sureties. In case the accused is released on his own bond such constructive control could still be exercised through the conditions of the bond secured from him. The literal meaning of the word "bail" is surety."

24. As grant of bail as a legal phenomenon arises when a crime is committed it is profitable to refer to certain authorities as to how this Court has understood the concept of crime in the context of society. In *P.S.R. Sadhanantham v. Arunachalam and another*[12], R.S. Pathak, J. (as his Lordship then was), speaking for himself and A.D. Kaushal, J, referred to *Mogul Steamship Co. v. McGregor Gow & Co.* (1989) 23 QBD 598, 606 and the definition given by Blackstone and opined thus: -

11. (2000) 3 SCC 409.

12. AIR 1980 SC 586.

"A crime, therefore, is an act deemed by law to be harmful to society in general, even though its immediate victim is an individual."

25. In *Mrs. Harpreet Kaur Harvinder Singh Bedi v. State of Maharashtra*[13] and another a two-Judge Bench, though in a different context, has observed: -

"Crime is a revolt against the whole society and an attack on the civilization of the day. Order is the basic need of any organized civilized society and any attempt to disturb that order affects the society and the community."

26. In *T.K. Gopal alias Gopi v. State of Karnataka*[14] it has been held that crime can be defined as an act that subjects the doer to legal punishment. It may also be defined as commission of an act specifically forbidden by law; it may be an offence against morality or social order.

27. Keeping in mind the aforesaid aspects, namely, the factors which are to be borne in mind while dealing with an application preferred under Section 439 of the Code of Criminal Procedure in respect of serious offences, the distinction between a perverse or illegal order and cancellation of order granting bail, the individual liberty and social security, the concept of bail, the definition of crime and the duty of the court, we may proceed to deal as to how in the case at hand the bail application has been dealt with by the High Court.

28. On a perusal of the order passed by the High Court it will be difficult to say that the High Court has passed a totally cryptic or unreasoned order. The spinal question is whether it has ignored the relevant factors which were brought to its notice at the time of extending the benefit of enlargement of bail to the accused. The prosecution by way of an affidavit had brought to the notice of the High Court about the cases pending against

13. AIR 1992 SC 979.

14. AIR 2000 SC 1669.

the accused. The High Court recorded the submission of the complainant that the accused was involved in 52 cases. On a perusal of the counter-affidavit filed before the High Court it is perceptible that it was categorically stated that the accused was a history-sheeter; that he was the pivotal force in getting the kidnapping done; that the victim Bihari Lal was in captivity for eight days; and that he escaped under the pretext that he was going to attend the call of nature. The High Court has only made a passing reference to the same and took note of period of custody of seven months and held, "considering the facts and circumstances of the case but without expressing any opinion on the merits of the case, the applicant is entitled to be released on bail".

29. It is worthy to note that the fact relating to involvement of the accused in various crimes was brought to the notice of the High Court by virtue of an affidavit filed by the competent authority of the prosecution. As per the Inspector-in-charge of the concerned police station the following cases were pending against the accused:

S. No.	Crime No.	Sections	Police Station	District
1.	270/86	25 Arms Act	Shahabad	Rampur
2.	271/86	395/397/307/332/ 337/225/427	Shahabad	Rampur
3.	137/88	3(1) Gangster Act	Shahabad	Rampur
4.	209/92	147/148/149/302	Shahabad	Rampur
5.	189/95	323/342/35/504/ 506	Shahabad	Rampur
6.	184/96	3/4 U.P. Gunda Act	Shahabad	Rampur
7.	185/96	147/148/149/307/ 225	Shahabad	Rampur
8.	485/98	323/504/506/3(1) 10 S.C./S.T. Act	Shahabad	Rampur
9.	493/98	420/506/467/468/ 47	Shahabad	Rampur
10.	281/99	3/4 U.P. Gunda Act	Shahabad	Rampur

11.	626/05	347/504/506	Shahabad	Rampur
12.	628A/05	452/352/504/506	Shahabad	Rampur
13.	363/06	3(1) Prevention of damage to Public Property Act, 1984	Shahabad	Rampur
14.	2171/08	147/143/283/341 and 6 United Province Special Power Act, 1936 and Section 7 of Criminal Law Amendment Act.	Shahabad	Rampur
15.	670/09	3(1) Gangster Act	Shahabad	Rampur
16.	1207/09	448/380	Shahabad	Rampur
17.	939/10	323/324/307/302	Shahabad	Rampur
18.	507/11	147/506	Shahabad	Rampur
19.	537/11	147/148/149/307	Shahabad	Rampur
20.	538/11	147/148/149/307/ 353 /354 and Section 7 of Criminal Law Amendment Act	Shahabad	Rampur
21.	313/91	447/323/504/506 & 3(1) 10 S.C./S.T. Act	Shahabad	Rampur
22.	391/92	348/379/504/506 & 3 (4) 10 S.C./S.T. Act	Shahabad	Rampur
23.	99/09	147/148/307/323/ 504 /506 & 3(2) 10 S.C. /S.T. Act	Milk	Rampur
24.	2007/08	147/504/506/307/ 427 & 3(1) 10 S.C./ S.T. Act	Milk	Rampur
25.	770/11	364/506	Patwai	Rampur
26.	575/93	302/392/412 IPC	Islam Nagar	Badayun
27.	441/94	25 Arms Act	Civil Line	Moradabad

28.	17/01	364 IPC (The court Issued non-bailable warrants but absconding)	Faizganj Behta	Badayun
29.	269/02	420 IPC	Kasganj	Eta
30.	270/02	25 Arms Act	Kasganj	Eta

In this Court also the same list has been filed. Thus, there is no doubt that the accused is a history-sheeter.

30. Coming to the nature of crime it is perceivable that two persons came on a motorcycle and kidnapped Bihari Lal and kept him in confinement for eight days. The role of the accused is clearly stated. It is apt to note that a history-sheeter has a recorded past. The High Court, in toto, has ignored the criminal antecedents of the accused. What has weighed with the High Court is that the accused had spent seven months in custody. That may be one of the factors but that cannot be the whole and the sole factor in every case. It depends upon the nature of the offence, the manner in which it is committed and its impact on the society. We may hasten to add that when we state that the accused is a history-sheeter we may not be understood to have said that a history-sheeter is never entitled to bail. But, it is a significant factor to be taken note of regard being had to the nature of crime in respect of which he has been booked. In the case at hand, as the prosecution case unfolds, the accused did not want anyone to speak against his activities. He had sent two persons to kidnap Bihari Lal, who remained in confinement for eight days. The victim was tortured. Kidnapping, as an offence, is on the increase throughout the country. Sometimes it is dealt with formidable skill and sometimes with terror and sometimes with threat or brute force. The crime relating to kidnapping has taken many a contour. True it is, sometimes allegations are made that a guardian has kidnapped a child or a boy in love has kidnapped a girl. They do stand on a different footing. But kidnapping for ransom or for revenge or

to spread terror or to establish authority are in a different realm altogether. In the present case the victim had been kidnapped under threat, confined and abused. The sole reason for kidnapping is because the victim had shown some courage to speak against the accused. This may be the purpose for sustaining of authority in the area by the accused and his criminal antecedents, speak eloquently in that regard. In his plea for bail the accused had stated that such offences had been registered because of political motivations but the range of offence and their alleged years of occurrence do not lend prima facie acceptance to the same. Thus, in the present case his criminal antecedents could not have been totally ignored.

31. Be it noted, a stage has come that in certain States abduction and kidnapping have been regarded as heroism. A particular crime changes its colour with efflux of time. The concept of crime in the contextual sense of kidnapping has really undergone a sea change and has really shattered the spine of the orderly society. It is almost nauseating to read almost every day about the criminal activities relating to kidnapping and particularly by people who call themselves experts in the said nature of crime.

32. We may usefully state that when the citizens are scared to lead a peaceful life and this kind of offences usher in an impediment in establishment of orderly society, the duty of the court becomes more pronounced and the burden is heavy. There should have been proper analysis of the criminal antecedents. Needless to say, imposition of conditions is subsequent to the order admitting an accused to bail. The question should be posed whether the accused deserves to be enlarged on bail or not and only thereafter issue of imposing conditions would arise. We do not deny for a moment that period of custody is a relevant factor but simultaneously the totality of circumstances and the criminal antecedents are also to be weighed. They are to be weighed in the scale of collective cry and desire. The societal concern has to be kept in view in

juxtaposition of individual liberty. Regard being had to the said parameter we are inclined to think that the social concern in the case at hand deserves to be given priority over lifting the restriction of liberty of the accused.

33. In the present context the period of custody of seven months, in our considered opinion, melts into insignificance. We repeat at the cost of repetition that granting of bail is a matter of discretion for the High Court and this Court is slow to interfere with such orders. But regard being had to the antecedents of the accused which is also a factor to be taken into consideration as per the pronouncements of this Court and the nature of the crime committed and the confinement of the victim for eight days, we are disposed to interfere with the order impugned.

34. We may note with profit that it is not an appeal for cancellation of bail as cancellation is not sought because of supervening circumstances. The present one is basically an appeal challenging grant of bail where the High Court has failed to take into consideration the relevant material factors which make the order perverse.

35. Consequently, the order passed by the High Court is set aside and the bail bonds of the accused are cancelled. The accused is directed to surrender to custody forthwith failing which it shall be the duty of the investigating agency to take him to custody immediately. We may hasten to clarify that anything that has been stated here are only to be read and understood for the purpose of annulment of the order of grant of bail and they would have no bearing whatsoever on trial.

36. The appeal is, accordingly, allowed.

B.B.B. Appeal allowed.