POOJA RANA

v.

STATE OF HARYANA & ORS.

(Writ Petition (Crl.) No.109 of 2012)

AUGUST 27, 2012

[DR. B.S. CHAUHAN AND JAGDISH SINGH KHEHAR, JJ.]

Constitution of India, 1950 - Article 32 - Writ petition - Petitioner had married a person out of her free will - However, her parents and maternal uncle had registered a criminal case against her husband - Prayer of petitioner for quashing FIR against petitioner's husband and for further direction to the State Authorities to register criminal case against her parents and maternal uncle - FIR sought to be quashed not placed on record - The person to be granted protection i.e. petitioner's husband as well as the complainants i.e. the petitioner's parents and maternal uncle also not impleaded in the writ petition - Maintainability of the writ petition - Held: It is not the case of the petitioner that she had made any attempt to get the copy of the FIR and it was not made available to her - Nor there is any statement in her petition that she tried to lodge FIR against her parents and uncle but it was not accepted - Counsel for the petitioner failed to explain as why the necessary parties i.e. the complainants as well as the person for whom the protection is sought have not been impleaded - Approach of the petitioner's counsel was casual - The petition is therefore liable to be dismissed - However, in facts and circumstances of the case, the petitioner, if so advised, may move the High Court for appropriate relief by filing appropriate petition - Penal Code, 1860 - ss.363, 366, 328 and 504.

Surinder Singh v. Central Government & Ors. **AIR 1986**

SC 2166: 1986 (3) SCR 946 and *Re: Sanjiv Datta* **(1995) 3 SCC 619: 1995 (3) SCR 450 - relied on.**

Case Law Reference:

1986 (3) SCR 946	**relied on**	**Para 5**
1995 (3) SCR 450	**relied on**	**Para 7**

CRIMINAL ORIGINAL JURISDICTION : Writ Petition (Crl.) No. 109 of 2012.

Under Article 32 of the Constitution of India.

Vivek Gupta for the Petitioner.

The following order of the Court was delivered

O R D E R

1. This petition has been filed for quashing the First Information Report No. 609 of 2012 under Sections 363, 366, 328 and 504 of Indian Penal Code, 1860 (hereinafter called 'IPC') registered at Police Station Hissar, (City) Haryana and for further direction to the State Authorities to register the criminal case against the petitioner's father, mother and maternal uncle.

2. The writ petition has been filed alleging that the petitioner was born on 2.9.1993, thus she was major and has a right to choose a person with whom she wants to settle in her life. Petitioner married one Sachin Kumar Rana, resident of Sambhal, Moradabad, (U.P.) of her free will. However, her parents and maternal uncle had registered a criminal case against her husband and they are harassing him. Thus, the petition has been filed for the aforesaid reliefs.

3. The matter was heard at length on 24.8.2012 and Mr. Gaurav Kumar Bansal, learned counsel appearing for the petitioner was asked to explain as under what circumstances

such a writ petition can be entertained as it suffers from following basic defects:

(i) The FIR sought to be quashed has not been placed on record.

(ii) The person who is to be granted protection i.e. Shri Sachin Kumar Rana is not a party as either petitioner or the respondent.

(iii) The complainant-persons who are harassing the petitioner's husband Sachin Kumar Rana, namely Ashok Bansal-father, Sunita Bansal-mother and Subhash Gupta-maternal uncle are not the parties before us.

4. As learned counsel for the petitioner was not able to provide proper assistance, we adjourned the case for today and also requested the learned Advocate-on-record who has signed the petition to remain present in the court so that he can explain as to whether such a petition is maintainable or ought to have been filed.

5. In *Surinder Singh v. Central Government & Ors.,* AIR 1986 SC 2166, this Court dealt with an issue for quashing of order which had not been made part of the record and observed as under:

> ".....In the absence of the impugned order it would not be possible to ascertain the reasons which may have impelled the authority to pass the order. It is therefore improper to quash an order which is not produced before the High Court in a proceeding under Art. 226 of the Constitution. The order of the High Court could be set aside for this reason..."

6. It is not the case of the petitioner that she had made any attempt to get the copy of the FIR and it was not made available to her. Nor there is any statement in her petition that she tried to lodge the FIR against her parents and uncle but it

was not accepted. Learned counsel for the petitioner failed to explain as why the necessary parties, i.e. the complainants as well as the person for whom the protection is sought have not been impleaded.

7. While dealing with a similar situation, this Court in Re: *Sanjiv Datta,* (1995) 3 SCC 619, held as under:

> ".....Some members of the profession have been adopting perceptibly casual approach to the practice of the profession as is evident from their absence *when the matters are called out, the filing of incomplete and inaccurate pleadings - many times even illegible and without personal check and verification, the non-payment* of court fees and process fees, the failure to remove office objections, the failure to take steps to serve the parties, et al. They do not realise the seriousness of these acts and omissions. *They not only amount to the contempt of the court but do positive disservice to the litigants and create embarrassing situation in the court* leading to avoidable unpleasantness and delay in the disposal of matters. This augurs ill for the health of our judicial system.....The lawyers took their profession seriously and practised it with dignity, deference and devotion. If the profession is to survive, the judicial system has to be vitalised. No service will be too small in making the system efficient, effective and credible...." (Emphasis added)

8. In view of the above, we are of the opinion that such a petition does not deserve to be entertained. It is accordingly dismissed. However, in the facts and circumstances of the case, the petitioner, if so advised, may move the High Court for appropriate relief by filing appropriate petition.

B.B.B. Writ Petition dismissed.

BHIMANNA
v.
STATE OF KARNATAKA
(Criminal Appeal No. 46 of 2005)

SEPTEMBER 4, 2012

[P. SATHASIVAM AND DR. B.S. CHAUHAN, JJ.]

Penal Code, 1860 - s.304 Part-I r/w s.34 - Applicability - Homicidal death - Three accused - While returning home from the agricultural fields, the accused trespassed on to the land of the victim - Verbal altercation ensued between the parties whereafter the accused assaulted the victim with axe and "meli" (wooden part of the plough) which the accused were carrying at that time - Victim fell down after receiving injuries, whereupon the accused stopped the assault - A-2 threw down the "meli" and all the accused left the place of occurrence saying that the victim had fallen - Victim died consequently - Conviction of A-1 u/s 302, and A-2 and A-3 u/s.302 r/w s.34 - Challenge to - Held: The evidence on record established that the three accused did not intend to kill the victim and it all happened in the spur of the moment upon a heated exchange of words between the parties, after criminal trespass by the accused on to the land of the victim - Therefore, it does not seem to be a pre-determined or pre-meditated case - Ends of justice would, therefore, be met, if all the three accused are convicted u/s. 304 Part-I r/w s.34.

Code of Criminal Procedure, 1973 - ss.216, 217, 385(2), 386, 464 and 465 - Homicidal death due to grievous injuries caused by weapons - Three accused - Trial court framed charges against all the accused u/ss.447, 504 and 302 r/w s.34 IPC - However, ultimately it came to the conclusion that A-2 was solely responsible for the death of the victim and all the accused did not act in furtherance of any common

intention, and therefore, A-1 and A-3 could not be convicted u/s.302 r/w s.34 IPC, and convicted A-1 and A-3 only u/ss. 447 and 504 IPC - Trial court held that, inspite of the fact that A-1 and A-3 were clearly responsible for causing multiple injuries to the victim, they still could not be convicted for any offence for want of framing of charges under any other penal provision - Held: The trial court did not proceed with the case in a proper manner - If trial court was of the view that there was sufficient evidence on record against A-1 and A-3, which would make them liable for conviction and punishment for offences, other than those under ss.447 and 504/34 IPC, it was certainly not helpless to alter/add the requisite charges, at any stage prior to the conclusion of the trial - An accused can be convicted for an offence minor than the one, he has been charged with (s.302 IPC in the instant case), unless the accused satisfies the Court that there has been a failure of justice by the non-framing of a charge under a particular penal provision, and some prejudice has been caused to the accused - Further the defect must be so serious that it cannot be covered under ss.464/465 CrPC - The plea of prejudice has to be in relation to investigation or trial and not matters falling beyond their scope - Penal Code, 1860 - ss. 447, 504 and 302 r/w s.34.

Criminal trial - Homicidal death due to grievous injuries caused by assault with weapons - Trial court framed charges against all the three accused u/s.s.302 r/w s.34 IPC - However, ultimately it held that A-2 was solely responsible for the death of the victim and all the accused did not act in furtherance of any common intention, and therefore, A-1 and A-3 could not be convicted u/s.302 r/w s.34 IPC - High Court convicted A-1 and A-3 u/s.302 r/w s.34 IPC - It came to the conclusion that, as the charge u/s.302/34 was also framed against A-1 and A-3, they too, were liable to be convicted u/s.302 IPC - Held: The conclusion of High Court was not justified, as it had not reversed the finding recorded by the trial court that all the three accused did not act in furtherance of any common

intention - Penal Code, 1860 - s.302 r/w s.34.

Criminal Jurisprudence - Right to fair trial - Rights of the accused - Held: Though the rights of the accused have to be kept in mind and safeguarded but they should not be over emphasised to the extent of forgetting that the victims also have rights.

Words and Phrases - Expression 'failure of justice' and 'prejudice' - Meaning of.

A-1 owned land adjacent to the land of the 'B'. The prosecution case was that on the date of the incident when A-1 alongwith A-2 and A-3 were returning home from their agricultural fields carrying their agricultural implements, they attempted to use the land of 'B' as a pathway, upon which 'B', who was present on his land alongwith his wife PW.1 and mother asked the accused persons not to pass through his land; that A-1 then started hurling abuses in filthy language and instigated A-2 and A-3 to assault 'B' and thus A-2 and A-3 began assaulting him with axes, while A-1 assaulted him with "Meli" (Wooden part of a plough); that thereafter the accused persons left the place, throwing away the axes and the "Meli". 'B' died consequently. Multiple injuries were found on his body. PW.12, who conducted the post-mortem, clarified in his cross-examination that the injuries were grievous and actually responsible for the death of 'B'

The trial court convicted A-2 under Sections 447, 504, 302 read with Section 34 IPC and A-1 and A-3 under Sections 447, 504 read with Section 34 IPC. In appeal, the High Court upheld the conviction of A-2 under Section 302 IPC and further convicted A-1 and A-3 under Section 302/34 IPC as well. Hence the present appeals by the three accused.

Disposing of the appeals, the Court

HELD: 1.1. An accused can be convicted for an offence which is minor as compared to the one, he has been charged with, unless the accused satisfies the Court that there has been a failure of justice by the non-framing of a charge under a particular penal provision, and some prejudice has been caused to the accused. Further the defect must be so serious that it cannot be covered under Sections 464/465 CrPC, 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 charges, has led to a failure of justice, this 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 18] [927-G-H; 928-A-D]

1.2. The expression 'failure of justice' is an extremely pliable or facile an expression which can be made to fit into any situation of any case. 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. Though the rights of the accused have to be kept in mind and safeguarded, 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 with respect to 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 matters falling beyond 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. [Paras 20, 21] [929-D-G]

1.3. The trial court framed charges against all the three accused-appellants (A-1, 2 and 3) under Sections 447 and 504 and Section 302 read with Section 34 IPC, however, it ultimately came to the conclusion that there was no meeting of minds and that all three appellants did not act in furtherance of any common intention and therefore, A-1 and A-3 could not be convicted under Section 302 read with Section 34 IPC and convicted them only under Sections 447 and 504 IPC. The trial court did not proceed with the case in a proper manner. It erred in holding that, in spite of the fact that the two accused A-1 and A-3 were clearly responsible for causing multiple injuries to the deceased 'B', they still could not be convicted for any offence for want of framing of charges under any other penal provision. In such an event, the trial court would be justified in altering/adding the requisite charge(s) or even without such alteration/ addition, punishing them for the said offences, considering the intensity of the injuries, as the same could be a minor offence, as compared to the offence punishable under Section 302 IPC. If the trial Court was of the view that there was sufficient evidence on record against A-1 and A-3, which would make them liable for conviction and punishment for offences, other than those

under Sections 447 and 504/34 IPC, the court was certainly not helpless to alter/add the requisite charges, at any stage prior to the conclusion of the trial. Section 216 CrPC empowers the trial Court to alter/add charge(s), at any stage before the conclusion of the trial. However, law requires that, in case such alteration/addition of charges causes any prejudice, in any way to the accused, there must be a fresh trial on the said altered/new charges, and for this purpose, the prosecution may also be given an opportunity to recall witnesses as required under Section 217 Cr.P.C. Such power of alteration/ addition of charge (s), can also be exercised by the appellate court, in exercise of its powers under Sections 385(2) and 386 CrPC. [Para 14, 16, 23] [926-A-C, F; 930-H; 931-A-C]

Hasanbhai Valibhai Qureshi v. State of Gujarat **AIR 2004 SC 2078: 2004 (3) SCR 762;** *Kantilal Chandulal Mehta v. State of Maharashtra and Anr.* **AIR 1970 SC 359: 1970 (2) SCR 742;** *Amar Singh v. State of Haryana* **AIR 1973 SC 2221;** *Sanichar Sahni v. State of Bihar* **AIR 2010 SC 3786: 2009 (10) SCR 112;** *Abdul Sayeed v. State of Madhya Pradesh* **(2010) 10 SCC 259: 2010 (13) SCR 311;** *Shamnsaheb M. Multtani v. State of Karnataka* **AIR (2001) SC 921: 2001 (1) SCR 514;** *Nageshwar Sh. Krishna Ghobe v. State of Maharashtra* **AIR 1973 SC 165: 1973 (2) SCR 377;** *State by Police Inspector v. T. Venkatesh Murthy* **AIR 2004 SC 5117: 2004 (4) Suppl. SCR 279;** *Rafiq Ahmed @ Rafi v. State of U.P.* **AIR 2011 SC 3114: 2011 (11) SCR 907 and** *Rattiram & Ors. v. State of M.P.* **AIR 2012 SC 1485: 2012 (4) SCC 516 - relied on.**

Topandas v. State of Bombay **AIR 1956 SC 33:1955 SCR 881;** *Willie (William) Staney v. State of M.P.* **AIR 1956 SC 116: 1955 SCR 1140;** *Fakhruddin v. State of Madhya Pradesh* **AIR 1967 SC 1326;** *State of A.P. v. Thakkidiram Reddy* **AIR 1998 SC 2702: 1998 (3) SCR 1088;** *Ramji Singh and Anr. v. State of Bihar* **AIR 2001 SC 3853: 2001 (3) Suppl.**

SCR 24 and *Gurpreet Singh v. State of Punjab* **AIR 2006 SC 191: 2005 (5) Suppl. SCR 90 - referred to.**

2. The High Court came to the conclusion that, as the charge under Section 302/34 was also framed against A-1 and A-3, they too, were liable to be convicted under Section 302. Such a conclusion is not justified, as the High Court had not reversed the finding recorded by the trial court that all three accused did not act in furtherance of any common intention. [Para 24] [931-D-E]

3. There is ample evidence on record, particularly the deposition of PW.1, wife of the deceased, to show that when her husband fell down after receiving the said injuries, the accused stopped the assault. A-2 threw down the "Meli" and all the accused left the place of occurrence saying that the victim had fallen. This clearly establishes that the three accused-appellants did not intend to kill the deceased and it all happened in the spur of the moment upon a heated exchange of words between the parties, after criminal trespass by the appellants on to the land of the deceased. Therefore, it does not seem to be a pre-determined or pre-meditated case. Ends of justice would, therefore, be met, if all the three appellants are convicted under Section 304 Part-I, read with Section 34 IPC and sentences are awarded accordingly. As a result, all the appellants are convicted under Sections 447, 504 and 304 Part-I, read with Section 34 IPC. A-2 has already served more than 13½ years in jail. Therefore, he is awarded sentence as already undergone and it is directed that he be released forthwith, unless wanted in some other case. A-1 and A-3 are awarded a sentence of 10 years RI. They be released from jail after serving the sentence of 10 years, if not already served and are not wanted in some other case. [Para 25] [931-F-H; 932-A-D]

Case Law Reference:

2004 (3) SCR 762	**relied on**	**Para 15**
1970 (2) SCR 742	**relied on**	**Para 16**
AIR 1973 SC 2221	**relied on**	**Para 18**
2009 (10) SCR 112	**relied on**	**Para 19**
1955 SCR 881	**referred to**	**Para 19**
1955 SCR 1140	**referred to**	**Para 19**
AIR 1967 SC 1326	**referred to**	**Para 19**
1998 (3) SCR 1088	**referred to**	**Para 19**
2001 (3) Suppl. SCR 24	**referred to**	**Para 19**
2005 (5) Suppl. SCR 90	**referred to**	**Para 19**
2010 (13) SCR 311	**relied on**	**Para 19**
2001 (1) SCR 514	**relied on**	**Para 20**
1973 (2) SCR 377	**relied on**	**Para 21**
2004 (4) Suppl. SCR 279	**relied on**	**Para 21**
2011 (11) SCR 907	**relied on**	**Para 21**
2012 (4) SCC 516	**relied on**	**Para 21**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 46 of 2005.

From the Judgment & Order dated 31.03.2004 of the High Court of Karnataka at Bangalore in Criminal Appeal No. 839 of 2001.

WITH

Crl. A. No. 171/2005

Basava Prabhu S. Patil, B. Subrahmanya Prasad, Venkatakrishna K, A.S. Bhasme for the Appellant.

V.N. Raghupathy, Shivpati B. Pandey for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. Both these appeals have been filed against the impugned judgment and order dated 31st March, 2004 passed by the High Court of Karnataka at Bangalore, dismissing the Criminal Appeal No. 839 of 2001 and allowing Criminal Appeal No. 1132 of 2001, filed by the State. The High Court has dismissed the appeal of appellant Bhimanna, against the order of conviction under Section 302 by the trial court, but allowed the appeal of the State against the appellants in Criminal Appeal No. 171 of 2005 herein, reversing the judgment of the trial court, acquitting them of the charge under Section 302 of the Indian Penal Code, 1860 (hereinafter called 'IPC') and awarding them life imprisonment.

2. Facts and circumstances giving rise to these appeals are as follows :-

A. As per the case of the prosecution, Yenkappa (A-1), appellant in Criminal Appeal No. 171 of 2005 is the father of Bhimanna (A-2), who is the appellant in Criminal Appeal No. 46 of 2005, and Suganna (A-3), is the nephew of Yenkappa (A-1). Deceased Bheemanna was the nephew of Yenkappa(A-1). Yenkappa(A-1) owns land adjacent to the land of the deceased Bheemanna in revenue estate of village Buddinni, Police Station Ramdurga, in the district of Raichur. There was a dispute between Yenkappa and the deceased over the land of the deceased as, deceased refused to give him right of passage through his land. Thus, a Panchayat was convened in the village, wherein it was decided that neither of the parties will enter the others' land, to use the same as a pathway.

B. On 17.11.1999 at about 4.00 p.m., Yenkappa(A-1),

alongwith Bhimanna (A-2) and Suganna (A-3), was returning home with agricultural implements i.e. axes and a plough. They attempted to use the land of the deceased as a pathway. The deceased Bheemanna, who was present on his land alongwith his wife Paddamma (PW.1) and mother, namely, Bheemava, obstructed the accused persons asking them not to pass through his land. Yenkappa(A-1) then started hurling abuses in filthy language and instigated Bhimanna (A-2) and Suganna (A-3) to assault the deceased. Thus, Bhimanna (A-2) and Suganna (A-3) began assaulting the deceased with axes over his head and right hand. Yenkappa (A-1) assaulted the deceased with "Meli" (Wooden part of a plough). Paddamma (PW.1) and Bheemava, mother of the deceased went to save the deceased, but they too, were threatened with assault. Similar threats were hurled when Rangayya (PW.6), nephew of the deceased and his father Hanumappa approached the place of occurrence. The accused persons left the place after assaulting the deceased, throwing away the axes and wooden part of the plough. Rangayya (PW.6) brought a bullock cart as asked by Paddamma (PW.1) from the village and the deceased was then taken to Ramdurga Police Station. Upon the advice of the police, the deceased was taken in a mini lorry, driven by Mahadevappa (PW.10) to Deodurga Hospital and when they reached there at 8.00 p.m., the doctor declared Bheemanna dead. On the basis of the complaint submitted by Paddamma (PW.1), an FIR was lodged at 8.15 p.m. under Sections 143, 147, 148, 302, 323 and 504 read with Section 149 IPC. Investigation was initiated by Rajashekhar (PW.14), Circle Inspector.

C. The inquest was conducted over the dead body of the deceased Bheemanna in the presence of Panchas, including Basawarajaiah (PW.2). The post-mortem was conducted by Dr. Patil Prabhakar (PW.12). The investigating officer recovered the axes and the wooden part of the plough used in the crime and sent the same for FSL examination and, subsequently, the three appellants were also arrested. After completion of the

investigation, charge-sheet was filed against the appellants for the offences punishable under Sections 447, 504, 302 read with Section 34 IPC.

D. Upon conclusion of the trial in Sessions Case No. 40 of 2000, the learned Sessions Judge vide judgment and order dated 19.6.2001, convicted Bhimanna (A-2) for the offences punishable under Sections 447, 504, 302 read with Section 34 IPC and awarded him life imprisonment with a fine of Rs. 2,000/-. So far as Yenkappa (A-1) and Suganna (A-3) are concerned, they were only convicted under Sections 447, 504 read with Section 34 IPC.

E. Being aggrieved, Bhimanna (A-2) preferred Criminal Appeal No. 839 of 2001 and the State of Karnataka filed Criminal Appeal No. 1132 of 2001 against the accused Yenkappa (A-1) and Suganna (A-3). The High Court has dismissed the appeal of Bhimanna (A-2) and allowed the appeal of the State convicting Yenkappa (A-1) and Suganna (A-3) also under Section 302 IPC.

Hence, these appeals.

3. Shri Basava Prabhu S. Patil, learned senior counsel appearing for the appellants, has submitted that Bhimanna (A-2) was wrongly convicted by the courts below under Section 302 read with Section 34 IPC, as the prosecution failed to explain adequately the genesis of the case. The deceased Bheemanna had no land in close proximity to the land of A-2. Therefore, the question of any dispute could not arise. The same was proved by way of cogent evidence and the courts below failed to appreciate the same in the correct perspective. The presence of witnesses, particularly Paddamma (PW.1) and Rangayya (PW.6), is doubtful, for the reason that Paddamma (PW.1) had given birth to a girl child only one month before the date of such incident, and it was thus highly unlikely, that in such a physical condition, she would be able to do any agricultural work. Bheemava, mother of the deceased, was in fact present

at the place of occurrence, and has not been examined by the prosecution. Thus, the prosecution is guilty of withholding a material witness. Rangayya (PW.6) could not have been present there for the reason that he did not have land in close proximity to the place of occurrence. More so, it was not a pre-determined assault and the incident clearly occurred in the spur of the moment. The weapons used in the crime were basically agricultural implements with which the appellants had been working in their fields. The High Court reversed the judgment of the trial court so far as the acquittal of Yenkappa (A-1) and Suganna (A-3) is concerned, without applying the parameters laid down in this regard, by this Court. The High court erred in convicting A-1 and A-3 for the offences punishable under Section 302 IPC, as there is no evidence available to show, that all the accused acted in furtherance of common intention. Thus, conviction of either of the appellants under Section 302 IPC is not justified and the appeals deserve to be allowed.

4. On the contrary, Shri V.N. Raghupathy, learned standing counsel appearing for the State has opposed the appeals, contending that no fault can be found with the judgment of the High Court. After re-appreciation of the evidence on record, the High Court reached the correct conclusion that all three appellants were responsible for the homicidal death of Bheemanna. The deceased suffered 12 injuries. In the opinion of the Dr. Patil Prabhakar (PW.12), injury nos. 1 and 12 could have been caused by Bhimanna (A-2), and thus, as a natural corollary, injury nos. 2 to 11 would have been caused by Yenkappa (A-1) and Suganna (A-3). Thus, not convicting them for the said injuries and restricting their conviction under Sections 447 and 504 read with Section 34 IPC cannot be justified. The trial Court's decision cannot be justified in regard to the fact that charges were not framed against A-1 and A-3 by it, for any other offence owing to the fact that, the same was not provided for by the Investigating Officer in the charge sheet filed by him. The High Court has rightly convicted Yenkappa (A-1) and Suganna (A-3) for the offences punishable under Section

302/34 IPC. The appeals lack merit and are liable to be dismissed.

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

6. At the time of autopsy, the following injuries were found on the body of the deceased Bheemanna:

1. Incised wound of size 3" X 0.75" X brain deep situated in the middle of the head. Edges everted, blood clots and brain matter present. Underlying fracture of skull bone seen and felt.

2. Incised wound transversely situated in the dorsum of the fore arm 2.5" above the right wrist joint, size 3" X 0.5" X muscle deep. Clots present, edges everted and clear out.

3. Lacerated wound of size 1" X 0.5" X muscle deep situated in the temporo-maxillary area in left side. Clots present.

4. Lacerated wound of size 1" X 0.5 X muscle deep behind the pinna of left ear. Clots present.

5. Contusion of size 5" x 1" situated in the left side of the arm directed above downwards from shoulder.

6. Contusion of size 3" X 1" in the left shoulder obliquely above downwards.

7. Lacerated wound of size 3" X 0.5" X muscle deep situated in the anterior aspect of the fore arm in the middle.

8. Lacerated wound in the middle of the right leg anteriorly size 1" X 0.5" X muscle deep clots present.

9. Contusion in the left side of the back obliquely in the middle size 3" X 2".

10. Contusion in the right side of the flank side of the chest size 3" X 0.5".

11. Lacerated wound in the medial aspect of the right knee size, 2" X 0.5" X muscle deep. Clots present.

12. Contusion in the left-side of the chest in the lower end, size 3" X 0.5".

Upon dissection, Dr. Patil Prabhakar (PW.12) noticed the following internal injuries.

1. Fracture of front parietal bone in the middle of the head, size 1" X 0.25" X brain deep, brain matter visible and silted out. Fracture underneath, brain lacerated, size 1" X 0.5" X 0.5".

2. Fracture of thorasic rib 9the and 10 ribs anteriorly in the middle. Laceration of lower lobe of lung, size 1.5" X 0.5" Blood present in the thorax about 200 ML.

7. So far as the injuries are concerned, Dr. Patil Prabhakar (PW.12) has clarified in his cross-examination that the injury Nos. 1 and 12 were grievous in nature and were actually responsible for the death of the deceased Bheemanna. Lacerated injuries were 5 in number, though the same were simple in nature and they could not have been caused by the blunt portion of an axe or by using a stick.

8. Paddamma (PW.1) deposed that her husband owned land, adjacent to the land of A-2. There was some dispute regarding the pathway between them. A Panchayat was convened to resolve the dispute, and the parties were restrained from using the others' land as passageway. She stated that she was working in the field alongwith her husband and mother-in-

law on 17.11.1999. At about 4.00 p.m., the accused persons, while going to the village, after finishing their work in the adjacent field, wanted to pass through her land. Her husband raised an objection. Yenkappa (A-1) then started abusing the deceased and instigated the other accused persons to assault him. The appellants used axes, and the wooden part of a plough to injure her husband. Her husband, as a result, fell down. When she tried to save him, she too, was threatened by the appellants. Once her husband had fallen, the accused, however, stopped the assault. (A-2) threw down the "Meli" there and the accused left the place saying that the victim had fallen. Rangayya (PW.6), who came to the said place, was asked to bring a bullock cart from the village, in which they then took the deceased to the police station. Upon the advice of the police the deceased was taken to the hospital, where he was declared dead. She has also admitted in her cross-examination that the place of occurrence was about 1 km. away from her house and that she had given birth to a girl child one month prior to the date of occurrence of such incident. Her mother-in-law, who was also present at the place of occurrence was suffering from weak eye-sight, and no longer had good vision as a result of old age.

9. Rangayya, in turn, (PW.6), deposed that he was the cousin of the deceased and was working in his field. There was a dispute between the appellants and the deceased with respect to using the land of the deceased, as passage. He witnessed the appellants causing injuries to the deceased and he corroborated the version of events as given by Paddamma (PW.1). In his cross-examination, it was also stated by Rangayya (PW.6) that the accused persons had filed a case against the deceased in court with respect to the aforementioned land dispute.

10. Venkat Rao (PW.8), Junior Engineer of PWD, after inspection and examination of the revenue record, prepared a site plan for the area, showing that the lands of the deceased

and the appellants were, in fact, in close proximity to each other and were merely demarcated by a bund.

11. The trial Court after appreciating the evidence on record, came to the conclusion that all three accused (A-1 to A-3) did not act in furtherance of any common intention. Bhimanna (A-2) was solely responsible for the death of the deceased. Therefore, Bhimanna (A-2) alone could be convicted under Section 302 IPC and further under Sections 447and 504 read with Section 34 IPC. However, Yenkappa (A-1) and Suganna (A-3) acted without sharing any common intention with Bhimanna (A-2). Thus, they could not be convicted under Section 302 IPC and could be convicted only under Sections 447 and 504 read with Section 34 IPC. The court further held that Yenkappa (A-1) and Suganna (A-3) could also be convicted for the offence of causing injury Nos. 2 to 11, but no charge had been framed under any of the Sections 323, 324, 325, 326 and 327 IPC in this regard. Therefore, no punishment could be awarded to them for the same. The trial Court held as under:

> "The prosecution has proved the charge under Section 302 read with Section 34 IPC only against Bhimanna and further the other charges under Sections 447 and 504 read with Section 34 IPC are proved against Yenkappa (A-1) and Suganna (A-3). Even though this court has accepted that A-1 and A-3 have also assaulted by Mos. 1 to 3 respectively, on the deceased, but those assaults *are not the direct result of death of the deceased Bheemanna. Moreover, in the charge-sheet, there is no incoporation of charges such as Sec. 323, 324, 325, 326 or 327 of IPC against these accused. Hence, in the absence of such specific charge regarding causing bleeding injuries by deadly weapons, by these A-1 and A-3,* this court is unable to convict them under any such charge, which is admittedly not incorporated in the charge-sheet and also not framed against them by this court." (Emphasis added)

12. The High Court, without reversing the finding recorded by the trial court, that there was no meeting of minds of all the accused with respect to causing such grievous injuries to the deceased, held that, as Yenkappa (A-1) and Suganna (A-3) had also been charged under Section 302/34 IPC, they too, could be convicted under Section 302 IPC and hence allowed the State appeal convicting them also under Section 302/34 IPC. The High Court held as under:

> "In view of the above, we are of the clear view that the trial court though rightly held that all the accused had committed the offences punishable under Sections 447 and 504 read with Section 34 of IPC and A-2 has committed the offence punishable under Section 302 of IPC, it has erroneously held that A-1 and A-3 cannot be held guilty for the offence of murder punishable under Section 302 of IPC, even though, Section 34 of IPC was invoked by the prosecution. So, we do not agree with the observations made in Para Nos. 36 to 39 of the impugned judgment and conclusion arrived at by the trial court so far as AI and A3 are concerned with regard to their guilt for the offence under Section 302 read with Section 34 of IPC.
>
> In the result and for the foregoing reasons, Criminal Appeal No. 839/2001 filed by A-2 is dismissed whereas, Criminal Appeal No. 1132/2001 filed by the State is allowed and Accused No. 1 and 3 are held guilty for the offence punishable under section 302 read with 34 of IPC also and accordingly convicted and sentenced to undergo imprisonment for life like that of A-2." (Emphasis added)

13. Thus, it is evident that both the courts below after appreciating the evidence available on record, came to a conclusion regarding the participation of all three appellants. The trial court could convict Yenkappa (A-1) and Suganna (A-3), only for the offences punishable under Sections 447 and 504 IPC, for want of framing of charges under any other section of IPC.

14. It is a matter of great regret that the trial court did not proceed with the case in the correct manner. If the trial Court was of the view that there was sufficient evidence on record against Yenkappa (A-1) and Suganna (A-3), which would make them liable for conviction and punishment for offences, other than those under Sections 447 and 504/34 IPC, the court was certainly not helpless to alter/add the requisite charges, at any stage prior to the conclusion of the trial. Section 216 of the Code of Criminal Procedure, 1973 (hereinafter called 'Cr.P.C.') empowers the trial Court to alter/add charge(s), at any stage before the conclusion of the trial. However, law requires that, in case such alteration/addition of charges causes any prejudice, in any way to the accused, there must be a fresh trial on the said altered/new charges, and for this purpose, the prosecution may also be given an opportunity to recall witnesses as required under Section 217 Cr.P.C.

15. In *Hasanbhai Valibhai Qureshi v. State of Gujarat,* AIR 2004 SC 2078, this Court held:

> "Therefore, if during trial the Trial Court, on a consideration of broad probabilities of the case, based upon total effect of the evidence and documents produced is satisfied that any addition or alteration of the charge is necessary, it is free to do so, and there can be no legal bar to appropriately act as the exigencies of the case warrant or necessitate."

16. Such power empowering alteration/addition of charge(s), can also be exercised by the appellate court, in exercise of its powers under Sections 385(2) and 386 Cr.P.C.

In *Kantilal Chandulal Mehta v. State of Maharashtra & Anr.,* AIR 1970 SC 359, this Court while dealing with the power of the appellate Court under the earlier Code held:

> "The power of the Appellate Court is set out in Section 423 of the Cr.P.C and invests it with very wide powers. A

particular reference may be made to Clause(d) of sub-section (1), as empowering it even to make any amendment or any consequential or incidental Order that may be just or proper. Apart from this power of the Appellate Court to alter or amend the charge, Section 535 Cr.P.C, further provides that, no finding or sentence, pronounced or passed shall be deemed to be invalid merely on the ground that no charge has been framed unless the Court of Appeal or revision thinks that the omission to do so, has occasioned failure of justice, and if in the opinion of any of these courts a failure of justice has been occasioned by an omission to frame a charge, it shall order a charge to be framed and direct that the trial be recommenced from the point immediately after the framing of the charge."

17. Thus, we are of the considered opinion that the trial court committed a grave error in acquitting Yenkappa (A-1) and Suganna (A-3) for the offence of causing injuries to the deceased, in spite of there being sufficient evidence on record against them in this respect, simply for the reason that the police did not file a charge-sheet in relation to such offences committed by them. Thus, the trial court should have altered/ added the requisite charge(s) and proceeded with the case in accordance with law.

18. In such a fact-situation, a question also arises as to whether a conviction under any other provision, for which a charge has not been framed, is sustainable in law. The issue is no longer res integra and has been considered by the Court time and again. The accused must always be made aware of the case against them so as to enable them to understand the defence that they can lead. An accused can be convicted for an offence which is minor than the one, he has been charged with, unless the accused satisfies the Court that there has been a failure of justice by the non-framing of a charge under a particular penal provision, and some prejudice has been

caused to the accused. (Vide : *Amar Singh v. State of Haryana,* AIR 1973 SC 2221).

Further the defect 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 charges, has led to a failure of justice, this 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).

19. This Court in *Sanichar Sahni v. State of Bihar,* AIR 2010 SC 3786, while considering the issue placed reliance upon various judgments of this Court particularly in *Topandas v. State of Bombay,* AIR 1956 SC 33; *Willie (William) Slaney v. State of M.P.,* AIR 1956 SC 116; *Fakhruddin v. State of Madhya Pradesh,* AIR 1967 SC 1326; *State of A.P. v. Thakkidiram Reddy,* AIR 1998 SC 2702; *Ramji Singh & Anr. v. State of Bihar,* AIR 2001 SC 3853; and *Gurpreet Singh v. State of Punjab,* AIR 2006 SC 191, and came to the following conclusion :

"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."

A similar view has been reiterated in *Abdul Sayeed v. State of Madhya Pradesh,* (2010) 10 SCC 259.

20. In *Shamnsaheb M. Multtani v. State of Karnataka,* AIR 2001 SC 921, this Court explained the meaning of the phrase 'failure of justice' observing that the superior court must examine whether the issue raised regarding failure of justice is really a failure of justice or whether it is only a camouflage. The court must further examine whether the said aspect is of such a nature, that non-explanation of it has contributed to penalising an individual, and if the same is true then the court may say, that since he was not given an opportunity to explain such aspect, there was 'failure of justice' on account of non compliance with the principles of natural justice. The expression 'failure of justice' is an extremely pliable or facile an expression which can be made to fit into any situation of a case.

21. 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 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 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 matters falling beyond 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: *Nageshwar Sh. Krishna Ghobe v. State of Maharashtra,* AIR 1973 SC 165; *State by Police*

Inspector v. T. Venkatesh Murthy, AIR 2004 SC 5117; *Rafiq Ahmed @ Rafi v. State of U.P.,* AIR 2011 SC 3114; and *Rattiram & Ors. v. State of M.P. through Inspector of Police,* AIR 2012 SC 1485).

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

The trial court has framed charges against all the appellants under Sections 447 and 504 and Section 302 read with Section 34 IPC and the points to be determined were also framed by the trial court as under:

(i) Whether the accused on account of their enmity with the deceased, trespassed on to his land with common object, and committed the offence under Section 447 read with Section 34 IPC.

(ii) Whether the accused on the said date, time and place, intentionally insulted the deceased by abusing him and thereby deliberately provoked him, knowing that it would cause him to break public peace, and therefore, committed the offence under Section 504 read with Section 34 IPC.

(iii) Whether the prosecution proved that the accused on the said date, time and place after trespassing on to the land of the deceased picked a quarrel with him due to earlier enmity, and assaulted him thereby committing the said murder under Section 302 read with Section 34 IPC.

(iv) Whether the prosecution proved that the accused have committed the offence under Sections 447, 504 and 302 read with Section 34 IPC with common object beyond all reasonable doubt.

23. The trial court came to the conclusion that there was no meeting of minds and all three appellants did not act in

furtherance of any common intention. Therefore, Yenkappa (A-1) and Suganna (A-3) could not be convicted under Section 302 read with Section 34 IPC and they were convicted only under Sections 447 and 504 IPC and sentences were awarded to them setting off the period spent by them in custody during trial. The trial court was patently in error in holding that, in spite of the fact that two accused were clearly responsible for causing injury Nos. 2 to 11, they still could not be convicted for any offence for want of framing of charges under any other penal provision. In such an event, the trial court would be justified in altering/adding the requisite charge(s) or even without such alteration/addition, punishing them for the said offences, considering the intensity of the injuries as the same could be an offence minor than the offence punishable under Section 302 IPC.

24. The High Court came to the conclusion that, as the charge under Section 302/34 was also framed against Yenkappa (A-1) and Suganna (A-3), they too, were liable to be convicted under Section 302. Such a conclusion is not justified, as the High Court has not reversed the finding recorded by the trial court that all three accused did not act in furtherance of any common intention.

25. We have examined the number and intensity of the injuries and the role played by each of the appellants. There is ample evidence on record particularly the deposition of Paddamma (PW.1), wife of the deceased to show that when her husband fell down after receiving the said injuries, the accused stopped the assault. Bhimanna (A-2) threw down the "Meli" and all the accused left the place of occurrence saying that the victim had fallen. This clearly establishes that the appellants did not intend to kill the deceased and it all happened in the spur of the moment upon a heated exchange of words between the parties, after criminal trespass by the appellants on to the land of the deceased. Therefore, it does not seem to be a pre-determined or pre-meditated case. Ends of justice

would, therefore, be met, if all the three appellants are convicted under Section 304 Part-I read with Section 34 IPC and sentences are awarded accordingly. As a result, all the appellants are convicted under Sections 447, 504 and 304 Part-I read with Section 34 IPC.

Bhimanna (A-2) has already served more than 13½ years in jail. Therefore, he is awarded sentence as already undergone and it is directed that he be released forthwith, unless wanted in some other case. Yenkappa (A-1) and Suganna (A-3) are awarded a sentence of 10 years RI. All of them have already served the sentences awarded for the offences punishable under Sections 447, 504/34 IPC.

Learned counsel for the appellants has pointed out that Yenkappa (A-1) and Suganna (A-3) have already served near about 10 years. They be released from jail after serving the sentence of 10 years, if not already served and are not wanted in some other case.

In view of the above, both the appeals stand disposed of.

B.B.B. Appeals disposed of.

M/S VIRGO INDUSTRIES (ENG.) P.LTD.
v.
M/S.VENTURETECH SOLUTIONS P.LTD.
(Civil Appeal No. 6372 of 2012)

SEPTEMBER 7, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Code of Civil Procedure, 1908:

Or.II, r.2 - Two suits on same cause of action - Bar u/Or.II, r.2 - Object - Applicability - Held: Or.II r.2 seeks to avoid multiplicity of litigations on same cause of action - The Rule engrafts a laudable principle that discourages/prohibits vexing the defendant again and again by multiple suits except in a situation where one of the several reliefs, though available to a plaintiff, may not have been claimed for a good reason - A later suit for such relief is contemplated only with the leave of the Court, granted upon due satisfaction and for good and sufficient reasons - The cardinal requirement for application of the provisions contained in Or. II r.2(2) and (3) is that the cause of action in the later suit must be the same as in the first suit.

Or.II, r.2 - Applicability - Based upon an agreement to sale entered into between the parties, respondent filed suit for permanent injunction restraining the defendant-appellant from alienating, encumbering or dealing with the suit property to any party other than the plaintiff - During pendency of the said suit, respondent filed suit for specific performance of the agreement to sale - Maintainability of the subsequent suit - Held: The cause of action for both suits were the same - The foundation for the relief of permanent injunction claimed in the earlier suit furnished a complete cause of action to the plaintiff-respondent to also sue for the relief of specific performance - Yet, the relief of specific performance was

omitted and no leave in this regard was obtained or granted by the Court - For claiming the relief of specific performance, the plaintiff-respondent was not required to wait for expiry of the due date for performance of the agreement to sale in a situation where the defendant-appellant made his intentions clear by his overt acts - Or.II, r.2 would apply in both the situations- when the earlier suit was disposed off and also when the subsequent suit was filed during pendency of the earlier suit - Consequently, subsequent suit filed by respondent for specific performance was barred under the provisions of Or.II, r.2 - Plaint in the subsequent suit filed by respondent accordingly struck off.

Words and Phrases - "cause of action" - Meaning of.

On 28.8.2005 and 9.9.2005, the respondent had instituted a set of two suits before the High Court seeking a decree of permanent injunction restraining the defendant-appellant from alienating, encumbering or dealing with the plaint schedule properties to any other third party other than the plaintiff-respondent. The said relief was claimed on the basis of two agreements of sale entered into by the respondent and the appellant both on 27.7.2005 in respect of two different parcels of immovable property.

Subsequently, on 29.5.2007, the respondent filed two suits for specific performance of the said agreements of sale in the Court of the District Judge seeking a decree against the appellant for execution and registration of the sale deeds in respect of the same property and for delivery of possession thereof to the respondent. While the matter was so situated, the appellant moved the High Court by filing two separate applications under Article 227 of the Constitution to strike off the plaints in the subsequent set of suits on the ground that the provisions contained in Order II Rule 2, CPC was a bar

to the maintainability of both the subsequent suits. A Single Judge of the High Court held that the provisions of Order II Rule 2 (3), CPC were not attracted to render the subsequent suits filed by the respondent non-maintainable and, therefore, the instant appeals.

Allowing the appeals, the Court

HELD: 1.1. Order II Rule 1, CPC requires every suit to include the whole of the claim to which the plaintiff is entitled in respect of any particular cause of action. However, the plaintiff has an option to relinquish any part of his claim if he chooses to do so. Order II Rule 2 contemplates a situation where a plaintiff omits to sue or intentionally relinquishes any portion of the claim which he is entitled to make. If the plaintiff so acts, Order II Rule 2, CPC makes it clear that he shall not, afterwards, sue for the part or portion of the claim that has been omitted or relinquished. Order II Rule 2 (2) does not contemplate omission or relinquishment of any portion of the plaintiff's claim with the leave of the court so as to entitle him to come back later to seek what has been omitted or relinquished. Such leave of the Court is contemplated by Order II Rule 2(3) in situations where a plaintiff being entitled to more than one relief on a particular cause of action, omits to sue for all such reliefs. In such a situation, the plaintiff is precluded from bringing a subsequent suit to claim the relief earlier omitted except in a situation where leave of the Court had been obtained. It is, therefore, clear from a conjoint reading of the provisions of Order II Rule 2 (2) and (3) of the CPC that the said two sub-rules of Order II Rule 2 contemplate two different situations, namely, where a plaintiff omits or relinquishes a part of a claim which he is entitled to make and, secondly, where the plaintiff omits or relinquishes one out of the several reliefs that he could have claimed in the suit. It is only in the latter situations where the plaintiff can

file a subsequent suit seeking the relief omitted in the earlier suit proved that at the time of omission to claim the particular relief he had obtained leave of the Court in the first suit. [Para 9] [944-D-H; 945-A-B]

1.2. The object behind enactment of Order II Rule 2(2) and (3) of the CPC is not far to seek. The Rule engrafts a laudable principle that discourages/ prohibits vexing the defendant again and again by multiple suits except in a situation where one of the several reliefs, though available to a plaintiff, may not have been claimed for a good reason. A later suit for such relief is contemplated only with the leave of the Court which leave, naturally, will be granted upon due satisfaction and for good and sufficient reasons. The cardinal requirement for application of the provisions contained in Order II Rule 2(2) and (3) is that the cause of action in the later suit must be the same as in the first suit. The true meaning of the expression, i.e. cause of action, was clearly enunciated in a recent judgment of this Court in Ponniamman Educational Trust. The huge number of opinions rendered on the issue including the judicial pronouncements available does not fundamentally detract from what is stated in Halsbury's Law of England, (4th Edition). [Paras 10, 11] [945-C-D; 946-D-E]

Gurbux Singh v. Bhooralal **AIR 1964 SC 1810: 1964 SCR 831;** *Deva Ram & Anr. v. Ishwar Chand & Anr.* **1995 (6) SCC 733: 1995 (4) Suppl. SCR 369 and** *M/s. Bengal Waterproof Ltd. v. M/s Bombay Waterproof Manufacturing Co.& Anr.* **AIR 1997 SC 1398: 1996 (8) Suppl. SCR 695 - relied on.**

Church of Christ Charitable Trust and Educational Charitable Society, represented by its Chairman v. Ponniamman Educational Trust represented by its Chairperson/ Managing Trustee **JT 2012 (6) SC 149 - referred to.**

Halsbury's Law of England, **(4th Edition) - referred to.**

2. In the instant case though leave to sue for the relief of specific performance at a later stage was claimed by the plaintiff in earlier suits, admittedly, no such leave was granted by the Court. A reading of the plaints filed in earlier suits showed the clear averments to the effect that after execution of the agreements of sale the plaintiff received a letter from the defendant conveying the information that the Central Excise Department was contemplating issuance of a notice restraining alienation of the property. The advance amounts paid by the plaintiff to the defendant by cheques were also returned. According to the plaintiff, it was surprised by the said stand of the defendant who had earlier represented that it had clear and marketable title to the property. The plaintiff seriously doubted the claim made by the defendant regarding the proceedings initiated by the Central Excise Department. In the plaint it was averred by the plaintiff that the defendant was "finding an excuse to cancel the sale agreement and sell the property to some other third party." It was further stated in the plaint that "in this background, the plaintiff submits that the defendant is attempting to frustrate the agreement entered into between the parties." The averments made by the plaintiff in earlier set of suits, leave no room for doubt that on the dates when the earlier suits were instituted, namely, 28.8.2005 and 9.9.2005, the plaintiff itself had claimed that facts and events had occurred which entitled it to contend that the defendant had no intention to honour the agreements dated 27.7.2005. In the said situation it was open for the plaintiff to incorporate the relief of specific performance alongwith the relief of permanent injunction that formed the subject matter of above two suits. The foundation for the relief of permanent injunction claimed in the two earlier suits furnished a complete cause of action to the plaintiff to

also sue for the relief of specific performance. Yet, the said relief was omitted and no leave in this regard was obtained or granted by the Court. Furthermore, according to the plaintiff, which fact is also stated in the plaints filed in the earlier suits, on the date when the aforesaid two suits were filed the relief of specific performance was premature inasmuch as the time for execution of the sale documents by the defendant in terms of the agreements dated 27.7.2005 had not elapsed. According to the plaintiff, it is only after the expiry of the said period of time and upon failure of the defendant to execute the sale deeds despite the legal notice dated 24.2.2006 that the cause of action to claim the relief of specific performance had accrued. The above stand of the plaintiff incorrectly found favour with the High Court. A suit claiming a relief to which the plaintiff may become entitled at a subsequent point of time, though may be termed as premature, yet, cannot per se be dismissed to be presented on a future date. There is no universal rule to the above effect inasmuch as "the question of a suit being premature does not go to the root of the jurisdiction of the Court". Even there is no provision in the Specific Relief Act, 1963 requiring a plaintiff claiming the relief of specific performance to wait for expiry of the due date for performance of the agreement in a situation where the defendant may have made his intentions clear by his overt acts. [Paras 12-15] [947-D-H; 948-A-H; 949-C-D]

Vithalbhai (P) Ltd. v. Union Bank of India **2005(4) SCC 315: 2005 (2) SCR 680 - relied on.**

3. The Single Judge of the High Court had considered, and very rightly, to be bound to follow an earlier Division Bench order in the case of *R. Vimalchand and M. Ratanchand v. Ramalingam*, T.Srinivasalu & T. Venkatesaperumal holding that the provisions of Order II Rule 2 of the CPC would be applicable only when the

first suit is disposed of. As in the present case the second set of suits were filed during the pendency of the earlier suits, it was held, on the ratio of the said decision of the Division Bench of the High Court, that the provisions of Order II, Rule 2(3) will not be attracted. Judicial discipline required the Single Judge of the High Court to come to the aforesaid conclusion. However, this Court is unable to agree with the same in view of the object behind the enactment of the provisions of Order II Rule 2 of the CPC, namely, that Order II Rule 2 of the CPC seeks to avoid multiplicity of litigations on same cause of action. The true object of the law would not stand fully subserved if it is held that the provisions of Order II Rule 2 of the CPC will apply only if the first suit is disposed of and not in a situation where the second suit has been filed during the pendency of the first suit. Rather, Order II, Rule 2 of the CPC will apply to both the aforesaid situations. Consequently, the plaint in the subsequent suits on the file of District Judge is struck off. [Para 16, 17] [949-D-H; 950-A-C]

Murti v. Bhola Ram **(1894) ILR 16 All 165 and** *Krishnaji v. Raghunath* **AIR 1954 Bom 125 - approved.**

R.Vimalchand and M.Ratanchand v. Ramalingam, T.Srinivasalu & T. Venkatesaperumal **2002 (3) MLJ 177 - not approved.**

Case Law Reference:

2002 (3) MLJ 177	**not approved**	**Para 6**
1964 SCR 831	**relied on**	**Para 10**
1995 (4) Suppl. SCR 369	**relied on**	**Para 10**
1996 (8) Suppl. SCR 695	**relied on**	**Para 10**
JT 2012 (6) SC 149	**referred to**	**Para 11**
2005 (2) SCR 680	**relied on**	**Para 15**

(1894) ILR 16 All 165	**approved**	**Para 16**
AIR 1954 Bom 125	**approved**	**Para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6372 of 2012.

From the Judgment and Order dated 06.10.2009 of the High Court of Judicature at Madras in C.R.P.PD. No. 3758 of 2007.

WITH

C.A. No. 6373 of 2012.

C.A. Sundaram, V. Achuthan, Rohini Musa, Zafar Inayat, Yogesh V. Kotemath, Binu Tamta for the Appellant.

S. Gurukrishna Kumar, Srikala G.K., A. Prasanna Venkat, S.R. Setia for the Respondent.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. Leave granted.

2. Both the appeals are directed against the common judgment and order dated 6.10.2009 passed by the High Court of Madras by which the High Court has refused to interdict the proceedings registered and numbered as OS Nos. 202 and 203 of 2007 pending in the Court of the learned District Judge, Thiruvallur filed by the respondents herein.

3. The brief facts that would be required to be noticed for the purpose of the present adjudication may now be recapitulated.

The respondent in the two appeals, as the plaintiff, instituted C.S No. 831 of 2005 and C.S. No. 833 of 2005 before the Madras High Court seeking a decree of permanent injunction restraining the appellant (defendant) from alienating, encumbering or dealing with the plaint schedule properties to

any other third party other than the plaintiff. The aforesaid relief was claimed on the basis of two agreements of sale entered into by the plaintiffs and the defendant both on 27.7.2005 in respect of two different parcels of immovable property consisting of land and superstructures built on plot No. 65 (old No.43) and plot No. 66 (old No.42), Second Main Road, Ambattur Industrial Estate, Chennai. In each of the aforesaid suits the plaintiff had stated that under the agreements of sale different amounts were paid to the defendants, yet, on the pretext that restrictions on the alienation of the suit land were likely to be issued by the Central Excise Department on account of pending revenue demands, the defendants were attempting to frustrate the agreements in question. In the suits filed by the plaintiff it was also stated that as the period of six months fixed for execution of the sale deeds under the agreements in question was not yet over, the plaintiff is not claiming specific performance of the agreements. The plaintiff, accordingly, sought leave of the court to omit to claim the relief of specific performance with liberty to sue for the said relief at a later point of time, if necessary. The two suits in question, i.e., C.S. Nos. 831 and 833 of 2005 were filed by the plaintiff on 28.8.2005 and 9.9.2005 respectively.

4. Thereafter on 29.5.2007, O.S. Nos. 202 and 203 were filed by the plaintiff in the Court of the District Judge, Tiruvallur seeking a decree against the defendant for execution and registration of the sale deeds in respect of the same property and for delivery of possession thereof to the plaintiff. In the aforesaid latter suits it was mentioned by the plaintiff that in respect of the same suit property it had earlier filed suit Nos. C.S. 831 and 833 of 2005 seeking the relief of permanent injunction. As the time for performance of the agreements of sale had not elapsed when C.S. No.831 and 833 of 2005 were instituted and the plaintiff was "under the bonafide belief that the defendants would perform the agreement" the relief of specific performance was not claimed in the aforesaid suits. However, as inspite of a legal notice issued to the defendants

on 24.2.2006, the sale deeds had not been executed by the defendant the latter suits i.e. O.S.Nos 202 and 203 were instituted.

5. While the matter was so situated the defendant in both the suits i.e. the present petitioner, moved the Madras High Court by filing two separate applications under Article 227 of the Constitution to strike off the plaints in O.S. Nos. 202 and 203 of 2007 on the ground that the provisions contained in Order II Rule 2 of the Civil Procedure Code, 1908 (for short the 'CPC') is a bar to the maintainability of both the suits. Before the High Court the defendant had contended that the cause of action for both sets of suits were the same, namely, the refusal or reluctance of the defendant to execute the sale deeds in terms of the agreements dated 27.7.2005. Therefore, at the time of filing of the first set of suits i.e. C.S. Nos. 831 and 833 of 2005, it was open for the plaintiff to claim the relief of specific performance. The plaintiff did not seek the said relief nor was leave granted by the Madras High Court. In such circumstances, according to the defendant-petitioner, the suits filed by the plaintiff for specific performance i.e O.S. Nos. 202 and 203 were barred under the provisions of Order II Rules 2 (3) of the CPC.

6. The High Court, on consideration of the cases of the parties before it, took the view that on the date of filing of C.S. Nos. 831 and 833 of 2005 the time stipulated in the agreements between the parties for execution of the sale deeds had not expired. Therefore, the cause of action to seek the relief of specific performance had not matured. According to the High Court it is only after filing of the aforesaid suits and on failure of the defendants to execute the sale deeds pursuant to the legal notice dated 24.2.2006 that the cause of action to seek the aforesaid relief of specific performance had accrued. The High Court, accordingly, took the view that the provisions of Order II Rule 2 (3) of the CPC were not attracted to render the subsequent suits filed by the plaintiff i.e. O.S. Nos. 202 and 203

non-maintainable. The High Court also took the view that the provisions of Order II Rule 2 (3) of the CPC would render a subsequent suit not maintainable, only, if the earlier suit has been decreed and the said provisions of the CPC will not apply if the first suit remains pending. In arriving at the aforesaid conclusion the learned Single Judge of the High Court considered himself to be bound by the decision of a Division Bench of the same High Court in the case of *R.Vimalchand and M.Ratanchand v. Ramalingam, T.Srinivasalu & T. Venkatesaperumal*[1]. The High Court also held that though the application filed by the defendant under Article 227 of the Constitution was not maintainable as the defendant had the remedy of approaching the learned trial court under Order VII Rule 11 of the CPC, yet, in view of the elaborate discussions that have been made and findings and conclusions recorded it would be appropriate to decide the issues raised on merits. It is the correctness of the aforesaid view of the High Court that has been assailed in the present appeals.

7. We have heard Mr. C.A. Sundaram, learned senior counsel for the appellants and Mr. S.Gurukrishna Kumar, learned counsel for the respondent.

8. The necessary discussions that will have to follow may be initiated by extracting the provisions of Order II Rule 2 of the CPC:

"ORDER II

2. Suit to include the whole claim.

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim-Where a plaintiff omits

1. 2002 (3) MLJ Page 177.

to sue in respect of, or intentionally relinquishes, any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs-A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation-For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action."

9. Order II Rule 1 requires every suit to include the whole of the claim to which the plaintiff is entitled in respect of any particular cause of action. However, the plaintiff has an option to relinquish any part of his claim if he chooses to do so. Order II Rule 2 contemplates a situation where a plaintiff omits to sue or intentionally relinquishes any portion of the claim which he is entitled to make. If the plaintiff so acts, Order II Rule 2 of CPC makes it clear that he shall not, afterwards, sue for the part or portion of the claim that has been omitted or relinquished. It must be noticed that Order II Rule 2 (2) does not contemplate omission or relinquishment of any portion of the plaintiff's claim with the leave of the court so as to entitle him to come back later to seek what has been omitted or relinquished. Such leave of the Court is contemplated by Order II Rule 2(3) in situations where a plaintiff being entitled to more than one relief on a particular cause of action, omits to sue for all such reliefs. In such a situation, the plaintiff is precluded from bringing a subsequent suit to claim the relief earlier omitted except in a situation where leave of the Court had been obtained. It is, therefore, clear from a conjoint reading of the provisions of Order II Rule 2 (2) and (3) of the CPC that the aforesaid two sub-rules of Order II Rule 2 contemplate two different situations,

namely, where a plaintiff omits or relinquishes a part of a claim which he is entitled to make and, secondly, where the plaintiff omits or relinquishes one out of the several reliefs that he could have claimed in the suit. It is only in the latter situations where the plaintiff can file a subsequent suit seeking the relief omitted in the earlier suit proved that at the time of omission to claim the particular relief he had obtained leave of the Court in the first suit.

10. The object behind enactment of Order II Rule 2 (2) and (3) of the CPC is not far to seek. The Rule engrafts a laudable principle that discourages/prohibits vexing the defendant again and again by multiple suits except in a situation where one of the several reliefs, though available to a plaintiff, may not have been claimed for a good reason. A later suit for such relief is contemplated only with the leave of the Court which leave, naturally, will be granted upon due satisfaction and for good and sufficient reasons. The situations where the bar under Order II Rule 2 (2) and (3) will be attracted have been enumerated in a long line of decisions spread over a century now. Though each of the aforesaid decisions contain a clear and precise narration of the principles of law arrived at after a detailed analysis, the principles laid down in the judgment of the Constitution Bench of this Court in *Gurbux Singh v. Bhooralal*[2] may be usefully recalled below:

> "In order that a plea of a bar under O. 2. r. 2(3), Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based, (2) that in respect of that cause of action the plaintiff was entitled to more than one relief, (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court, omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar."

2. AIR 1964 SC 1810.

The above principles have been reiterated in several later judgments of this Court. Reference by way of illustration may be made to the judgments *Deva Ram & Anr. v. Ishwar Chand & Anr.*[3] and *M/s. Bengal Waterproof Ltd. v. M/s Bombay Waterproof Manufacturing Co.& Anr.*[4]

11. The cardinal requirement for application of the provisions contained in Order II Rule 2(2) and (3), therefore, is that the cause of action in the later suit must be the same as in the first suit. It will be wholly unnecessary to enter into any discourse on the true meaning of the said expression, i.e. cause of action, particularly, in view of the clear enunciation in a recent judgment of this Court in the *Church of Christ Charitable Trust and Educational Charitable Society, represented by its Chairman v. Ponniamman Educational Trust represented by its Chairperson/Managing Trustee*[5]. The huge number of opinions rendered on the issue including the judicial pronouncements available does not fundamentally detract from what is stated in *Halsbury's Law of England,* (4th Edition). The following reference from the above work would, therefore, be apt for being extracted hereinbelow:

> "Cause of Action" has been defined as meaning simply a factual situation existence of which entitles one person to obtain from the Court a remedy against another person. The phrase has been held from earliest time to include every fact which is material to be proved to entitle the

3. 1995 (6) SCC 733.

4. AIR 1997 SC 1398.

5. JT 2012 (6) SC 149.

plaintiff to succeed, and every fact which a defendant would have a right to traverse. 'Cause of action' has also been taken to mean that particular action the part of the defendant which gives the plaintiff his cause of complaint, or the subject-matter of grievance founding the action, not merely the technical cause of action."

12. In the instant case though leave to sue for the relief of specific performance at a later stage was claimed by the plaintiff in C.S. Nos. 831 and 833 of 2005, admittedly, no such leave was granted by the Court. The question, therefore, that the Court will have to address, in the present case, is whether the cause of action for the first and second set of suits is one and the same. Depending on such answer as the Court may offer the rights of the parties will follow.

13. A reading of the plaints filed in C.S. Nos. 831 and 833 of 2005 show clear averments to the effect that after execution of the agreements of sale dated 27.7.2005 the plaintiff received a letter dated 1.8.2005 from the defendant conveying the information that the Central Excise Department was contemplating issuance of a notice restraining alienation of the property. The advance amounts paid by the plaintiff to the defendant by cheques were also returned. According to the plaintiff it was surprised by the aforesaid stand of the defendant who had earlier represented that it had clear and marketable title to the property. In paragraph 5 of the plaint, it is stated that the encumbrance certificate dated 22.8.2005 made available to the plaintiff did not inspire confidence of the plaintiff as the same contained an entry dated 1.10.2004. The plaintiff, therefore, seriously doubted the claim made by the defendant regarding the proceedings initiated by the Central Excise Department. In the aforesaid paragraph of the plaint it was averred by the plaintiff that the defendant is *"finding an excuse to cancel the sale agreement and sell the property to some other third party."* In the aforesaid paragraph of the plaint, it was further stated that *"in this background, the plaintiff submits that*

the defendant is attempting to frustrate the agreement entered into between the parties."

14. The averments made by the plaintiff in C.S. Nos. 831 and 833 of 2005, particularly the pleadings extracted above, leave no room for doubt that on the dates when C.S. Nos. 831 and 833 of 2005 were instituted, namely, 28.8.2005 and 9.9.2005, the plaintiff itself had claimed that facts and events have occurred which entitled it to contend that the defendant had no intention to honour the agreements dated 27.7.2005. In the aforesaid situation it was open for the plaintiff to incorporate the relief of specific performance alongwith the relief of permanent injunction that formed the subject matter of above two suits. The foundation for the relief of permanent injunction claimed in the two suits furnished a complete cause of action to the plaintiff in C.S. Nos. 831 and 833 to also sue for the relief of specific performance. Yet, the said relief was omitted and no leave in this regard was obtained or granted by the Court.

15. Furthermore, according to the plaintiff, which fact is also stated in the plaints filed in C.S. Nos. 831 and 833, on the date when the aforesaid two suits were filed the relief of specific performance was premature inasmuch as the time for execution of the sale documents by the defendant in terms of the agreements dated 27.7.2005 had not elapsed. According to the plaintiff, it is only after the expiry of the aforesaid period of time and upon failure of the defendant to execute the sale deeds despite the legal notice dated 24.2.2006 that the cause of action to claim the relief of specific performance had accrued. The above stand of the plaintiff found favour with the High Court. We disagree. A suit claiming a relief to which the plaintiff may become entitled at a subsequent point of time, though may be termed as premature, yet, can not per se be dismissed to be presented on a future date. There is no universal rule to the above effect inasmuch as "the question of a suit being premature does not go to the root of the jurisdiction of the Court"

as held by this Court in *Vithalbhai (P) Ltd. v. Union Bank of India*[6]. In the aforesaid case this Court has taken the view that whether a premature suit is required to be entertained or not is a question of discretion and unless "there is a mandatory bar created by a statute which disables the plaintiff from filing the suit on or before a particular date or the occurrence of a particular event", the Court must weigh and balance the several competing factors that are required to be considered including the question as to whether any useful purpose would be served by dismissing the suit as premature as the same would entitle the plaintiff to file a fresh suit on a subsequent date. We may usefully add in this connection that there is no provision in the Specific Relief Act, 1963 requiring a plaintiff claiming the relief of specific performance to wait for expiry of the due date for performance of the agreement in a situation where the defendant may have made his intentions clear by his overt acts.

16. The learned Single Judge of the High Court had considered, and very rightly, to be bound to follow an earlier Division Bench order in the case of *R.Vimalchand and M.Ratanchand v. Ramalingam, T.Srinivasalu & T. Venkatesaperumal* (supra) holding that the provisions of Order II Rule 2 of the CPC would be applicable only when the first suit is disposed of. As in the present case the second set of suits were filed during the pendency of the earlier suits, it was held, on the ratio of the aforesaid decision of the Division Bench of the High Court, that the provisions of Order II, Rule 2(3) will not be attracted. Judicial discipline required the learned Single Judge of the High Court to come to the aforesaid conclusion. However, we are unable to agree with the same in view of the object behind the enactment of the provisions of Order II Rule 2 of the CPC as already discussed by us, namely, that Order II Rule 2 of the CPC seeks to avoid multiplicity of litigations on same cause of action. If that is the true object of the law, on which we do not entertain any doubt, the same would not stand fully subserved by holding that the provisions of Order II Rule 2

6. 2005 (4) SCC 315.

of the CPC will apply only if the first suit is disposed of and not in a situation where the second suit has been filed during the pendency of the first suit. Rather, Order II, Rule 2 of the CPC will apply to both the aforesaid situations. Though direct judicial pronouncements on the issue are somewhat scarce, we find that a similar view had been taken in a decision of the High Court at Allahabad in Murti v. Bhola Ram and by the Bombay High Court in *Krishnaji v. Raghunath*[7].

17. In the light of the above discussions we are of the view that the present appeals deserve to be allowed. Accordingly we allow the same and set aside the judgment and order dated 6.10.2009 passed by the High Court of Madras in C.R.P.PD. Nos. 3758 and 3759 of 2007. Consequently, we strike off the plaint in O.S.Nos.202 and 203 of 2007 on the file of District Judge, Thiruvallur.

B.B.B. Appeals allowed.

PHOOL KUMARI

v.

OFFICE OF THE SUPERINTENDENT CENTRAL JAIL, TIHAR, NEW DELHI AND ANR.

(Criminal Appeal No.1186 of 2012)

AUGUST 09, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Prisoners: Employment of - Payment of wages - Conviction of appellant u/ss.323, 342, 307 read with s.34, IPC and rigorous imprisonment (RI) for 10 years - Sentence reduced by High Court to 5 years - Appellant remaining in jail from 24.03.2007 to 23.12.2010 i.e., for a period of 3 years and 10 months after grant of remission - During this period, she was allotted work in Medical Inspection (MI) room as 'Sewadar' (Assistant) for assisting the Doctors in OPD of Jail and also taking care of the cleanliness of the said room till her release - In 2009, claim made by appellant through her husband for payment of wages for the work done during her custody in prison - Claim rejected - Complaint before the visiting Judge, Additional Sessions Judge (ASJ) for release of wages also rejected - Petition u/s.482, Cr.P.C. before High Court for quashing the order passed by the visiting Judge (ASJ) and also for the release of her wages - High Court disposing of the petition taking note of the fact that the appellant was already released from jail and relying upon the affidavit filed on behalf of the DIG (Prisons) stating therein that the appellant performed soft labour work during her period in jail and whenever the appellant was given hard labour work, she had drawn wages for that period - On appeal, held: It was definite case of jail authorities that for the work done, the appellant-convict was paid wages as per the circulars/orders applicable to her and in this regard ledger containing her signatures was produced - Contra stand of appellant-convict that she did not

put her signatures as shown in the ledger - In view of the conflicting stand by both the sides and assertion of the appellant about her signature and certain entries in the Ledger, in order to do substantial justice, the appellant is permitted to make a fresh representation to the visiting Judge giving all the details about the work done during the period of custody within a period of 4 weeks - On receipt of representation, the visiting Judge would inspect and peruse the Ledgers/documents with the assistance of the jail authorities in the presence of the appellant duly assisted by Supreme Court Legal Services Committee and pass an order within a period of 3 months thereafter - The said decision would be communicated to the appellant and the respondent-Jail Authorities - In the ultimate inquiry, if it is found that the appellant is entitled to any amount in addition to the amount already settled as wages, the same shall be paid within a period of 4 weeks thereafter.

Sentence/sentencing: Types of Imprisonment - Held: s.53 of the IPC defines 5 kinds of punishment which includes punishment for life and two other kinds of imprisonment i.e., rigorous and simple imprisonment - Rigorous imprisonment is one which is required by law to be completed with hard labour - A person sentenced to simple imprisonment cannot be required to work unless he volunteers himself to do the work - But the Jail officer who requires a prisoner sentenced to rigorous imprisonment to do hard labour would be doing so as enjoined by law and mandated by the court - The undertrials are not required to work in Jail - Delhi Prisons Act, 2000 - s.36 - Penal Code, 1860 - s.53.

State of Gujarat & Anr. vs. Hon'ble High Court of Gujarat (1998) 7 SCC 392 - relied on.

Delhi Prisons (Transfer of Prisoners, Labour and Jail Industry, Food, Clothings and Sanitation) Rules, 1988:

r.43 - Classification of Labour - Held: r.43 classifies

labour into three classes, namely, Hard Labour, Medium Labour and Light Labour - Hard Labour is further divided into three categories; skilled, semi-skilled and unskilled - The Inspector General may, with the sanction of the Delhi Administration from time to time, prescribe the description of works to be carried out and the tasks to be fixed for labour in respect of each class - Since the Delhi Jail Manual does not give detailed description as to what kind of work/task will fall under which category of labour, the Jail Authorities rely upon the Punjab Jail Manual framed under the Prisons Act, 1894 for determining the same - Prisons Act, 1894.

r.45 - Convicts - Work given to male and female convicts - Distinction between - Held: Under r.45, female convicts shall not, in any case, exceed two third of the maximum task for hard labour and medium labour, respectively, prescribed in respect of adult male convicts.

Delhi Prisons Act, 2000:

Chapter VII - Employment of Prisoners - Held: s.35 of the Act deals with employment of criminal prisoners - Sub-section (1) states that a criminal prisoner desiring to be employed on labour, may be employed with the permission of the Superintendent, subject to such restrictions as may be prescribed in the rules made under this Act - Sub-section (2) states that no criminal prisoner sentenced to labour or employed on labour at his own desire shall, except on an emergency, with the sanction in writing of the Superintendent be kept to labour for more than 8 hours in a day - Sub-sections (3) and (4) deal with medical examination and check-up and the placement of criminal prisoners on work based on their health - The Office of the Director General (Prisons), Prison Headquarters, Tihar, New Delhi, released Standing Order 38 bearing No.F.10(7832)/CJ/Legal/2012/2626 dated 24.05.2012 laying down rules relating to the employment of convicts for the guidance of the prison staff in accordance with the provisions mentioned in the Delhi Jail Manual - Delhi

Prisons (Definition) Rules, 1988 - r.2(k).

Wages paid to prisoners - Determination of - Tihar Jail, Delhi - Held: The rate of wages provided to convicts in Tihar Jail is prepared by a Wage Fixation Committee constituted by Government of NCT of Delhi - The Committee decides wages keeping in view the present economic scenario, minimum wages notified by the Govt. of Delhi for workers, the expenses on the upkeep of a prisoner and deduction towards the Welfare Fund - The scale of wages paid to prisoners in various States is also taken into consideration - The Committee also considers the criteria for wages as prescribed in Model Prison Manual for the superintendence and management of prisons in India formulated by the Bureau of Police Research and Development (BPR&D), Ministry of Home Affairs, Government of India.

Case Law Reference:

(1998) 7 SCC 392 relied on Para 9

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1186 of 2012.

From the Judgment and Order dated 19.05.2011 of the High Court of Delhi at New Delhi in Criminal Misc. Case No. 2243 of 2010.

Prachi Bajpai for the Appellant.

Sidharth Luthra, ASG, T.A. Khan, Sidharth Dave, Amit Kumar, B.V. Balram Das, Anil Katiyar for the Respondents.

The Order of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the final order dated 19.05.2011 passed by the High Court of Delhi at New Delhi in

Criminal Misc. Case No. 2243 of 2010 whereby the High Court disposed of the petition filed by the appellant herein.

3. **Brief facts:**

(i) The appellant was convicted by the trial Court in case FIR No. 487 of 1995 under Sections 323, 342, 307 read with Section 34 of the Indian Penal Code, 1860 (in short 'IPC') and sentenced to rigorous imprisonment (RI) for 10 years and, thereafter, the High Court, in an appeal filed by the appellant, reduced the period of sentence to 5 years. The appellant remained in Tihar Central Jail, New Delhi from 24.03.2007 to 23.12.2010 i.e., for a period of 3 years and 10 months after grant of remission. During this period, she was allotted work in Medical Inspection (MI) room as 'Sewadar' (Assistant) for assisting the Doctors in OPD of Jail No. 6. Apart from that, she was also taking care of the cleanliness of the said room till her release.

(ii) In the year 2009, the appellant, through her husband, filed an application before the Superintendent of Jail for the payment of wages for the work done during her custody in prison but the same was rejected. Aggrieved by the same, he filed a complaint before the visiting Judge, Additional Sessions Judge (ASJ) for the release of wages for the work done by his wife. After perusing the documents on record, by order dated 08.04.2010, the visiting Judge (ASJ) rejected the said complaint.

(iii) Aggrieved by the said order, the appellant filed a petition under Section 482 of the Code of Criminal Procedure, 1973 (in short 'the Code') before the High Court of Delhi for quashing the order dated 08.04.2010, passed by the visiting Judge (ASJ) and also prayed for the release of her wages. The High Court, by impugned order dated 19.05.2011, disposed of the petition taking note of the fact that the appellant has already been released from jail and relying upon the affidavit

filed on behalf of the DIG (Prisoners) stating therein that the prisoners who perform hard labour are given the wages and the appellant performed soft labour work during her period in jail and whenever the appellant was given hard labour work, she had drawn wages for that period.

(iv) Challenging the said order, the appellant has filed this appeal by way of special leave before this Court.

4. Heard Ms. Prachi Bajpai, learned counsel for the appellant and Mr. Sidharth Luthra, learned Additional Solicitor General for the respondents.

5. Ms. Prachi Bajpai, learned counsel for the appellant, after taking us through the entire materials including the impugned order of the High Court, submitted that inasmuch as the convicts working in M.I. Room of another Jail were getting payments for the same work, the appellant was denied and paid wages only for few months which aspect has not been considered by the High Court. According to the learned counsel, the Jail Authorities and the High Court failed to appreciate that the appellant was throughout engaged in M.I. room for assisting doctors in OPD and was taking care of the cleanliness till her release, hence, she is entitled for wages in terms of various Government Orders for the said period.

6. On the other hand, Mr. Sidharth Luthra, learned ASG after placing relevant circulars/instructions/orders applicable to various types of prisoners, their eligibility, entitlement of wages for their work and details about the work done and wages paid to the appellant submitted that she was paid as per the rules and she is not entitled to any further amount.

7. We have considered the rival submissions and perused all the relevant materials. In order to understand the case better, it is useful to refer certain relevant provisions applicable to the prisoners in Delhi.

Types of Imprisonment

Section 53 of the IPC defines 5 kinds of punishment which includes punishment for life and two other kinds of imprisonment i.e., rigorous and simple imprisonment. Rigorous imprisonment is one which is required by law to be completed with hard labour. Section 36 of the Delhi Prisons Act, 2000 prescribes that the convicts sentenced to simple imprisonment shall be employed only so long as they desire but cannot be punished for neglect of work.

A person sentenced to simple imprisonment cannot be required to work unless he volunteers himself to do the work. But the Jail officer who requires a prisoner sentenced to rigorous imprisonment to do hard labour would be doing so as enjoined by law and mandated by the court. [Vide *State of Gujarat & Anr. vs. Hon'ble High Court of Gujarat,* (1998) 7 SCC 392].

Thus, while a person sentenced to simple imprisonment has the option of choosing to work, a person sentenced to rigorous imprisonment is required by law to undergo hard labour. The undertrials are not required to work in Jail.

Classification of Labour

Rule 43 of the Delhi Prisons (Transfer of Prisoners, Labour and Jail Industry, Food, Clothings and Sanitation) Rules, 1988 (in short 'the Delhi Prisons Rules') classifies labour into three classes, namely, Hard Labour, Medium Labour and Light Labour. Hard Labour is further divided into three categories; skilled, semi-skilled and unskilled. The Inspector General may, with the sanction of the Delhi Administration from time to time, prescribe the description of works to be carried out and the tasks to be fixed for labour in respect of each class. It is brought to our notice that since the Delhi Jail Manual does not give detailed description as to what kind of work/task will fall under which category of labour, the Jail Authorities rely upon the

Punjab Jail Manual framed under the Prisons Act, 1894 for determining the same.

Distinction between work given to male and female convicts:

Under Rule 45 of the Delhi Prisons Rules, female convicts shall not, in any case, exceed two third of the maximum task for hard labour and medium labour, respectively, prescribed in respect of adult male convicts.

Employment of Prisoners

Chapter VII of the Delhi Prisons Act, 2000, deals with the "Employment of Prisoners". Under Rule 2(k) of the Delhi Prisons (Definition) Rules, 1988, a convict is described as a Criminal prisoner.

Section 35 of the Delhi Prisons Act, 2000 deals with employment of criminal prisoners. Sub-section (1) states that a criminal prisoner desiring to be employed on labour, may be employed with the permission of the Superintendent, subject to such restrictions as may be prescribed in the rules made under this Act.

Sub-section (2) states that no criminal prisoner sentenced to labour or employed on labour at his own desire shall, except on an emergency, with the sanction in writing of the Superintendent be kept to labour for more than 8 hours in a day.

Sub-sections (3) and (4) deal with medical examination and check-up and the placement of criminal prisoners on work based on their health.

The Office of the Director General (Prisons), Prison Headquarters, Tihar, New Delhi, released Standing Order 38 bearing No.F.10(7832)/CJ/Legal/2012/2626 dated 24.05.2012 laying down rules relating to the employment of convicts for the

guidance of the prison staff in accordance with the provisions mentioned in the Delhi Jail Manual.

Determination of wages:

The rate of wages provided to convicts in Tihar Jail is prepared by a Wage Fixation Committee constituted by the Principal Secretary (Home), Government of NCT of Delhi. The said Committee comprises of: (i) DIG (Prisons) as Chairperson, (ii) Dy. Secretary (Finance expenditure) and (iii) Deputy Commissioner of Labour as Members.

The Committee decides wages keeping in view the present economic scenario, minimum wages notified by the Govt. of Delhi for workers, the expenses on the upkeep of a prisoner and deduction towards the Welfare Fund. The scale of wages paid to prisoners in various States was also taken into consideration.

The Committee also considers the criteria for wages as prescribed in Model Prison Manual for the superintendence and management of prisons in India formulated by the Bureau of Police Research and Development (BPR&D), Ministry of Home Affairs, Government of India. It also takes into consideration the rate of minimum wages notified by the Delhi Govt. in the notification dated 18.03.2011 which is as under:-

Category	Rates w.e.f. 01.02.2010 (Rupees)	Revised rates from 01.02.2011 Per month	(Per day)
Unskilled	5278.00	6084.00	234.00
Semi-skilled	5850.00	6734.00	259.00
Skilled	6448.00	7410.00	285.00

The office of the Director General (Prisons), Prison

Headquarters, Tihar, New Delhi, released Standing Order - 10 bearing No. PS/DG(P)/2011/902-911 dated 27.07.2011 regarding the revision of wages to the convicts. The following is the latest wage structure for the prisoners.

Remuneration Wages	Wages credited to the Welfare Fund	Net Payable
Unskilled - 70.00	18.00	52.00
Semi-skilled - 81.00	20.00	61.00
Skilled - 99.00	25.00	74.00

Details of the appellant relating to her custody

The appellant was convicted by the trial Court in case FIR No. 487 of 1995 under Sections 323, 342, 307 read with Section 34 IPC and sentenced to RI for 10 years. Thereafter, the High Court of Delhi reduced the sentence of the appellant to RI for 5 years. The appellant was admitted in jail on 24.03.2007 and subsequently released on 23.12.2010. The total period undergone by the appellant in custody is 3 years 10 months after grant of remission. During this period, the appellant was assigned work in MI room as Sewadar which includes assisting Doctors in OPD and 'Mulhiza' and for additional labour allotted to her, she was paid wages at Rs. 44 for 8 hours.

8. By placing relevant certificates/orders/statement of accounts, learned ASG has brought to our notice that the appellant was allotted hard labour for the period w.e.f. September, 2009 to March, 2010 and the wages were duly paid to her in accordance with the rates prevalent for the aforementioned period. In support of the above claim, he also produced a copy of the Jail Account Ledger Statement relating to the wages prevalent at that time. In addition to the above information, learned ASG has also placed the relevant accounts relating to payment of wages duly acknowledged by the

appellant. On the other hand, Ms. Prachi Bajpai, learned counsel for the appellant, while accepting various circulars/orders issued by the Government/Jail Authorities, strongly denied the claim that the appellant had been paid wages for the whole period she worked. In other words, according to the counsel, except for the period October-December, 2009 and January, 2010 for her work in M.I. room, she was not paid for any other period. It is also the stand of the counsel for the appellant that even for the said period, the appellant was paid only due to the interim orders passed by the High Court. Learned counsel for the appellant also refuted the claim of signatures in the Ledger produced by learned ASG during the course of hearing. She also pointed out that the appellant-convict did not put her signature as shown in the Ledger which was produced before this Court. She also pointed out that except for the above mentioned period, she was not paid any amount, though according to her, she attended all kinds of work in M.I. room. She also pointed out that the stand taken by the Jail Authorities before the visiting Judge (ASJ), High Court and before this Court is contradictory in nature and cannot be accepted. Finally, learned counsel for the appellant asserted that the stand of the Jail Authorities that the appellant had been paid all her wages is blatantly wrong and not acceptable.

9. In the earlier part of our order, we have highlighted various provisions applicable to convicts in prison, particularly, in Tihar Jail. It is the simple case of the appellant that during her actual custody, viz., 3 years 10 months, she was assigned work in M.I. room as Sewadar (Assistant) which includes assisting Doctors in OPD and 'Mulhiza' and additional labour was also allotted to her and except for the above mentioned period, she was not paid any wages. On the other hand, it is the definite case of the jail authorities that for the work done, the convict had been paid wages as per the circulars/orders applicable to her.

10. In view of the conflicting stand taken by both the sides

and assertion of the appellant about her signature and certain entries in the Ledger, in order to do substantial justice, we permit the appellant to make a fresh representation to the visiting Judge giving all the details about the work done during the period of custody within a period of 4 weeks from today. On receipt of the representation, we direct the visiting Judge to inspect and peruse the Ledgers/documents with the assistance of the jail authorities in the presence of the appellant duly assisted by Supreme Court Legal Services Committee, preferably, Ms. Prachi Bajpai, and pass an order within a period of 3 months thereafter. The said decision has to be communicated to the appellant and the respondent-Jail Authorities. In the ultimate inquiry, if it is found that the appellant is entitled to any amount in addition to the amount already settled as wages, the same shall be paid within a period of 4 weeks thereafter. It is further made clear that except highlighting the grievance of the appellant and various circulars/orders of the Jail Authorities, we have not expressed anything on the merits of the claim of either party.

11. The appeal is disposed of with the above direction.

B.B.B. Appeal disposed of.

M/S SALORA INTERNATIONAL LTD.
v.
COMMISSIONER OF CENTRAL EXCISE, NEW DELHI
(Civil Appeal No. 4427 of 2003)

SEPTEMBER 7, 2012

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

CENTRAL EXCISE TARIFF ACT, 1985:

First Schedule - Tariff Entry 8528 or 8529 - 'Television Receivers' or 'Parts' thereof - Components of Television sets - Manufactured by assessee - Assembled in factory itself to check the working of each television set - Then television sets disassembled and transported as parts to various satellite units of the assessee where the separate components are reassembled - Held: The consequence of this is that the goods assembled at the satellite units would be identifiably the same as those assembled together by the assessee in its factory for the purpose of testing, as all such parts are already numbered and matched - This element of identifiability shall take the goods manufactured by the assessee away from being classified as 'parts', and they will be classified as identifiable 'Television Receivers' and, as such, rightly classified by Revenue under Tariff Entry 8528.

INTERPRETATION OF STATUTES:

Tariff Entries in First Schedule to Central Excise Tariff Act, 1985 - Interpretation of - Held: Resort must first be had only to the particular tariff entries, along with the relevant Section and Chapter Notes, to see whether a clear picture emerges - It is only in the absence of such a picture emerging, that recourse can be made to the Rules for Interpretation - In the instant case, Section Note 2 of Section XVI being not applicable, there is no bar to application of r.2 of the Rules

for Interpretation to the goods produced and transported by assessee and in terms of this Rule the said goods do, in fact, possess the essential character of 'Television Receivers' - Rules for Interpretation of the Tariff.

The appellant-assessee, a manufacturer of various components of television sets, was issued a show-cause notice dated 31.3.1990 as to why the goods manufactured by it were not liable to be classified under sub-heading 8528.00 of the Tariff as 'Television Receivers' rather than under Entry 8529.00 as 'parts' of the same. Ultimately, the Collector (Appeals), and the Income Tax Appellate Tribunal accepted the case of the Revenue and held the goods manufactured by the assessee liable to be classified under Tariff Entry 8528 as 'Television Receivers' rather than under Tariff Entry 8529 as 'parts' thereof.

Dismissing the appeal of the assessee, the Court

HELD: 1.1 As regards the applicability of the Rules for Interpretation vis-à-vis the Section Notes and Chapter Notes in the Tariff Schedule, resort must first be had only to the particular tariff entries, along with the relevant Section and Chapter Notes, to see whether a clear picture emerges. It is only in the absence of such a picture emerging, that recourse can be made to the Rules for Interpretation. [para 19 and 20] [973-F; 974-C-D]

Commissioner of Central Excise, Nagpur Vs. Simplex Mills Co. Ltd. **2005 (2) SCR 441 = (2005) 3 SCC 51 - relied on.**

Commissioner of Customs Vs. M/S Sony India Ltd. **2008 (13) SCR 873 = (2008) 13 SCC 145 - distinguished.**

Union of India vs. Tara Chand Gupta **(1971) 1 SCC 486 - cited.**

1.2 In the matter at hand, the entire case of the Revenue is based on an application of r. 2(a) of the Rules for Interpretation of Tariff to the goods produced by the appellant. However, the applicability of this Rule cannot be established unless the classification is first tested against the relevant Section and Chapter Notes. In this case, the relevant Section Note is Section Note 2 to Section XVI of the Tariff, which contains a clear stipulation to the effect that 'parts' of goods mentioned in the Chapters specified therein, shall in all cases be classified in their respective heading. [para 21-22] [974-D-E; 975-A, B]

1.3 In view of the unique facts of the instant case, the goods of the appellant may not be said to be 'parts' as per Section Note 2 to Section XVI of the Tariff. The appellant not only used to assemble all parts of the Television Receivers and make complete television sets, but the said Television Receivers were also operated in the manufacturing unit of the appellant and thoroughly checked and only upon it being confirmed that the Television Receivers were complete in all respects, they were disassembled and along with relevant material and individual serial numbers, sent to the various satellite units. Once the Television Receivers are assembled or are made completely finished goods, the manufacturing process is over. Whether they are sent to the satellite units of the appellant in its complete form or in a disassembled form is irrelevant. [para 24] [975-F-H; 976-A]

Commissioner of Central Excise, Nagpur Vs. Simplex Mills Co. Ltd. **2005 (2) SCR 441 = (2005) 3 SCC 51 - relied on.**

Commissioner of Customs Vs. M/S Sony India Ltd. **2008 (13) SCR 873 = (2008) 13 SCC 145 - distinguished.**

1.4 It is seen from the material on record, that at the time of the parts of the TV set being transported from the factory of the appellant, the parts manufactured by it are already identified as distinct units. As it can be seen from the affidavit of the Revenue, which has not been controverted by the appellant, the parts manufactured by it are matched and numbered within the factory itself, and also assembled together to receive pictures for the purpose of testing and quality control. The consequence of this is that the goods assembled at the satellite units would be identifiably the same as those assembled together by the appellant in its factory for the purpose of testing, as all such parts are already numbered and matched. This element of identifiability shall take the goods manufactured by the appellant away from being classified as 'parts', and they will be classified as identifiable Television Receivers. The fact that the packing material for the products is also manufactured and transported by the appellant further lends credence to this conclusion. [para 26] [976-C-F]

1.5 Section Note 2 to Section XVI of the Tariff being not applicable, there is no bar to the application of r.2 of the Rules for Interpretation to the goods transported by the appellant. The terminology of the Rule is wide enough to cover the goods transported by the appellant, and it cannot be said that the processes required to be carried out at the satellite units are so vital to the manufacture of the Television Receivers as to render the goods transported by the appellant lacking the 'essential character' of Television Receivers. Rule 2(a) of the Rules for Interpretation has been couched in wide terms, and in terms of this Rule, the goods produced by the appellant do in fact possess the essential character of Television Receivers. [para 29-30] [977-C-G]

1.6 Looking to the facts of the case, it is not in dispute that the complete Television was manufactured

by the appellant and, therefore, the Revenue had rightly classified the goods- product as complete Television set even though it was subsequently disassembled. [para 25] [976-A-B]

1.7 As regards the plea of double-taxation, it is always open to the satellite units of the appellant to avail input tax credit on the duty paid by the appellant on the goods transported by them. [para 31] [977-G; 978-A]

1.8 The Tribunal did not commit any error while passing the impugned order. [para 32] [978-B]

Case Law Reference:

2008 (13) SCR 873	**distinguished**	**para 11**
(1971) 1 SCC 486	**cited**	**para 12**
2005 (2) SCR 441	**relied on**	**para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4427 of 2003.

From the Judgment and Order dated 01.04.2003 the Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi in Appeal No. E/1553/02-B being final Order No. 244/03-B.

Dushyant Dave, Meenakshi Arora, Aniruddha Deshmukh, Mohit D. Ram. P. Kataki, Vaishnavi Krishnamani for the Appellant.

P.P. Malhotra, ASG, Harish Chandra, Rachna Joshi Issar, Arti Singh, B. Krishna Prasad for the Respondent.

The Judgment of the Court was delivered by

ANIL R. DAVE, J. 1. The challenge in this appeal is to an order dated 1st April, 2003 passed by the Customs, Excise and Gold (Control) Appellate Tribunal at New Delhi (in short 'The Tribunal') in E/APPEAL No. 1553/02-B whereby the Tribunal has dismissed the appeal filed by the appellant herein and upheld the Order-in-Appeal passed by the Commissioner (Appeals).

2. The issue under consideration in this appeal is whether the goods manufactured by the appellant are liable to be taxed as 'Parts of Television Receivers' falling under Tariff Entry 8529 of the Central Excise Tariff contained in the First Schedule to the Central Excise Tariff Act, 1985 (in short 'the Tariff') or as 'Television Receivers' under Tariff Entry 8528 of the Tariff, for the year 1989-90.

3. The appellant is a manufacturer of various components of television sets. The components are manufactured at its factory at Delhi. Thereafter, the said components are assembled in the same factory for the purpose of testing of each component and for checking the working of each television set. Thereafter the television sets so assembled are disassembled and then transported as parts to various satellite units of the appellant company at different places. In these satellite units, the separate components are re-assembled and, as per the appellant, some further processes are carried out in order to make those sets marketable. The issue is whether such components, which are manufactured at and transported from the factory of the appellant at Delhi are liable to be assessed as 'Television Receivers' or as 'Parts of Television Receivers'.

4. The appellant was issued a show-cause notice dated 21.3.1990 by the Assistant Collector, New Delhi, whereby it was asked to show-cause as to why the goods manufactured by the appellant were not liable to be classified under sub-heading 8528.00 of the Tariff as 'Television Receivers', rather than under Entry 8529.00, as 'parts' of the same. The appellant replied to the show-cause notice that the goods/components as transported from its factory did not possess the essential characteristics of finished Television Receivers as required by

Rule 2(a) of the Rules for Interpretation of the Tariff (in short the 'Rules for Interpretation'), and also detailed the various further processes required to be performed on those goods for them to be considered as complete Television Receivers. These contentions of the appellant appear to have been accepted as no further action was taken by the Revenue until the year 1993.

5. Thereafter, the Collector of Central Excise, exercising his power under Section 35E(2) of the Central Excise and Salt Act, 1944 vide order dated 18.02.1994 directed the Assistant-Collector to file an appeal before the Collector, Central Excise (Appeals) for setting aside the approval granted to the classification of the goods of the appellant. The Collector (Appeals) by order dated 21/22.07.1994 dismissed the appeal filed by the Department.

6. Against the aforestated order, the Department preferred an appeal before the Tribunal. The Tribunal by its order dated 18.02.2000 remanded the matter to the Collector (Appeals), on finding that the earlier order of the Collector (Appeals) was a non-speaking order and violative of the principles of natural justice. Consequently, the Collector (Appeals) in the remand proceedings decided the issue in favour of the Department vide order dated 26.06.2002. Against this, the appellant filed an appeal before the Tribunal, wherein the order impugned herein was passed. By the impugned order, the Tribunal has accepted the contentions of the Department and held the goods manufactured by the appellant liable to be classified under Tariff Entry 8528 as 'Television Receivers' rather than under Tariff Entry 8529 as 'parts' thereof.

7. At the outset, recourse may be had to the respective Tariff Entries during the relevant period:

> **"8528.00** - Television Receivers (including video monitors and video projectors), whether or not incorporating radio broadcast receivers or sound or video recording or reproducing apparatus.

> **8529.00** - Parts suitable for use solely or principally with the apparatus of heading Nos. 85.25 to 85.28."

8. Rules 1 & 2 of the Rules for the Interpretation of Excise Tariff framed under Section 2 of the Act read as under:

> "1. The titles of Sections and Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the provisions hereinafter contained.
>
> 2. (a) Any reference in a heading to goods shall be taken to include a reference to those goods incomplete or unfinished, provided that, the incomplete or unfinished goods have the essential character of the complete or finished goods. It shall also be taken to include a reference to those goods complete or finished (or falling to be classified as complete or finished by virtue of this rule), removed unassembled or disassembled."

9. Mr. Dushyant Dave, learned senior counsel appearing for the appellant contended that the aforestated Rules of the Rules for Interpretation may not be taken recourse to in the instant case, as there exists a clear stipulation to the contrary in the Section Notes to Section XVI of the Tariff, where the headings involved herein are located. Note 2 of the Section Notes to Section XVI is as follows:

> "2. Subject to Note 1 to this Section, Note 1 to Chapter 84 and to Note 1 to Chapter 85, parts of machines (not being parts of the articles of heading No. 84.84, 85.44, 85.45, 85.46 or 85.47) are to be classified according to the following rules :
>
> a. parts which are goods included in any of the headings of Chapter 84 or Chapter 85 (other than headings

84.85 and 85.48) are in all cases to be classified in their respective headings;"

10. He further submitted that the classification of the goods manufactured by the appellant was not correct. According to him, as per the sound principle of classification and more particularly as per the provisions of interpretative Rule 1, the goods ought to have been classified under Tariff Entry 8529 because the appellant had manufactured only parts of Television Receivers. He submitted that invocation of Rule 2(a) of the Rules for Interpretation was not justified because looking to the facts of the case, the provisions of Rule 1 of the Rules for Interpretation would apply because of the specific head for 'parts of Television Receiver', being Tariff Head 8529.00.

11. The learned senior counsel cited the decision of this Court in *Commissioner of Customs Vs. M/S Sony India Ltd.* [(2008) 13 SCC 145], wherein a case involving analogous headings as those in this case in the Schedule to the Customs Tariff Act, the goods imported by the assessee therein were held to be 'parts of Television Receivers', and further interpretative Rule 2(a) was held to be inapplicable to such goods. He further contended that as the goods transported by the appellant were substantially in the same position and condition as those transported by the assessee in the above case, the ratio in the said decision would be applicable to this case also.

12. In the written submissions submitted on behalf of the appellant, it was stated that keeping in mind the law laid down by this Court in *Union of India vs. Tara Chand Gupta* [(1971) 1 SCC 486], the goods manufactured by the appellant ought to have been classified under Tariff Entry 8529.00 and an effort was made to compare the facts of the said case with the present one by submitting that in the case referred to hereinabove, parts of scooter, in completely knocked down condition, were treated as parts of the scooter and not scooter itself.

13. He further submitted that the Rule 1 of the Rules for Interpretation clearly denotes that the title of Sections and Chapters are provided for ease of reference only but for legal purposes, the classification should be determined according to the terms of the headings, and as the appellant had manufactured only parts of Television Receivers, the Revenue ought not to have classified the goods manufactured by the appellant as 'Television Receivers' under a different head instead of as 'parts' of the same.

14. In addition to these contentions, he also contended that if the goods manufactured by it are held to be Television Receivers covered by Tariff Entry 8528 mentioned above, it would lead to double-taxation as the satellite units, where such goods are finally assembled into Television Receivers, are in fact paying excise duty on the assembled goods under the above Tariff Entry 8528.

15. On the other hand, on behalf of the revenue, Mr. P.P. Malhotra, learned Additional Solicitor General justified the judgment delivered by the Tribunal. He tried to narrate the facts which lead the Revenue to classify the goods manufactured by the appellant as complete television for the reasons, some of which are as follows:

a. The appellant was assembling manufactured parts of TV sets and operating TV sets so as to check whether the entire set was complete and operative and then the TV sets were being disassembled;

b. The appellant was giving the same serial number on the chassis as well as the sub assemblies of the TV sets;

c. The matching of the said chassis and sub-assemblies was done at the factory of the appellant itself;

d. The packing material and literature were supplied by the appellant along with the disassembled parts.

….etc.

16. He further contended that the goods produced and temporarily assembled by the appellant, being essentially/ substantially complete Television Receivers in a disassembled state, would necessarily have to be classified as such, owing to Rule 2(a) of the Rules for Interpretation. It was a simple contention of the Revenue that the appellant had chosen to disassemble the television sets as parts before transporting them in order to avail the lower duty payable on such parts.

17. We have heard the learned counsel and considered the facts of the case. We have also gone through the judgments cited by the learned counsel and upon doing so, we are of the view that the Tribunal did not commit any error while passing the impugned order.

18. The main question that arises for consideration in this case is that of the applicability or otherwise of Rule 2(a) of the Rules for Interpretation to the goods of the Appellant, and the effect of Section Note 2 to Section XVI of the Tariff, reproduced above, on the applicability of such provision.

19. On the question of the applicability of the Rules for Interpretation vis-à-vis the Section Notes and Chapter Notes in the Tariff Schedule, the rule laid down by this Court in *Commissioner of Central Excise, Nagpur Vs. Simplex Mills Co. Ltd.* (2005) 3 SCC 51 may be seen to be applicable in this case. In that decision, a three judge bench had the following to say on the subject:

"The rules for the interpretation of the Schedule to the Central Excise Tariff Act, 1985 have been framed pursuant to the powers under Section 2 of that Act. According to Rule 1 titles of Sections and Chapters in the Schedule are provided for ease of reference only. But for legal purposes,

classification "shall be determined according to the terms of the headings and any relevant section or Chapter Notes". If neither the heading nor the notes suffice to clarify the scope of a heading, then it must be construed according to the other following provisions contained in the Rules. Rule-I gives primacy to the Section and Chapter Notes along with terms of the headings. They should be first applied. If no clear picture emerges then only can one resort to the subsequent rules."

20. Therefore, as clearly specified by the above rule, resort must first be had only to the particular tariff entries, along with the relevant Section and Chapter Notes, to see whether a clear picture emerges. It is only in the absence of such a picture emerging, that recourse can be made to the Rules for Interpretation.

21. In the matter at hand, the entire case of the Revenue is based on an application of Rule 2(a) of the Rules for Interpretation to the goods produced by the appellant, however, the applicability of this Rule cannot be established unless the classification is first tested against the relevant Section and Chapter Notes. In this case, the relevant Section Note is Section Note 2 to Section XVI of the Tariff, as reproduced above. The same may be reproduced again here for the purpose of a closer examination:

"2. Subject to Note 1 to this Section, Note 1 to Chapter 84 and to Note 1 to Chapter 85, parts of machines (not being parts of the articles of heading 84.84, 85.44, 85.45, 85.46 or 85.47) are to be classified according to the following rules :

a. parts which are goods included in any of the headings of Chapter 84 or 85 (other than headings 84.85 and 85.48) are in all cases to be classified in their respective headings;

b. …" [Emphasis added]

22. As can be seen from the above, the clear stipulation contained in Section Note 2 is to the effect that 'parts' of goods mentioned in the Chapters specified therein, shall in all cases be classified in their respective heading. In that light, the fundamental enquiry in this case must be that of whether the goods produced by the appellant may be said to be covered by the above Section Note.

23. In view of the above mentioned Section Note, the question that arises here is whether the goods produced by the appellant can be described as 'parts' under the goods included in any of the headings of Chapter 84 or 85. In this respect, it is the contention of the appellant that the goods produced by them shall inevitably have to be considered as 'parts', as they are unable to receive a picture, which is said to be a fundamental requirement for a good to be considered as a 'Television Receiver'. At the first sight, one may find force in this contention. As the test in Section Note 2 is simply that of whether the goods in question are 'parts', it may be convincingly said that as the goods transported by the appellant are incapable of functioning as 'Television Receivers', they shall have to be considered to be 'parts' thereof.

24. However, on closer scrutiny of the unique facts of this case, it is our view, the goods of the appellant may not be said to be 'parts' as per Section Note 2 to Section XVI of the Tariff. The appellant not only used to assemble all parts of the Television Receivers and make complete television sets, but the said Television Receivers were also operated in the manufacturing unit of the appellant and thoroughly checked and only upon it being confirmed that the Television Receivers were complete in all respects, they were disassembled and along with relevant material and individual serial numbers, sent to the various satellite units. Once the Television Receivers are assembled or are made completely finished goods, the manufacturing process is over and we are not concerned as

to what happens subsequently. Whether they are sent to the satellite units of the appellant in its complete form or in a disassembled form is irrelevant.

25. Looking to the facts of the case, it is not in dispute that complete Television was manufactured by the appellant and therefore, in our opinion, the Revenue had rightly classified the goods- product as complete Television set even though it was subsequently disassembled.

26. It is seen from the material on record, that at the time of the parts of the TV set being transported from the factory of the appellant, the parts manufactured by it are already identified as *distinct units*. As it can be seen from the affidavit of the Revenue, which has not been controverted by the appellant, the parts manufactured by it are matched and numbered within the factory itself, and also assembled together to receive pictures for the purpose of testing and quality control. The consequence of this is that the goods assembled at the satellite units would be identifiably the same as those assembled together by the appellant in its factory for the purpose of testing, as all such parts are already numbered and matched. This element of identifiability shall take the goods manufactured by the appellant away from being classified as 'parts', and they will be classified as identifiable Television Receivers. The fact that the packing material for the products is also manufactured and transported by the appellant further lends credence to this conclusion.

27. The facts in the case of *Sony India Ltd.* (supra) may be distinguished in this respect. In that case, the assessee had imported different parts of television sets in 94 different consignments. The said parts were imported separately in bulk, and thereafter, the process of matching, numbering and assembling was carried out once they were in the possession of the assessee. Therefore, it may be seen that what the assessee had imported in that case were merely various parts which could not yet be identified and distinguished as individual Television Receivers such as the parts transported by the

appellant in this case. The said decision is, therefore, distinguishable on facts.

28. For further clarification, it may also be stated that if the appellant had been in the practice of simply manufacturing and transporting parts of Television Receivers in bulk, while leaving the matching and numbering functions to be done at the satellite units, then it could have availed the benefit of Section Note 2, because in such a case, there would not have been any production of *identifiable* television sets such as in the present case.

29. Once the question of applicability of Section Note 2 to Section XVI of the Tariff is answered in the above manner, i.e. in the negative, there may be seen to be no bar to the application of Rule 2 of the Rules for Interpretation to the goods transported by the appellant. Consequently, the only question that remains is with respect to whether such goods shall fall foul of the said Rule.

30. In this regard, despite the attempts of the appellant to establish otherwise, we are unable to see how the goods transported by them shall not be covered by the Rule, especially as a complete or finished article, 'presented unassembled or disassembled'. The terminology of the Rule is wide enough to cover the goods transported by the appellant, and we are not convinced that the processes required to be carried out at the satellite units are so vital to the manufacture of the Television Receivers so as to render the goods transported by the appellant lacking the 'essential character' of Television Receivers. Rule 2(a) of the Rules for Interpretation has been couched in wide terms, and in terms of this Rule, it is our view that the goods produced by the appellant do in fact possess the essential character of Television Receivers.

31. The appellant had also raised the plea of double-taxation; however, in our view once the question of classification of the goods transported by the appellant has been answered

in the above manner, it is not open to us to grant the appellant any relief on this ground alone. Further, it is always open to the satellite units of the appellant to avail input tax credit on the duty paid by the appellant on the goods transported by them.

32. In view of the facts stated hereinabove, we are of the view that the Tribunal did not commit any error while passing the impugned order and, therefore, the appeal is dismissed with no order as to costs.

R.P. Appeal dismissed.

MARUTI NIVRUTTI NAVALE

v.

STATE OF MAHARASHTRA & ANR.

(Criminal Appeal No. 1376 of 2012)

SEPTEMBER 7, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

CODE OF CRIMINAL PROCEDURE, 1973:

s.438 - Anticipatory bail - Complaint against appellant for committing forgery in lease deed and other documents in respect of property belonging to complainant and furnishing false information to Education Authorities - Held: It is true that the parties have also approached civil court for various reliefs - At the same time, considering the seriousness relating to additions/alterations made in various documents, information furnished to the Education Authorities which, according to them, are incorrect, and in order to secure possession of those documents, custodial interrogation of appellant is necessary - Courts below rightly rejected the relief of anticipatory bail - Penal Code, 1860 - ss.420, 465, 468 and 471 r/w s.34 IPC.

Respondent No.2-Trustee of a Charity Trust filed a complaint against the appellant-Founder President and Managing Trustee of a Technical Education Society for offences punishable u/ss 420, 465, 468 and 471 read with s.34 IPC stating that the Charity Trust leased certain properties to the appellant to run the school housed in a building on the said property, under a lease deed for a period of 35 months w.e.f. 15.4.2008, and when on the expiry of the lease period, i.e. on 9.3.2011, the possession of the said building and land was to be handed over back to the Trust, it was revealed that the appellant had made forgery in the lease deed and other documents and asserted his claim over the property. The appellant

applied for anticipatory bail which was also opposed by the State on the ground that he had produced copies of false documents and submitted false information to the Education Department while obtaining permission for running the school. The prayer was declined by the Additional Sessions Judge as also the High Court.

Dismissing the appeal, the Court

HELD: 1.1 The Additional Sessions Judge and the High Court while considering the application for anticipatory bail scrutinized/analysed the materials. It is true that the parties have also approached the civil court for various reliefs. At the same time, there are serious allegations against the appellant relating to corrections/ additions/alterations made in various documents, information furnished to the Educational Authorities which, according to them are incorrect, and allegation that the appellant has made false representation before the Public Authority on the basis of those documents for obtaining necessary permission. This Court is, therefore, of the view that in order to bring out all the material information and documents, more particularly, to ascertain in respect of the documents which were alleged to have been forged and fabricated and which are in possession of the appellant and in order to secure their possession, the custodial interrogation is necessary. Therefore, in view of the mandate prescribed in s.438 of the Code, the Additional Sessions Judge and the High Court were right in rejecting the relief of anticipatory bail. [Para 12, 14] [986-D-H; 987-A, C]

1.2 It is stated that after the order of this Court dated 23.09.2011 granting interim protection to the appellant, he has misused his liberty in creating hindrance to the investigation and continues to scuttle it and also has been intimidating and pressurizing the complainant as well as the prosecution witnesses. Accordingly, the

interim protection granted by this Court on 23.09.2011 shall stand vacated. [Para 13,15] [987-B, D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1376 of 2012.

From the Judgment & Order dated 19.09.2011 of the High Court of Judicature of Bombay in Criminal Application No. 786 of 2011.

Mukul Rohtagi, Ranjit Kumar, Krishnan Venugopal, V. Prakash, Vineet Naik, Sukand Kulkarni, Shivaji M. Jadhav, Brij Kishor Sah, Anish R. Shah for the Appellant.

Prashant Bhushan, Chinmoy Khaldkar, Sanjay V. Kharde, Asha Gopalan Nair, for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the final order dated 19.09.2011 passed by the High Court of Judicature at Bombay in Criminal Application No. 786 of 2011 whereby the High Court dismissed the application for anticipatory bail filed by the appellant herein.

3. Brief facts:

(a) The appellant is the Founder President and Managing Trustee of Sinhgad Technical Education Society, Pune (in short 'the Society'). The Society is engaged in imparting formal and informal education by establishing various schools, colleges and institutions in the State of Maharashtra. Respondent No.1 is the State and Chainsukh Sobhachand Gandhi-Respondent No.2 herein is the original Complainant and is a Trustee of Pawan Gandhi Charity Trust (in short 'the Trust') working for the upliftment of economically and socially impoverished sections of the society.

(b) Respondent No. 2 was running a school on land bearing Survey No.154/6/1 admeasuring 57 acres situated at Ambavet, Tal. Mulshi, Dist. Pune, on which a building in the area of 650 sq. mts. was constructed. In the year 2008, it was decided to run the School with the help of other educational institutions by leasing out the property. Respondent No. 2 approached the appellant herein for the same. The appellant herein has also shown interest in acquiring lease hold rights in order to run school activities in the said property. Pursuant to the same, negotiations took place and it was offered to lease out the said school building for a period of 87 years and to sell the other property, viz., land bearing Survey No. 165/1 admeasuring 8500 sq. mts., Survey No. 162 admeasuring 7600 sq. mts., Survey No. 160/1 admeasuring 1900 sq. mts. and Survey No. 161 admeasuring 21300 sq. mts. situated at Ambavet, Tal. Mulshi, Dist. Pune for a consideration of Rs. 3,50,00,000/-.

(c) Accordingly, two separate Memorandums of Understanding (MoUs) were executed on 10.05.2008. Both the memorandums were duly notarized and registered. On 13.05.2008, in order to realize the object, the Trust leased out the said property to the Society for a period of 2 years and 11 months commencing from 15.04.2008 and expiring on 09.03.2011 by way of an interim arrangement for an amount of Rs. 1/- towards lease fee for the entire duration of the lease granted. This deed was duly registered with the office of sub-Registrar, Mulshi (Paud) at S.No. 3701/2008.

(d) On 19.02.2011, the appellant-Society received a legal notice to remove the dead stock and articles kept in the school within 4 days and further to vacate the school and to handover the possession in favour of the Trust alleging breach of the clauses mentioned in lease deed dated 13.05.2008. By reply dated 07.03.2011, the appellant-Society denied the said allegations.

(e) The Trust filed an application under Section 41E of the Bombay Public Trust Act, 1950 before the Joint Charity Commissioner, Pune seeking prohibitory orders against the appellant-Society.

(f) Aggrieved by the inaction of the Trust, the appellant-Society also filed two separate suits bearing Special Civil Suit bearing Nos. 1146 and 1147 of 2011 before the Civil Court, Pune.

(g) On 20.07.2011, respondent No.2 filed a complaint with the Deccan Police Station, Pune under Sections 420, 465, 468 and 471 read with Section 34 of the Indian Penal Code, 1860 which was registered as S.No. 168 of 2011.

(h) Against the said complaint, the appellant filed an application bearing No. 2651 of 2011 before the Court of Additional Sessions Judge, Pune for grant of anticipatory bail. By order dated 29.08.2011, the Sessions Judge dismissed the said application.

(i) Aggrieved by the said order, the appellant preferred Criminal Application No. 786 of 2011 before the High Court. By impugned order dated 19.09.2011, the High Court dismissed the said application. Against the said order, the appellant has filed this appeal by way of special leave petition.

4. Heard Mr. Mukul Rohtagi and Mr. Ranjit Kumar, learned senior counsel for the appellant and Mr. Chinmoy Khaldkar, learned counsel for Respondent No.1-State and Mr. Prashant Bhushan, learned counsel for Respondent No. 2-Complainant.

5. The only point for consideration in this appeal is whether the appellant has made out a case for grant of anticipatory bail under Section 438 of the Code of Criminal Procedure, 1908 (in short 'the Code').

6. Inasmuch as the Additional Sessions Judge, Pune in the

order dated 29.08.2011 and the High Court in the impugned order dated 19.09.2011 adverted to all the factual details relating to the appellant-accused and the Respondent No. 1-State and Respondent No. 2-Complainant, there is no need to traverse the same once again except certain aspects which are essential for the disposal of the present appeal. According to the Complainant/respondent No.2 herein - Pawan Gandhi Charity Trust had been established in the memory of his son and the Trust had a land on which a building was constructed for running a school. The appellant claims to be the founder President and Managing Trustee of the said Society and the Trust had a land bearing Survey No. 154/6/1 admeasuring 57 acres on which building in the area of 650 sq. mts. was constructed. An English Medium School was started in the building in 2005 known as Loyala School. In March, 2008, it was offered to lease out the said school building for a period of 87 years and also to sell other property of the Trust to the Society. Based on the negotiations, two separate Memorandum of Understandings (MoUs) dated 10.05.2008 were signed between the parties.

7. It is the claim of the Complainant-respondent No.2 herein that on 13.05.2008, a lease deed for a period of 35 months w.e.f. 15.04.2008 was executed and registered between the parties and it was agreed not to act upon the two MoUs. On the expiry of the lease period i.e. on 09.03.2011, the Society was to handover the possession of the said building and the land to the Trust.

8. It is the stand of the first respondent-State and the second respondent-Complainant that the present appellant made a forgery in further lease deed dated 07.03.2011 pertaining to the granting of lease for 87 years without the consent of the Complainant. It is also stated that on the same date, the appellant also made a forgery by making additions/alterations in the original draft agreement for lease which was prepared at the time of executing the MoU and got it franked.

It is also their grievance that the document was notarized in the year 2008 and even in the said notarized document, forgery was committed by the appellant. It is the contention of the Complainant that on the basis of the forged document, the appellant asserted his claim over the property.

9. During the course of hearing, Mr. Rohtagi, learned senior counsel for the appellant by taking us through the MoUs and lease deed and also the corrections in those documents submitted that those corrections have been made with the consent of the Complainant and according to him, no forgery has been committed as claimed by the respondents. He pointed out that inasmuch as the sale deed could not take place and the property of the Trust could be leased out for a period of more than 3 years without the permission of the Charity Commissioner, the lease deed for a period of 35 months was executed and registered as stop-gap arrangement with an understanding that the Trust would approach the concerned Assistant Charity Commissioner for necessary permission and, thereafter, the lease deed for a period of 87 years in respect of the school building and the sale deed about the larger property could be executed and registered.

10. In the course of argument, learned counsel appearing for the State vehemently opposed the claim of anticipatory bail and contended that custodial interrogation of the appellant is necessary because he has forged several documents and also submitted false information to the Education Department while obtaining permission for running the school. It is further pointed out that he has also produced copies of false document. It is his claim that unless custodial interrogation of the appellant is granted, it would not be possible to seize all those documents from him. In other words, according to the State, the appellant has committed not only the offence of forgery in respect of private documents but also made false representations and committed offence of cheating by giving false information to the Education Department, thus committed an offence not only

against the State but also against the public in general.

11. Like the counsel appearing for the State, Mr. Prashant Bhushan, learned counsel for the second respondent-Complainant by drawing our attention to various materials including corrections in the documents and several communications with the Educational Authorities as well as the letter dated 04.07.2012 of the Deputy Collector, Maval Sub-division, Pune addressed to Senior Police Inspector, Bundgarden Police Station, Pune submitted that in view of the conduct and involvement in various heinous offences, the appellant is not entitled indulgence by this Court for any relief.

12. As observed above, all the three counsel appearing for the parties took us through MoUs, lease deed and other correspondence/communications with the Educational Authorities as well as the report of the Deputy Collector, Pune, to Senior Police Inspector, Bundgarden Police Station, Pune. It is also relevant to point out that all these materials were scrutinized/analyzed by the Additional Sessions Judge, Pune and the High Court while considering the application for anticipatory bail. It is true that the parties have also approached the Civil Court for various reliefs. At the same time, as pointed out by counsel for the State and the second respondent-Complainant, considering the seriousness relating to corrections/additions/alterations made in various documents, information furnished to the Educational Authorities which, according to them, are incorrect, we are of the view that in order to bring out all the material information and documents, custodial interrogation is required, more particularly, to ascertain in respect of the documents which were alleged to have been forged and fabricated. In the said documents and other materials which are in the possession of the appellant and the allegation against him that he has made false representation before the Public Authority on the basis of those documents for obtaining necessary permission, as pointed out by the State, in order to secure possession of those documents, custodial

interrogation is necessary. For this reason, the Additional Sessions Judge and the High Court rejected the claim for anticipatory bail.

13. In addition to the same, it is stated by the respondents that after the order of this Court dated 23.09.2011 granting interim protection, the appellant has misused his liberty in creating hindrance to the investigation and continues to scuttle it and also intimidating and pressurizing the Complainant as well as the prosecution witnesses.

14. In the light of the above discussion and in view of the mandate prescribed in Section 438 of the Code, we fully agree with the conclusion arrived at by the Additional Sessions Judge and the High Court in rejecting the relief of anticipatory bail. Consequently, the appeal fails and the same is dismissed.

15. In view of our order dismissing the appeal, the interim protection granted by this Court on 23.09.2011 shall stand vacated and the appellant is granted two weeks time from today to surrender and seek regular bail. It is also made clear that the conclusion arrived at by the courts below including the present order relates only to eligibility or otherwise of the relief of anticipatory bail and the trial Court is free to decide the bail application de hors to the above observation and in accordance with law.

R.P. Appeal dismissed.

AMIT KAPOOR

v.

RAMESH CHANDER & ANR.

(Criminal Appeal No. 1407 of 2012)

SEPTEMBER 13, 2012

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

CODE OF CRIMINAL PROCEDURE, 1973:

ss. 397 and 482 – Extent and scope of powers exercisable by High Court u/s. 397 independently or read with s. 482 – Explained – Exercise of jurisdiction u/s. 397 or s. 482 or together, for quashing of charge – Principles culled out – Maxim, 'qnando lex liquid alicuiconcedit, conceder videtur id quo res ipsa non protest.

s. 397 – Revision before High Court challenging the framing of charges against accused for offences punishable u/ss.306 and 448 IPC – High Court quashing the charge for offence punishable u/s. 306 – Held: As per the suicide note left by deceased and the statement of her son, she committed suicide and the abetment by the accused cannot be ruled out at this stage, but is obviously subject to the final view that the court may take upon trial – One very serious averment that was made in the suicide note was that the deceased was totally frustrated when the accused persons took possession of the ground floor of her property, and refused to vacate the same – There could be cases where the circumstances created by the accused are such that a person feels totally frustrated and finds it difficult to continue existence – Grabbing of the property, as alleged in the suicide note and the statement made by the son of the deceased, as well as getting blank papers signed and not giving monies due to them are the circumstances stated to have led to the suicide of the

deceased – Court is not expected to form a firm opinion at this stage but a tentative view that would evoke the presumption referred to u/s 228 of the Code – High Court could not have appreciated or evaluated the record and documents filed with it – It was not the stage – Order of High Court quashing the charge framed for offence punishable u/s. 306 IPC set aside – Penal Code, 1860 – ss. 107 and 306.

ss.227 and 228 – Discharge and framing of charge – Explained.

PENAL CODE, 1860:

ss. 107, 108 and 306 – Ingredients – Explained.

An FIR was registered against the appellant and another on 5.12.2007 in respect of the suicide committed by the deceased on 4.12.2007. The prosecution case as revealed from the suicide note left by the deceased and the statement of her son was that on account of the husband of the deceased falling ill and there being a loss in the family business, the family decided to sell two of its properties through the appellant, who was a property dealer. In the process, the appellant obtained her signatures on some blank papers. Subsequently, the appellant was successful in occupying a portion of the residential house of the deceased initially for a few days, but later when he was asked to vacate, he refused stating that it was his house as he had paid a sum of Rs.24,00,000/- for it. The accused and his son were stated to have threatened the deceased and his family to vacate the house or else they would ruin them and that the deceased would get rid of this only after her death. This was followed by the appellant sending a legal notice dated 1.12.2007 to the deceased, which was received by her on 3.12.2007. The following morning she committed suicide. The trial court framed charges against the accused for offences punishable u/ss 306 and 448 IPC.

However, in a criminal revision filed by the appellant, the High Court quashed the charge for offence punishable u/s 306 IPC.

In the instant appeal filed by the son of the deceased, the issue for consideration before the Court was the extent and scope of the powers exercisable by the High Court u/s 397 independently or read with s. 482 of the Code of Criminal Procedure, 1973 regarding quashing of a charge framed by the trial court.

Allowing the appeal, the Court

HELD: 1.1. Framing of a charge is an exercise of jurisdiction by the trial court in terms of s.228 of the Code of Criminal Procedure, 1973, unless the accused is discharged u/s. 227. Under both these provisions, the court is required to consider the 'record of the case' and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section exist, then the court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima *facie* case. There is a fine distinction between the language of ss. 227 and 228. Section 227 is the expression of a definite opinion; whereas the judgment of the court u/s. 228 is tentative. At the initial stage of framing of a charge, the court is concerned not with proof but with a strong suspicion that the accused has committed an offence,

which, if put to trial, could prove him guilty. All that the court has to see is that the material on record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at that stage. Thus, to say that at the stage of framing of charge, the court should form an opinion that the accused is certainly guilty of committing an offence is an approach which is impermissible in terms of s. 228 of the Code. [paras 10 and 11] [1015-D-G; 1016-D]

State of Bihar v. Ramesh Singh **(1977) 4 SCC 39 – referred to**

1.2. The legislature in its wisdom has used the expression 'there is ground for presuming that the accused has committed an offence'. This has an inbuilt element of presumption once the ingredients of an offence with reference to the allegations made are satisfied, the court would not doubt the case of the prosecution unduly and extend its jurisdiction to quash the charge in haste.The word 'presume' in this context indicates that the truth of the matter has to come out when the prosecution evidence is led, the witnesses are cross-examined by the defence, the incriminating material and evidence is put to the accused in terms of s.313 of the Code and then the accused is provided an opportunity to lead defence, if any. It is only upon completion of such steps that the trial concludes with the court forming its final opinion and delivering its judgment. [para 22] [1027-F-H; 1028-A-B]

State of Maharashtra v. Som Nath Thapa & Ors. **(1996) 4 SCC 659-referred to**

2.1. The inherent as well as the revisional jurisdiction should be exercised cautiously. If the jurisdiction u/s 482 of the Code in relation to quashing of an FIR is circumscribed by the factum and caution, in that event,

the revisional jurisdiction, particularly, while dealing with framing of a charge, has to be even more limited. Section 397 of the Code vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well-founded error and it may not be appropriate for the court to scrutinize the order, which upon the face of it bears a token of careful consideration and appear to be in accordance with law. Where the court is dealing with the question as to whether the charge has been framed properly and in accordance with law in a given case, it may be reluctant to interfere in exercise of its revisional jurisdiction unless the case substantially falls within the stated categories. Even framing of charge is a much advanced stage in the proceedings under the Code. The revisional jurisdiction of the higher court is a very limited one and cannot be exercised in a routine manner. One of the inbuilt restrictions is that it should not be against an interim or interlocutory order. The court has to keep in mind that the exercise of revisional jurisdiction itself should not lead to injustice ex facie. [Para 8-10] [1015-E; 1013-A-C; E-G]

State of West Bengal & Ors. v. Swapan Kumar Guha & Ors. **(1982) 1 SCC 561.**

State of Haryana & Ors. v. Bhajan Lal & Ors. **1992 Supp. (1) SCC 335**

2.2. On the other hand, s. 482 is based upon the maxim *quando lex liquid alicuiconcedit, conceder videtur id quo res ipsa esse non protest*, i.e., when the law gives anything to anyone, it also gives all those things without which the thing itself would be unavoidable. The Section

confers very wide power on the High Court to do justice and to ensure that the process of court is not permitted to be abused. Inherent power u/s 482 being an extraordinary and residuary power, it is inapplicable in regard to matters which are specifically provided for under other provisions of the Code. Normally the court may not invoke its power u/s 482 where a party could have availed of the remedy available u/s 397 itself. The inherent powers u/s 482, are of a wide magnitude and are not as limited as the power u/s 397. Section 482 can be invoked where the order in question is neither an interlocutory order within the meaning of s.397(2) nor a final order in the strict sense. The distinction between a final and an interlocutory order is well known in law. The orders which will be free from the bar of s.397(2) would be orders which are not purely interlocutory but at the same time are less than a final disposal. They should be the orders which do determine some right and still are not rendering the court functus officio of the lis. The provisions of s. 482 are pervasive. It should not subvert legal interdicts written into the same Code but, inherent powers of the High Court unquestionably have to be read and construed as free of restriction. The use of extraordinary powers conferred upon the High Court under this section are, however, required to be reserved as far as possible for extraordinary cases. Where the factual foundation for an offence has been laid down, the courts should be reluctant and should not hasten to quash the proceedings even on the premise that one or two ingredients have not been stated or do not appear to be satisfied if there is substantial compliance to the requirements of the offence. [paras 12 – 14 and 20] [1018-F-G; 1019-A-C, G-H; 1020-A-C-D; 1026-G]

Raj Kapoor & Ors. v. State of Punjab & Ors. **[AIR 1980 SC 258: (1980) 1 SCC 43;** *Dinesh Dutt Joshi v. State of Rajasthan & Anr*. **(2001) 8 SCC 570;** *Janata Dal v. H.S. Chowdhary & Ors*. **(1992) 4 SCC 305;** *Madhavrao Jiwaji Rao Scindia supra State of Bihar & Anr. v. Shri P.P. Sharma & Anr.* **AIR 1991 SC 1260 and** *M.N. Damani v. S.K. Sinha & Ors*. **AIR 2001 SC 2037 – referred to.**

2.4. Upon objective analysis of various judgments of this Court, some of the principles to be considered for proper exercise of jurisdiction, particularly, with regard to quashing of charge either in exercise of jurisdiction u/s 397 or s. 482 of the Code or together, as the case may be, are culled out as follows:

(1) Though there are no limits of the powers of the High Court u/s 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of s. 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases. [Para 19] [1022-G; 1023-A-C]

(2) The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere. [Para 19] [1023-D-E]

(3) The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge. [Para 19] [1023-F]

(4) Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loath to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers. [Para 19] [1023-G-H; 1024-A]

(5) Where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to an accused. [Para 19] [1024-A, B]

(6) The court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender. [Para 19] [1024-C]

(7) The process of the court cannot be permitted to be used for an oblique or ultimate/ulterior purpose. [Para 19] [1024-C]

(8) Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a 'civil wrong' with no 'element of criminality' and does not satisfy the basic ingredients of a criminal offence, the Court may be justified in quashing the charge. Even in such cases, the Court would not embark upon the critical analysis of the evidence. [Para 19] [1024-D-E]

(9) It cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction, the Court is concerned primarily with the allegations taken as a whole

whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice. [Para 19] [1024-F-G]

(10) It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction. [Para 19] [1024-H; 1025-A]

(11) Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained. [Para 19] [1025-A-B]

The power cannot be invoked to stifle or scuttle a legitimate prosecution. The factual foundation and ingredients of an offence being satisfied, the court will not either dismiss a complaint or quash such proceedings in exercise of its inherent or original jurisdiction. [para 18] [1022-E]

Indian Oil Corporation v. NEPC India Ltd. & Ors. **(2006) 6 SCC 736 – relied on**

(12) In exercise of its jurisdiction u/s 228 and/or u/s 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The court has to consider the record and documents annexed with by the prosecution. [Para 19] [1025-C]

(13) Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The court is not

expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie. [Para 19] [1025-D-E]

(14) Where the charge-sheet, report u/s 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge. [Para 19] [1025-F]

(15) Coupled with any or all of the above, where the court finds that it would amount to abuse of process of the Court or that interest of justice favours, otherwise it may quash the charge. The power is to be exercised *ex debito justitiae*, i.e. to do real and substantial justice for administration of which alone, the courts exist. [Para 19] [1025-G-H]

State of West Bengal & Ors. v. Swapan Kumar Guha & Ors. **AIR 1982 SC 949;** *Madhavrao Jiwaji Rao Scindia & Anr. v. Sambhajirao Chandrojirao Angre & Ors.* **AIR 1988 SC 709;** *Janata Dal v. H.S. Chowdhary & Ors.* **AIR 1993 SC 892;** *Mrs. Rupan Deol Bajaj & Anr. v. Kanwar Pal Singh Gill & Ors.* **AIR 1996 SC 309;** *G. Sagar Suri & Anr. v. State of U.P. & Ors.* **AIR 2000 SC 754;** *Ajay Mitra v. State of M.P*. **AIR 2003 SC 1069];** *M/s. Pepsi Foods Ltd. & Anr. v. Special Judicial Magistrate & Ors*. **AIR 1988 SC 128;** *State of U.P. v. O.P. Sharma***(1996) 7 SCC 705;** *Ganesh Narayan Hegde v. s. Bangarappa & Ors.* **(1995) 4 SCC 41;** *Zundu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque & Ors.* **[AIR 2005 SC 9];** *M/s. Medchl Chemicals & Pharma (P) Ltd. v. M/s. Biological E. Ltd. & Ors.* **AIR 2000 SC 1869;** *Shakson Belthissor v. State of Kerala & Anr*. **(2009) 14 SCC 466;** *V.V.S. Rama Sharma & Ors. v. State of U.P. & Ors*. **(2009) 7 SCC 234;** *Chunduru Siva Ram Krishna & Anr. v. Peddi Ravindra Babu & Anr*. **(2009) 11 SCC 203;** *Sheo Nandan Paswan v. State of Bihar & Ors.* **AIR 1987 SC 877;** *State of Bihar & Anr. v. P.P. Sharma & Anr.* **AIR 1991 SC 1260;**

Lalmuni Devi (Smt.) v. State of Bihar & Ors. **(2001) 2 SCC 17;** *M. Krishnan v. Vijay Singh & Anr.* **(2001) 8 SCC 645;** *Savita v. State of Rajasthan* **(2005) 12 SCC 338; and** *S.M. Datta v. State of Gujarat & Anr*. **(2001) 7 SCC 659 – referred to.**

3.1. In the instant case, what weighed with the High Court was that firstly, it was an abuse of the process of court and, secondly, it was a case of civil nature and that the facts, as stated, would not constitute an offence u/s 306 read with s.107 IPC. The High Court itself recorded, that 'this aspect of the matter will get unravelled only after a full-fledged trial'. Once the High Court itself was of the opinion that clear facts and correctness of the allegations made can be examined only upon full trial, there was no need for it to quash the charge u/s 306 at that stage. Framing of charge is a kind of tentative view that the trial court forms in terms of s.228 which is subject to final culmination of the proceedings. [para 21] [1027-C-E]

3.2. The ingredients of s. 306 IPC are that a person commits suicide and somebody alone abets commission of such suicide which renders him liable for punishment. Both these ingredients appear to exist in the instant case in terms of the language of s.228 of the Code, subject to trial. The deceased committed suicide and as per the suicide note left by her and the statement of her son, the abetment by the accused cannot be ruled out at this stage, but is obviously subject to the final view that the court may take upon trial. One very serious averment that was made in the suicide note was that the deceased was totally frustrated when the accused persons took possession of the ground floor of her property, and refused to vacate the same. [para 22] [1028-D-F]

3.3. The High Court has also noticed that a perusal of the suicide note brings to fore the fact that the

petitioner-accused is not only named but his illegal occupation of the house of the deceased is stated to be one of the primary reasons for the deceased in committing the suicide. The statement of the son of the deceased is also on the same line. Once ss. 107 and 306 IPC are read together, then the court has to merely examine as to whether apparently the person could be termed as causing abetment of a thing. An abetter u/s 108 is a person who abets an offence. It includes both the person who abets either the commission of an offence or the commission of an act which would be an offence. Explanation (1) to. S. 107 has been worded very widely. [para 24] [1029-C-H; 1030-A]

Goura Venkata Reddy v. State of A.P. **[(2003) 12 SCC 469 – referred to**

3.4. A person making wilful misrepresentation or wilful concealment of material fact and such person voluntarily causing or procuring or attempting to cause or procure a thing to be done is said to instigate the doing of that thing. According to the record, the accused had made a wrong statement that he had paid a sum of Rs.24,00,000/- for purchase of the property and the property belonged to him. Whether it was a misrepresentation of the accused and was an attempt to harass the deceased and her family which ultimately led to her suicide is a question to be examined by the court. It would have been more appropriate exercise of jurisdiction by the High Court, if it would have left the matter to be determined by the Court upon complete trial. [para 25] [1030-G-H; 1031-A-C]

Ramesh Kumar v. State of Chhattisgarh **(2001) 9 SCC 618 – Cited**

Chitresh Kumar Chopra v. State (Government of NCT of Delhi) **(2009) 16 SCC 605 – referred to**

3.5. There could be cases where the circumstances created by the accused are such that a person feels totally frustrated and finds it difficult to continue existence. Husband of the deceased was a paralysed person. They were in financial crises. They had sold their property. They had great faith in the accused and were heavily relying on him as their property transactions were transacted through the accused itself. Grabbing of the property, as alleged in the suicide note and the statement made by the son of the deceased as well as getting blank papers signed and not giving monies due to them are the circumstances stated to have led to the suicide of the deceased. The Court is not expected to form even a firm opinion at this stage but a tentative view that would evoke the presumption referred to u/s 228 of the Code. [para 26] [1032-A-D]

3.6. Merely because there was civil transaction between the parties would not by itself alter the status of the allegations constituting the criminal offence. This was not a case where the allegations were so predominately of a civil nature that it would have eliminated criminal intent and liability. On the contrary, it is a fact and, in fact, is not even disputed that the deceased committed suicide and left a suicide note. May be, the accused are able to prove their non- involvement in inducing or creating circumstances which compelled the deceased to commit suicide but that again is a matter of trial. [para 22] [1028-B-D]

3.7. There also appears to be some contradiction in the judgment of the High Court primarily for the reason that if charge u/s 306 is to be quashed and the accused is not to be put to trial for this offence, then where would be the question of trying them for an offence of criminal trespass in terms of s.448 IPC based on some facts, which has been permitted by the High Court. Besides,

The High Court could not have appreciated or evaluated the record and documents filed with it. It was not the stage. [para 22] [1028-H; 1029-A-B]

3.8. Thus, this Court is of the considered view that the finding returned by the High Court suffers from an error of law. It has delved into the field of appreciation and evaluation of the evidence which is beyond the jurisdiction, either revisional or inherent, of the High Court u/s 397 and 482 of the Code. The order of the High Court is set aside. The trial court shall proceed with the trial in accordance with law. [para 27-28] [1032-E-F]

Case Law Reference:

(1977) 4 SCC 39	**Referred to.**	**Para 11**
(1982) 1 SCC 561	**Referred to.**	**Para 9**
1992 Supp. (1) SCC 335	**Referred to.**	**Para 9**
[AIR 1980 SC 258:		
(1980) 1 SCC 43	**Referred to.**	**Para 13**
(2001) 8 SCC 570	**Referred to.**	**Para 14**
(1992) 4 SCC 305	**Referred to.**	**Para 15**
(2006) 6 SCC 736	**Relied on.**	**Para 18**
AIR 1982 SC 949	**Relied on.**	**Para 19**
AIR 1988 SC 709	**Relied on.**	**Para 19**
AIR 1993 SC 892	**Relied on.**	**Para 19**
AIR 1996 SC 309	**Relied on.**	**Para 19**
AIR 2000 SC 754	**Relied on.**	**Para 19**
AIR 2003 SC 1069]	**Relied on.**	**Para 19**

AIR 1988 SC 128	**Relied on.**	**Para 19**
(1996) 7 SCC 705	**Relied on.**	**Para 19**
(1995) 4 SCC 41	**Relied on.**	**Para 19**
[AIR 2005 SC 9]	**Relied on.**	**Para 19**
AIR 2000 SC 1869	**Relied on.**	**Para 19**
(2009) 14 SCC 466	**Relied on.**	**Para 19**
(2009) 7 SCC 234	**Relied on.**	**Para 19**
(2009) 11 SCC 203	**Relied on.**	**Para 19**
AIR 1987 SC 877	**Relied on.**	**Para 19**
AIR 1991 SC 1260	**Relied on.**	**Para 19**
(2001) 2 SCC 17	**Relied on.**	**Para 19**
(2001) 8 SCC 645	**Relied on.**	**Para 19**
(2005) 12 SCC 338	**Relied on.**	**Para 19**
(2001) 7 SCC 659	**Relied on.**	**Para 19**
AIR 1991 SC 1260	**Referred to.**	**Para 20**
AIR 2001 SC 2037	**Referred to.**	**Para 20**
(1996) 4 SCC 659	**Referred to.**	**Para 22**
[(2003) 12 SCC 469	**Referred to.**	**Para 26**
(2009) 16 SCC 605	**Referred to.**	**Para 26**
(2001) 9 SCC 618	**Referred to.**	**Para 26**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1407 of 2012.

From the Judgment & Order dated 13.08.2009 of the High

Court of Delhi at New Delhi in Criminal Revision Petition No. 277 of 2009.

S.K. Dhingra, M.L. Khattar, Shefali Mitra for the Appellant.

P.P. Malhotra, ASG, Shailendra Sharma, Anil Katiyar, Seeraj Bagga, Rajinder Mathur for the Respondents.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Leave granted.

2. A question of law that arises more often than not in criminal cases is that of the extent and scope of the powers exercisable by the High Court under Section 397 independently or read with Section 482 of the Code of Criminal Procedure, 1973 (for short, the 'Code').

3. The facts as they emerge from the record fall within a very narrow compass. On 4th December, 2007, the Rajouri Garden Police Station received information that a woman had committed suicide at C-224, Tagore Garden Extension, Delhi. Upon making entry under DD No.16A of that date, Sub Inspector O.P. Mandal commenced investigation and reached the place of occurrence. The deceased was identified as Komal Kapoor. Her body was sent for post mortem. The Investigating Officer recorded the statement of her son Amit Kapoor and on 5.12.2007 at about 12.15 p.m. an FIR was registered on the complaint filed by him. This FIR was registered against Ramesh Chander Sibbal (the accused) and another, on the basis of the statement of Amit Kapoor and the suicide note. According to Amit Kapoor, he knew Ramesh Chander Sibbal for the last 10 years. Father of Amit Kapoor was running a paint brush business and had purchased property No.C-225, Tagore Garden, Delhi through the said Ramesh Chander Sibbal. Since the father of Amit Kapoor had fallen ill, his mother was also looking after the business. However, the family business suffered acute losses. The family discussed the

possibility of selling their moveable and immoveable property situated at Rohini. The accused persons are stated to have fraudulently obtained signatures of the deceased in this connection. In order to get over the financial crises and to meet their liabilities, the deceased had also discussed the possibility of selling another plot owned by the family situated in Bawana Industrial Area. At that time also, the accused told the deceased that certain documents have to be executed before the plot is sold. On this pretext, he again got some papers signed by them. The accused paid a sum of Rs.5,00,000/- to the deceased at the first instance and thereafter a sum of Rs.3,00,000/- for the plot situated in Bawana as against the market value of Rs.28,00,000/-, with an assurance that the rest of the amount will be paid after execution of the sale deed.

4. Around the time of Dussehra in 2007, the accused approached the deceased claiming that he be given accommodation on a temporary basis for a period of ten to twelve days on the ground floor of her house situated at C-224, Tagore Garden, Delhi on the pretext that his own house was under renovation. The deceased believing him and keeping the relationship in mind, agreed and allowed him to occupy two rooms on the ground floor. It is alleged that while the deceased was away at Haridwar, just before the festival of Diwali, the accused encroached upon one more room in the said house. When the deceased asked the accused to vacate the said premises, he refused and, on the contrary, stated that he had paid a sum of Rs.24,00,000/- and that it was his house. Not only this, the accused as well as his son threatened the deceased and her family to vacate the house or else they would ruin them. It is also alleged that when the deceased asked the accused as to when she will get rid of this problem, he is said to have replied that she could get rid of this only after her death. This was followed by the accused sending a legal notice dated 1st December, 2007 to the deceased which was received on 3rd December, 2007 in which similar claim was made by the accused against the deceased. The trust that she had placed

upon the accused was totally betrayed by him. This led to the deceased slipping into depression. In face of all these circumstances, coupled with the threats extended by the accused persons, the deceased committed suicide on 4.12.2007 at about 7.30 a.m. by hanging herself from a ceiling fan, using a scarf (chunni). It may be noticed at this stage, that the deceased had left a suicide note which can appropriately be reproduced at this stage as under :

"This Ramesh Sibbal, his wife Suman and his son Gaurav.

I am committing suicide for the reason that the aforesaid persons who are residing in our house forcefully, used to say that he was to do white wash so please allow him to keep some of his articles. But after some time, when I came, I saw that the aforesaid person has completely occupied my house as his own house. When my children objected to his aforesaid act, he said that he was to stay there only for a period of 04 days and that he would perform Diwali worship pooja ceremony at his own house but he did not vacate the house. When I had gone to Haridwar, he occupied front room of my house as well after giving beatings to my children. I know this person since that day when he had got my plot of Rohini disposed off. As we both (husband and wife) had not read those papers (relating to disposal of our Rohini plot) so this person kept on obtaining our signatures on the stamp papers relating to our House No. C-224 on the pretext that these papers were required to execute the lease. My husband was ill and I used to remain busy in looking after him. Whenever, he came to us he used to show urgency in taking our signature by stating that the sale proceed of our plot would be given to us that day itself. He kept on giving payment time to time to us and we kept on receiving the same.

Written on the top of page 411

This man gave me only a sum of Rs 05 lacs of my plot

situated in Bawana, but he obtained my signature on Rs 15 lacs as I did not read the contents thereof.

When this man got our Bawana a plot sold, he took the file from us but I do not know as to what he had done with that amount. He used to say that he had given us the entire amount. Whatever amount he gave to us he used to take in writing on a paper. After giving his amount, when I asked for the file, he demanded Rs.05 lacs otherwise, he would reveal it to my daughter that the file was lying with him. He also threatened me to sign the paper without raising any objection otherwise, he would get our children grandson and granddaughter kidnapped. On this, I used to scare and this man used to succeed in getting the stamp papers signed by me. When he got our plot of Rohini sold, he started obtaining my signatures. But at the time when the plot of Rohini was sold, he told me that the plot situated in Bawana has been sold and he asked us to accompany him to sign the papers. Thereafter, he said that the person with whom he has kept the file was saying to him that he could take away the file from that person but only in lieu of keeping papers of some other house with that person. When this man (suggested) me to keep other file (of property) in lieu of taking the said file from that person and this man (also assured me) that he would return those papers of property to me as and when the plot of Bawana would be sold. On this, I handed over the file of property No. C-225 to this man. After that, he told that the plot was not getting higher price and so he offered us to take some amount, if required by us urgently whereupon , this man gave us a sum of Rs. 3 lacs but he kept on taking an interest at the rate of 10%. This man gave us Rs.5 lacs earlier and Rs.3 lacs later so he kept on taking an interest on Rs. 8 lacs. Before Diwali, I gave him a cheque of Rs.2,50,000/- and also gave a sum of Rs.3 lacs in cash to his son. Thereafter, I gave a sum of Rs.2 lacs in cash and his son knows the account of it whose name is

Gaurav. When I gave money, I asked him to give me the written paper as I have returned the as I have returned the money whereupon, he (Gaurav) said that since he had no paper with him that time so the same would be returned to her by his father. This man's son Gaurav and wife Suman are together involved (in this conspiracy). His son also used to do my fake signatures. Whenever, I demanded my file back from him, he used to ask me to return Rs.15 lacs first. On this, when I asked him as to how the amount of Rs.5 lacs became to Rs.15 lacs? He replied that it had become Rs.15 lacs including interest thereon. I kept on giving him interest because of the fear of my family. He has also grabbed my entire money which I had taken on loan basis from somewhere. I kept on giving him interest only for the reason that since he used to promise me to return the papers that day itself or on the next day.

Written on top of page no.415

He said that the money of Bawana's (plot) has been sent by his father and he asked me to write down a receipt of Rs.04 lacs and when I wrote a receipt of it, he said that the money was kept in the motorcycle and he was first giving me the cash but this man's son did not give me the said cash. He asked me to sign the papers related to Bawana's (plot) first and then he would return the paper as well as the money to me. On reaching the house, I demanded the money and paper from him whereupon he said that he had the paper written by me and that he would show that paper to my son and when my son asked him to return the paper, he replied that he would not return the paper as his mother had taken a sum of Rs.15 lacs from him. Kindly take it guaranteed that out of aforesaid Rs.15 lacs I have returned a sum of Rs. of Seven and a half lacs to him. After that, this man's son came to me and said that his father was saying to give papers of property No.C-225 to you and in lieu thereof he asked me to show him the

file of lease. On this, when I started to show him the said file to him then, this man's son Gaurav said that he was just giving me the said paper and saying this he took away the lease file from me and since then, he had not returned me the said paper. Kindly save my house. Please save my children from this person. I have not visited any court to sign. One day these persons crossed all the limits when his wife said that she was agreed to return all the papers in lieu of giving a receipt of the same in writing. After that, they gave me the amount of sale proceeds of Rohini and Bawana's properties. She brought fake papers which were related to some other person's property, to me. I saw that those papers were fake papers and were in English language and when I showed those papers to someone, it was found that those papers were not related to my plot. When I went to this man's house to show him that those papers were not related to my plot, his wife said that since there was no electricity in her house that time so they had given some others property paper to her mistakenly and that they were just sending their son Gaurav to give me the correct papers but Gaurav did not come to me till today. Thereafter, we started receiving threats from Gunda elements that they would harm us in different ways. I have no proof of the money returned by me. This man used to say to my female friends that he would show them after purchasing my house by hook and crook. He used to spread rumour in the street that I, Komal have sold out my house to him and that there were several cases pending related to that house.

I pray, with folded hands, that keeping in view the illness of my husband, my house and the papers related thereto may please be restored to me. This man's wife Suman and their son Gaurav are most dishonest persons. His wife Suman used to talk in such an artificial way as she was telling a truth. One of my sons had died due to cancer and if I am dishonest to anyone, my rest of both children may

also die from cancer. You can verify these facts from the residents of the street as to how many houses (families) has been ruined by this person. This man is supported by some reputed persons who use to give him money but he did not return their money. He kept on keeping papers of our property with him and used to lend our money on interest to other persons. This man intends to grab my house. My matter may please be decided. This man Ramesh Sibbal, his wife Suman and son Gaurav may be punished so that they may not commit such an act with anyone in future. He kept on threatening me while involving my daughter-in-law that he would do this and that. Since the day this man entered my house, everything has been ruined by him. I may please be imparted justice.

Sd/- Komal Kapur
(In English)"

5. The Investigating Officer prepared the site plan, effected recoveries of the articles from the place of occurrence and thereafter recorded the statements of the witnesses. Upon completion of the investigation, a charge sheet was filed in terms of Section 173(2) of the Code wherein Ramesh Chander Sibbal was stated as the accused and names of his wife, Suman Sibbal and son Gaurav Sibbal were shown in Column No.2. Upon committal, the learned Additional Sessions Judge framed charges against the accused under Sections 306 and 448 of the Indian Penal Code, 1860 (IPC).

6. The accused filed a criminal revision being Criminal Revision No.227 of 2009 in the High Court of Delhi at New Delhi challenging the order of the trial Court dated 2nd April, 2009, framing the charge. The High Court vide its judgment dated 13th August, 2009 quashed the charge framed under Section 306 IPC, while permitting the Trial Court to continue the trial in relation to the offence under Section 448 IPC. It will be useful to refer to certain findings recorded by the High Court in its

judgment dated 13th August, 2009 :

"3. In the background of the aforesaid case set up by the prosecution the learned counsel for the petitioner submitted that the ingredients of an offence under Section 306 of the IPC were not present in the instant case. As a matter of fact the learned counsel for the petitioner went further to say that this is not a case of suicide, rather is, a case of homicide. For this purpose he took me through the post mortem report and also the literature (Pathology of Neck Injury by Peter Venezis). On being told that since the trial was on and hence, the learned counsel decided to give up the arguments initially advanced on this aspect of the matter.

3.1 As regards whether a charge could be framed under Section 306 of the IPC, the upshot of his submissions was that even if the entire material/ evidence placed on record by the prosecution is fully accepted to be correct, no offence under Section 306 of the IPC is made out against the petitioner accused. For this purpose the learned counsel for the petitioner took me through the suicide note dated 04.12.2007, the statement of the sons of the deceased Amit Kapoor (the complainant) and Sumit Kapoor, as well as, the report of the Forensic Science Laboratory. It was his submission that merely because the petitioner-accused is named in the suicide note and has been referred to as the reason which propelled the deceased to take the extreme step of suicide, it would still not fall within the realm of Section 306 of the IPC.

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g. a perusal of the suicide note brings to fore the fact the petitioner-accused is not only named but his illegal occupation of the house of the deceased is stated to be one of the primary reasons for Kamol Kapoor, to have committed suicide. The statement of the sons of the deceased, Amit Kapoor and Sumit Kapoor, is primarily on the same lines. The issue for consideration is that, even if it is assumed at this stage, that the suicide note was written in the hand writing of the deceased and the statement of Amit Kapoor is believed to be true in its entirety would it be sufficient to charge the petitioner-accused with the offence of abetment of suicide by Komal Kapoor. In my view the answer is in the negative. The mere fact that the actions of the petitioner-accused, that is, forcible occupation of the portion of the house of the deceased, led her to take the extreme step of committing suicide would not bring his act within the definition of abetment as there is no material or evidence placed by the prosecution on record to show that he intended or had the necessary mens rea that the Komal Kapoor should take the extreme step of committing suicide. As long as there is absence of material and/or evidence on record to show that the abettor had intended to aid or encourage the commission of the principal offence, the accused cannot be charged with the offence of abetment and, therefore, in the present case, abetment to commit suicide. Nor I am persuaded by the submission that because the name of the petioner-accused appears in the suicide note it would be sufficient to charge him with an offence under Section 306 of the IPC. In this context see observation in *Sanju @ Sanjay Singh Senger* (supra) and *Mahender Singh* (supra). In both the cases not ony was the accused named in the

suicide note but they were also cited as the reason for committing suicide by the deceased. The learned APP may perhaps be correct in his submission that the agreement to sell dated 30.06.2007 was executed by the petitioner-accused, only to grab the property of the deceased after a receipt had been executed by the deceased acknowledging that she had taken a loan from the petitioner-accused in the first instance in the sum of Rs.15 lacs and thereafter, another sum of Rs. 1 lac, but then, this aspect of the matter will get unravelled only after a full-fledged trial. I do not wish to comment any further on this aspect of the matter as it could impact both, the case of the prosecution as well as that of the defence, and perhaps wisely, therefore, even the learned counsel or the petitioner-accused has not assailed the charge framed under Section 448 of the IPC.

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12. For the aforementioned reasons, I am of the opinion that it is a fit case in which this Court should exercise its revisional and inherent powers to quash the charge framed against the petitioner accused under Section 306 of the IPC. The revision petition is thus partially allowed. The charge framed against the petitioner-accused under Section 306 of the IPC shall be dropped. The trial court will continue with the trial of the petitioner-accused in respect of the remaining charge framed against him."

7. Aggrieved from the judgment of the High Court, in the present appeal, the appellant impugnes the same primarily on the ground that the High Court had exceeded and not appropriately exercised its jurisdiction under Sections 397 and 482 of the Code in quashing the charge framed against the respondent under Section 306 IPC.

8. Before examining the merits of the present case, we must advert to the discussion as to the ambit and scope of the power which the courts including the High Court can exercise under Section 397 and Section 482 of the Code. Section 397 of the Code vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well-founded error and it may not be appropriate for the court to scrutinize the orders, which upon the face of it bears a token of careful consideration and appear to be in accordance with law. If one looks into the various judgments of this Court, it emerges that the revisional jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. These are not exhaustive classes, but are merely indicative. Each case would have to be determined on its own merits.

9. Another well-accepted norm is that the revisional jurisdiction of the higher court is a very limited one and cannot be exercised in a routine manner. One of the inbuilt restrictions is that it should not be against an interim or interlocutory order. The Court has to keep in mind that the exercise of revisional jurisdiction itself should not lead to injustice ex facie. Where the Court is dealing with the question as to whether the charge has been framed properly and in accordance with law in a given case, it may be reluctant to interfere in exercise of its revisional jurisdiction unless the case substantially falls within the categories aforestated. Even framing of charge is a much advanced stage in the proceedings under the Cr.P.C. Right from the case of *State of West Bengal & Ors. v. Swapan Kumar Guha & Ors.* [(1982) 1 SCC 561], which was reiterated with approval in the case of *State of Haryana & Ors. v. Bhajan*

Lal & Ors. [1992 Supp. (1) SCC 335], the courts have stated the principle that if the FIR does not disclose the commission of a cognizable offence, the Court would be justified in quashing the investigation on the basis of the information as laid or received. It is further stated that the legal position appears to be that if an offence is disclosed, the court will not normally interfere with an investigation into the case and will permit investigation into the offence alleged to have been committed; if, however, the materials do not disclose an offence, no investigation should normally be permitted. Whether an offence has been disclosed or not, must necessarily depend on the facts and circumstances of each case. If on consideration of the relevant materials, the Court is satisfied that an offence is disclosed, it will normally not interfere with the investigation into the offence and will generally allow the investigation into the offence to be completed in order to collect materials for proving the offence. In *Bhajan Lal's* case (supra), the Court also stated that though it may not be possible to lay down any precise, clearly defined, sufficiently channelized and inflexible guidelines or rigid formulae or to give an exhaustive list of myriad kinds of cases wherein power under Section 482 of the Code for quashing of an FIR should be exercised, there are circumstances where the Court may be justified in exercising such jurisdiction. These are, where the FIR does not prima facie constitute any offence, does not disclose a cognizable offence justifying investigation by the police; where the allegations are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused; where there is an expressed legal bar engrafted in any of the provisions of the Code; and where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge. Despite stating these grounds, the Court unambiguously uttered a note of caution to the effect that power of quashing a criminal proceeding should be

exercised very sparingly and with circumspection and that too, in the rarest of rare cases; the Court also warned that the Court would not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice.

10. The above-stated principles clearly show that inherent as well as revisional jurisdiction should be exercised cautiously. If the jurisdiction under Section 482 of the Code in relation to quashing of an FIR is circumscribed by the factum and caution afore-noticed, in that event, the revisional jurisdiction, particularly while dealing with framing of a charge, has to be even more limited. Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the court is required to consider the 'record of the case' and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section exists, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code. It may

also be noticed that the revisional jurisdiction exercised by the High Court is in a way final and no inter court remedy is available in such cases. Of course, it may be subject to jurisdiction of this court under Article 136 of the Constitution of India. Normally, a revisional jurisdiction should be exercised on a question of law. However, when factual appreciation is involved, then it must find place in the class of cases resulting in a perverse finding. Basically, the power is required to be exercised so that justice is done and there is no abuse of power by the court. Merely an apprehension or suspicion of the same would not be a sufficient ground for interference in such cases.

11. At the initial stage of framing of a charge, the court is concerned not with proof but with a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty. All that the court has to see is that the material on record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at that stage. We may refer to the well settled law laid down by this Court in the case of *State of Bihar v. Ramesh Singh* (1977) 4 SCC 39:

> "4. Under Section 226 of the Code while opening the case for the prosecution the Prosecutor has got to describe the charge against the accused and state by what evidence he proposes to prove the guilt of the accused. Thereafter comes at the initial stage the duty of the Court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf. The Judge has to pass thereafter an order either under Section 227 or Section 228 of the Code. If "the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing", as enjoined by Section 227. If, on the other hand, "the Judge is of opinion that there is ground for presuming that the accused has committed an offence which- … (b)

is exclusively triable by the Court, he shall frame in writing a charge against the accused", as provided in Section 228. Reading the two provisions together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. It the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient

ground for proceeding with the trial. An exhaustive list of the circumstances to indicate as to what will lead to one conclusion or the other is neither possible nor advisable. We may just illustrate the difference of the law by one more example. If the scales of pan as to the guilt or innocence of the accused are something like even, at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227."

12. The jurisdiction of the Court under Section 397 can be exercised so as to examine the correctness, legality or proprietary of an order passed by the trial court or the inferior court, as the case may be. Though the section does not specifically use the expression 'prevent abuse of process of any court or otherwise to secure the ends of justice', the jurisdiction under Section 397 is a very limited one. The legality, proprietary or correctness of an order passed by a court is the very foundation of exercise of jurisdiction under Section 397 but ultimately it also requires justice to be done. The jurisdiction could be exercised where there is palpable error, non-compliance with the provisions of law, the decision is completely erroneous or where the judicial discretion is exercised arbitrarily. On the other hand, Section 482 is based upon the maxim quando lex liquid alicuiconcedit, conceder videtur id quo res ipsa esse non protest, i.e., when the law gives anything to anyone, it also gives all those things without which the thing itself would be unavoidable. The Section confers very wide power on the Court to do justice and to ensure that the process of the Court is not permitted to be abused.

13. It may be somewhat necessary to have a comparative examination of the powers exercisable by the Court under these two provisions. There may be some overlapping between these

two powers because both are aimed at securing the ends of justice and both have an element of discretion. But, at the same time, inherent power under Section 482 of the Code being an extraordinary and residuary power, it is inapplicable in regard to matters which are specifically provided for under other provisions of the Code. To put it simply, normally the court may not invoke its power under Section 482 of the Code where a party could have availed of the remedy available under Section 397 of the Code itself. The inherent powers under Section 482 of the Code are of a wide magnitude and are not as limited as the power under Section 397. Section 482 can be invoked where the order in question is neither an interlocutory order within the meaning of Section 397(2) nor a final order in the strict sense. Reference in this regard can be made to *Raj Kapoor & Ors. v. State of Punjab & Ors.* [AIR 1980 SC 258 : (1980) 1 SCC 43]}. In this very case, this Court has observed that inherent power under Section 482 may not be exercised if the bar under Sections 397(2) and 397(3) applies, except in extraordinary situations, to prevent abuse of the process of the Court. This itself shows the fine distinction between the powers exercisable by the Court under these two provisions. In this very case, the Court also considered as to whether the inherent powers of the High Court under Section 482 stand repelled when the revisional power under Section 397 overlaps. Rejecting the argument, the Court said that the opening words of Section 482 contradict this contention because nothing in the Code, not even Section 397, can affect the amplitude of the inherent powers preserved in so many terms by the language of Section 482. There is no total ban on the exercise of inherent powers where abuse of the process of the Court or any other extraordinary situation invites the court's jurisdiction. The limitation is self-restraint, nothing more. The distinction between a final and interlocutory order is well known in law. The orders which will be free from the bar of Section 397(2) would be the orders which are not purely interlocutory but, at the same time, are less than a final disposal. They should be the orders which do determine some right and still are not finally rendering the

Court functus officio of the lis. The provisions of Section 482 are pervasive. It should not subvert legal interdicts written into the same Code but, however, inherent powers of the Court unquestionably have to be read and construed as free of restriction.

14. In *Dinesh Dutt Joshi v. State of Rajasthan & Anr.* [(2001) 8 SCC 570], the Court held that Section 482 does not confer any power but only declares that the High Court possesses inherent powers for the purposes specified in the Section. As lacunae are sometimes found in procedural law, the Section has been embodied to cover such lacunae wherever they are discovered. The use of extraordinary powers conferred upon the High Court under this section are, however, required to be reserved as far as possible for extraordinary cases.

15. In *Janata Dal v. H.S. Chowdhary & Ors.* [(1992) 4 SCC 305], the Court, while referring to the inherent powers to make orders as may be necessary for the ends of justice, clarified that such power has to be exercise in appropriate cases ex debito justitiae, i.e. to do real and substantial justice for administration of which alone, the courts exist. The powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the powers requires a great caution in its exercise. The High Court, as the highest court exercising criminal jurisdiction in a State, has inherent powers to make any order for the purposes of securing the ends of justice. Being an extra ordinary power, it will, however, not be pressed in aid except for remedying a flagrant abuse by a subordinate court of its powers.

16. If one looks at the development of law in relation to exercise of inherent powers under the Code, it will be useful to refer to the following details :

As far back as in 1926, a Division bench of this Court In Re: Llewelyn Evans, took the view that the provisions of Section

561A (equivalent to present Section 482) extend to cases not only of a person accused of an offence in a criminal court, but to the cases of any person against whom proceedings are instituted under the Code in any Court. Explaining the word "process", the Court said that it was a general word, meaning in effect anything done by the Court. Explaining the limitations and scope of Section 561A, the Court referred to "inherent jurisdiction", "to prevent abuse of process" and "to secure the ends of justice" which are terms incapable of having a precise definition or enumeration, and capable, at the most, of test, according to well-established principles of criminal jurisprudence. The ends of justice are to be understood by ascertainment of the truth as to the facts on balance of evidence on each side. With reference to the facts of the case, the Court held that in the absence of any other method, it has no choice left in the application of the Section except, such tests subject to the caution to be exercised in the use of inherent jurisdiction and the avoidance of interference in details and directed providing of a legal practitioner.

17. Having examined the inter-relationship of these two very significant provisions of the Code, let us now examine the scope of interference under any of these provisions in relation to quashing the charge. We have already indicated above that framing of charge is the first major step in a criminal trial where the Court is expected to apply its mind to the entire record and documents placed therewith before the Court. Taking cognizance of an offence has been stated to necessitate an application of mind by the Court but framing of charge is a major event where the Court considers the possibility of discharging the accused of the offence with which he is charged or requiring the accused to face trial. There are different categories of cases where the Court may not proceed with the trial and may discharge the accused or pass such other orders as may be necessary keeping in view the facts of a given case. In a case where, upon considering the record of the case and documents submitted before it, the Court finds that no offence

is made out or there is a legal bar to such prosecution under the provisions of the Code or any other law for the time being in force and there is a bar and there exists no ground to proceed against the accused, the Court may discharge the accused. There can be cases where such record reveals the matter to be so predominantly of a civil nature that it neither leaves any scope for an element of criminality nor does it satisfy the ingredients of a criminal offence with which the accused is charged. In such cases, the Court may discharge him or quash the proceedings in exercise of its powers under these two provisions.

18. This further raises a question as to the wrongs which become actionable in accordance with law. It may be purely a civil wrong or purely a criminal offence or a civil wrong as also a criminal offence constituting both on the same set of facts. But if the records disclose commission of a criminal offence and the ingredients of the offence are satisfied, then such criminal proceedings cannot be quashed merely because a civil wrong has also been committed. The power cannot be invoked to stifle or scuttle a legitimate prosecution. The factual foundation and ingredients of an offence being satisfied, the Court will not either dismiss a complaint or quash such proceedings in exercise of its inherent or original jurisdiction. In the case of *Indian Oil Corporation v. NEPC India Ltd. & Ors.* [(2006) 6 SCC 736], this Court took the similar view and upheld the order of the High Court declining to quash the criminal proceedings because a civil contract between the parties was pending.

19. Having discussed the scope of jurisdiction under these two provisions, i.e., Section 397 and Section 482 of the Code and the fine line of jurisdictional distinction, now it will be appropriate for us to enlist the principles with reference to which the courts should exercise such jurisdiction. However, it is not only difficult but is inherently impossible to state with precision such principles. At best and upon objective analysis of various

judgments of this Court, we are able to cull out some of the principles to be considered for proper exercise of jurisdiction, particularly, with regard to quashing of charge either in exercise of jurisdiction under Section 397 or Section 482 of the Code or together, as the case may be :

1) Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.

2) The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.

3) The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

4) Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loathe to interfere, at the threshold, to throttle the prosecution in

exercise of its inherent powers.

5) Where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to an accused.

6) The Court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.

7) The process of the Court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.

8) Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a 'civil wrong' with no 'element of criminality' and does not satisfy the basic ingredients of a criminal offence, the Court may be justified in quashing the charge. Even in such cases, the Court would not embark upon the critical analysis of the evidence.

9) Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction, the Court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

10) It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to

find out whether it is a case of acquittal or conviction.

11) Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.

12) In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed with by the prosecution.

13) Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.

14) Where the charge-sheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.

15) Coupled with any or all of the above, where the Court finds that it would amount to abuse of process of the Code or that interest of justice favours, otherwise it may quash the charge. The power is to be exercised ex debito justitiae, i.e. to do real and substantial justice for administration of which alone, the courts exist.

{Ref. *State of West Bengal & Ors. v. Swapan Kumar Guha & Ors.* [AIR 1982 SC 949]; *Madhavrao Jiwaji Rao Scindia & Anr. v. Sambhajirao Chandrojirao Angre & Ors.* [AIR 1988 SC 709]; *Janata Dal v. H.S. Chowdhary & Ors.* [AIR 1993 SC 892]; *Mrs. Rupan Deol Bajaj & Anr. v. Kanwar Pal Singh Gill & Ors.* [AIR 1996 SC 309; *G. Sagar Suri & Anr. v. State of U.P. & Ors.* [AIR 2000 SC 754]; *Ajay Mitra v. State of M.P.* [AIR 2003 SC 1069]; *M/s. Pepsi Foods Ltd. & Anr. v. Special Judicial Magistrate & Ors.* [AIR 1988 SC 128]; *State of U.P. v. O.P. Sharma* [(1996) 7 SCC 705]; *Ganesh Narayan Hegde v. s. Bangarappa & Ors.* [(1995) 4 SCC 41]; *Zundu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque & Ors.* [AIR 2005 SC 9]; *M/s. Medchl Chemicals & Pharma (P) Ltd. v. M/s. Biological E. Ltd. & Ors.* [AIR 2000 SC 1869]; *Shakson Belthissor v. State of Kerala & Anr.* [(2009) 14 SCC 466]; *V.V.S. Rama Sharma & Ors. v. State of U.P. & Ors.* [(2009) 7 SCC 234]; *Chunduru Siva Ram Krishna & Anr. v. Peddi Ravindra Babu & Anr.* [(2009) 11 SCC 203]; *Sheo Nandan Paswan v. State of Bihar & Ors.* [AIR 1987 SC 877]; *State of Bihar & Anr. v. P.P. Sharma & Anr.* [AIR 1991 SC 1260]; *Lalmuni Devi (Smt.) v. State of Bihar & Ors.* [(2001) 2 SCC 17]; *M. Krishnan v. Vijay Singh & Anr.* [(2001) 8 SCC 645]; *Savita v. State of Rajasthan* [(2005) 12 SCC 338]; and *S.M. Datta v. State of Gujarat & Anr.* [(2001) 7 SCC 659]}.

20. These are the principles which individually and preferably cumulatively (one or more) be taken into consideration as precepts to exercise of extraordinary and wide plenitude and jurisdiction under Section 482 of the Code by the High Court. Where the factual foundation for an offence has been laid down, the courts should be reluctant and should not hasten to quash the proceedings even on the premise that one or two ingredients have not been stated or do not appear to be satisfied if there is substantial compliance to the requirements of the offence. At this stage, we may also notice that the principle stated by this Court in the case of *Madhavrao Jiwaji Rao Scindia* (supra) was reconsidered and explained in

two subsequent judgments of this Court in the cases of *State of Bihar & Anr. v. Shri P.P. Sharma & Anr.* [AIR 1991 SC 1260] and *M.N. Damani v. S.K. Sinha & Ors.* [AIR 2001 SC 2037]. In the subsequent judgment, the Court held that, that judgment did not declare a law of universal application and what was the principle relating to disputes involving cases of a predominantly civil nature with or without criminal intent.

21. In light of the above principles, now if we examine the findings recorded by the High Court, then it is evident that what weighed with the High Court was that firstly it was an abuse of the process of court and, secondly, it was a case of civil nature and that the facts, as stated, would not constitute an offence under Section 306 read with Section 107 IPC. Interestingly and as is evident from the findings recorded by the High Court reproduced supra that 'this aspect of the matter will get unravelled only after a full-fledged trial', once the High Court itself was of the opinion that clear facts and correctness of the allegations made can be examined only upon full trial, where was the need for the Court to quash the charge under Section 306 at that stage. Framing of charge is a kind of tentative view that the trial court forms in terms of Section 228 which is subject to final culmination of the proceedings.

22. We have already noticed that the legislature in its wisdom has used the expression 'there is ground for presuming that the accused has committed an offence'. This has an inbuilt element of presumption once the ingredients of an offence with reference to the allegations made are satisfied, the Court would not doubt the case of the prosecution unduly and extend its jurisdiction to quash the charge in haste. A Bench of this Court in the case of *State of Maharashtra v. Som Nath Thapa & Ors.* [(1996) 4 SCC 659] referred to the meaning of the word 'presume' while relying upon the Black's Law Dictionary. It was defined to mean 'to believe or accept upon probable evidence'; 'to take as proved until evidence to the contrary is forthcoming'. In other words, the truth of the matter has to come out when the

prosecution evidence is led, the witnesses are cross-examined by the defence, the incriminating material and evidence is put to the accused in terms of Section 313 of the Code and then the accused is provided an opportunity to lead defence, if any. It is only upon completion of such steps that the trial concludes with the court forming its final opinion and delivering its judgment. Merely because there was civil transaction between the parties would not by itself alter the status of the allegations constituting the criminal offence. This was not a case where the allegations were so predominately of a civil nature that it would have eliminated criminal intent and liability. On the contrary, it is a fact and, in fact, is not even disputed that the deceased committed suicide and left a suicide note. May be, the accused are able to prove their non-involvement in inducing or creating circumstances which compelled the deceased to commit suicide but that again is a matter of trial. The ingredients of Section 306 are that a person commits suicide and somebody alone abets commission of such suicide which renders him liable for punishment. Both these ingredients appear to exist in the present case in terms of the language of Section 228 of the Code, subject to trial. The deceased committed suicide and as per the suicide note left by her and the statement of her son, the abetment by the accused cannot be ruled out at this stage, but is obviously subject to the final view that the court may take upon trial. One very serious averment that was made in the suicide note was that the deceased was totally frustrated when the accused persons took possession of the ground floor of her property, C-224, Tagore Garden, Delhi and refused to vacate the same. It is possible and if the Court believes the version given by the prosecution and finds that there was actual sale of property in favour of the accused, as alleged by him, in that event, the Court may acquit them of not only the offence under Section 306 IPC but under Section 107 IPC also. There appears to be some contradiction in the judgment of the High Court primarily for the reason that if charge under Section 306 is to be quashed and the accused is not to be put to trial for this offence, then where would be the question of trying them

for an offence of criminal trespass in terms of Section 448 IPC based on some facts, which has been permitted by the High Court.

23. The High Court could not have appreciated or evaluated the record and documents filed with it. It was not the stage. The Court ought to have examined if the case falls in any of the above-stated categories.

24. The High Court has also noticed that perusal of the suicide note brings to fore the fact that the petitioner-accused is not only named but his illegal occupation of the house of the deceased is stated to be one of the primary reasons for Komal Kapoor in committing the suicide. The statement of the son of the deceased is also on the same line. Then the High Court proceeds further to notice that even if it is assumed at this stage that the suicide note and statement were correct, the action of the petitioner-accused in forcibly occupying the portion of the house of the deceased and the deceased taking the extreme step would not bring his act within the definition of abetment, as there is no material or evidence placed by the prosecution on record. This finding could hardly be recorded without travelling into the merits of the case and appreciating the evidence. The Court could pronounce whether the offence falls within the ambit and scope of Section 306 IPC or not. These documents clearly show that the accused persons had brought in existence the circumstances which, as claimed by the prosecution, led to the extreme step of suicide being taken by the deceased. It cannot be equated to inflictment of cruelty as discussed by the High Court in its judgment. Once Sections 107 and 306 IPC are read together, then the Court has to merely examine as to whether apparently the person could be termed as causing abetment of a thing. An abetter under Section 108 is a person who abets an offence. It includes both the person who abets either the commission of an offence or the commission of an act which would be an offence. In terms of Section 107 IPC, Explanation (1) to Section 107 has been

worded very widely. We may refer to the judgment of this Court in the case of *Goura Venkata Reddy v. State of A.P.* [(2003) 12 SCC 469], wherein this Court held as under :

> "8. Section 107 IPC defines abetment of a thing. The offence of abetment is a separate and distinct offence provided in the Act as an offence. A person abets the doing of a thing when (1) he instigates any person to do that thing; or (2) engages with one or more other persons in any conspiracy for the doing of that thing; or (3) intentionally aids, by act or illegal omission, the doing of that thing. These things are essential to complete abetment as a crime. The word "instigate" literally means to provoke, incite, urge on or bring about by persuasion to do any thing. The abetment may be by instigation, conspiracy or intentional aid, as provided in the three clauses of Section 107. Section 109 provides that if the act abetted is committed in consequence of abetment and there is no provision for the punishment of such abetment then the offender is to be punished with the punishment provided for the original offence. "Act abetted" in Section 109 means the specific offence abetted. Therefore, the offence for the abetment of which a person is charged with the abetment is normally linked with the proved offence. In the instant case, the abetted persons have been convicted for commission of offence punishable under Section 304. So in the case of A-1 it is Section 304 read with Section 109 IPC, that is attracted."

25. A wilful misrepresentation or wilful concealment of material fact and such person voluntarily causing or procuring or attempting to cause or procure a thing to be done is said to instigate the doing of that thing. According to the record, the accused had made a wrong statement that he had paid a sum of Rs.24,00,000/- for purchase of the property C-224, Tagore Garden, Delhi and the property belonged to him. Whether it was a misrepresentation of the accused and was an attempt

to harass the deceased and her family which ultimately led to her suicide is a question to be examined by the Court. The allegations as made in the afore-stated documents clearly reflects that blank documents were got signed, but the purpose, the consideration and complete facts relating to the transaction were not disclosed to the deceased or the family. This would, at least at this stage, not be a case for examining the correctness or otherwise of these statements as these allegations cannot be said to be ex facie perverse, untenable or malicious. It would have been more appropriate exercise of jurisdiction by the High Court, if it would have left the matter to be determined by the Court upon complete trial. May be the accused would be entitled to get some benefits, but this is not the stage. These are matters, though of some civil nature, but are so intricately connected with criminal nature and have elements of criminality that they cannot fall in the kind of cases which have been stated by us above. There, the case has to be entirely of a civil nature involving no element of criminality.

26. The learned counsel appearing for the appellant has relied upon the judgment of this Court in the case of *Chitresh Kumar Chopra v. State (Government of NCT of Delhi)* [(2009) 16 SCC 605] to contend that the offence under Section 306 read with Section 107 IPC is completely made out against the accused. It is not the stage for us to consider or evaluate or marshal the records for the purposes of determining whether offence under these provisions has been committed or not. It is a tentative view that the Court forms on the basis of record and documents annexed therewith. No doubt that the word 'instigate' used in Section 107 of the IPC has been explained by this Court in the case of *Ramesh Kumar v. State of Chhattisgarh* [(2001) 9 SCC 618] to say that where the accused had, by his acts or omissions or by a continued course of conduct, created such circumstances that the deceased was left with no other option except to commit suicide, an instigation may have to be inferred. In other words, instigation has to be gathered from the circumstances of the

case. All cases may not be of direct evidence in regard to instigation having a direct nexus to the suicide. There could be cases where the circumstances created by the accused are such that a person feels totally frustrated and finds it difficult to continue existence. Husband of the deceased was a paralysed person. They were in financial crises. They had sold their property. They had great faith in the accused and were heavily relying on him as their property transactions were transacted through the accused itself. Grabbing of the property, as alleged in the suicide note and the statement made by the son of the deceased as well as getting blank papers signed and not giving monies due to them are the circumstances stated to have led to the suicide of the deceased. The Court is not expected to form even a firm opinion at this stage but a tentative view that would evoke the presumption referred to under Section 228 of the Code.

27. Thus, we are of the considered view that the finding returned by the High Court suffers from an error of law. It has delved into the field of appreciation and evaluation of the evidence which is beyond the jurisdiction, either revisional or inherent, of the High Court under Sections 397 and 482 of the Code.

28. For the reasons afore-recorded, this appeal is allowed. The order of the High Court is set aside. The trial Court shall proceed with the trial in accordance with law, uninfluenced in any way whatsoever from what has been recorded in this judgment. Charge against the accused under Section 306 read with Section 107 and Section 448 IPC are found to be in order.

R.P. Appeal allowed.

GAJOO

v.

STATE OF UTTARAKHAND

(Criminal Appeal No. 1856 of 2009)

SEPTEMBER 13, 2012

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

Penal Code, 1860 - s.302 - Murder -Appellant and one other accused - Conviction of appellant - Challenge to - Held: Not tenable - The injuries on the victim evidently were inflicted by appellant holding a 'Daranti' in one hand and holding the neck of the victim-widow with the other hand - It was the pressing of her neck and body to the earth by both the accused who were of much greater strength than the victim, that resulted in her death - Recovery of the 'Daranti' and a 'blood stained pyjama' was duly established - The recoveries having been proved and the case of the prosecution being duly supported by two eye-witnesses, PW2 and PW3 and two witnesses, PW4 and PW5 who were present immediately after the occurrence, proved the case of prosecution beyond any reasonable doubt - Conviction of appellant accordingly sustained.

Criminal Trial - Defect in investigation - Effect of - Held: A defective investigation, unless it affects the very root of the prosecution case and is prejudicial to the accused, should not be an aspect of material consideration by the Court - In the instant murder case, there was omission on the part of the investigating officer PW-6 as he did not obtain serologist report in respect of two Exhibits- the alleged weapon of offence (Daranti) and the blood stained pyjama - Though, on facts, such omission on the part of PW6 did not give any advantage to the accused-appellant, the definite lapse cannot be overlooked - Director General of Police directed to take

disciplinary action against PW6.

Evidence - Witness - Related witness - Appreciation of.

Evidence - Variation between medical evidence and ocular evidence - Appreciation of.

The prosecution case was that 'T', a widow, was murdered by her brother-in-law (appellant) and elder son. It was alleged that at night when PW2 and 3 were returning back to their home after attending a 'Satyanarain Katha', they heard moaning sounds near the house of 'T'; that PWs 2 and 3 were carrying torches, and in the light thereof, they saw appellant hitting 'T with a Daranti, Ext. 2 while her elder son was holding her down. The trial court convicted appellant under Section 302 IPC and sentenced him to life imprisonment. The conviction and sentence was affirmed by the High Court. The other accused (the elder son of 'T' had died in the meanwhile).

In the instant appeal, the appellant challenged his conviction on various grounds, viz. 1) that PW4 (the younger son of 'T') had not completely supported the case of the prosecution; 2) that PW2 and PW3, the so-called eye-witnesses, were not genuine and were related to PW1 (the uncle of PW4) and their presence at the place of occurrence was doubtful; 3) that there were clear and material contradictions between the medical and oral evidence i.e. the post-mortem report (Ext. Ka-10) and statements of PW2 and PW3 and even the cause of death was not clear and 4) that the 'Daranti' and blood stained pyjama, which were recovered, were not sent for FSL examination and no serological report was obtained.

Dismissing the appeal, the Court

HELD: 1. In cross-examination, PW4 made certain statements which no doubt, did not support the case of the prosecution. He stated that he had not given the

names of the murderers to his uncle, PW1. However, the statement of PW4 has to be read collectively along with the statement of PW1, PW2 and PW3. PW4 was a minor, when he saw his mother dead. His statement was recorded more than two and a half years after the date of occurrence. It cannot be said that there are any serious contradictions or untruthfulness in the statement of this witness. Even if his statement has to be evaluated as it is on record, he had stated the facts that when he returned after attending the Satyanarain Katha, he saw his mother lying dead and thereafter he went and informed his uncle, PW1, who subsequently lodged the report with the police the next morning and in view of the statement of PW2 and PW3, the accused were arrested. One fails to understand as to what advantage the accused intends to draw from this statement of PW4. It was not the case of the prosecution that PW4 was an eye-witness or had seen the accused persons murdering his mother. The trial court had recorded that in view of the death of his mother as well as the co-accused, his elder brother, PW4 might not have stated certain facts correctly before the Court. This Court does not see any reason for making such a remark in the judgment. [Para 10] [1043-B-F]

2. There are no material or other contradictions in the statements of the four witnesses. PW2 is stated to be related to PW1, who in turn is related to the deceased. Also, PW3 is related to the deceased. However, once, the presence of PW2 and PW3 is shown to be natural, then to doubt their statement would not be a correct approach in law. It cannot be said that the statement of the witnesses cannot be relied upon, they being relatives and interested witnesses of the deceased and other witnesses. It has unequivocally come on record through various witnesses, including PW4, that there was a 'Satyanarayan Katha' which was attended by various

villagers. It was on their way back at midnight when PW2 and PW3 had seen the occurrence in dark with the help of the torches that they were carrying. The mere fact that PW2 happens to be related to PW1 and to the deceased, would not result in doubting the statement of these witnesses which otherwise have credence, are reliable and are duly corroborated by other evidence. In cases such as the present one, it is only the members of the family who come forward to depose. Once it is established that their depositions do not suffer from material contradictions, are trustworthy and in consonance with the above-stated principles, the Courts would not be justified in overlooking such valuable piece of evidence. [Paras 10 and 15] [1043-F-H; 1045-F-H; 1046-A]

Dalip Singh v. State of Punjab **(1954) SCR 145;** *State of A.P. v. S. Rayappa and Others* **(2006) 4 SCC 512: 2006 (2) SCR 200;** *State of Uttar Pradesh v. Kishanpal and Others* **(2008) 16 SCC 73: 2008 (11) SCR 1048 and** *Darya Singh & Ors. v. State of Punjab* **AIR 1965 SC 328: 1964 (7) SCR 397 - relied on.**

3. The defence plea that there was contradiction between the ocular and medical evidence - that according to PW2 and PW3, the deceased was killed by the use of Daranti that the accused-appellant was carrying, while according to the medical evidence,the death resulted from asphyxia, is based upon misreading of the evidence. In the facts and circumstances of the case, there is no variation between the medical evidence and the ocular evidence, and once they are conjointly read, it does not falsify either the statement of the witnesses, PW2 and PW3 or the Post-Mortem Report, Ext. Ka-10. In fact, both of them must be read as complimentary to each other. The injuries evidently were inflicted by accused appellant holding Daranti in one hand and holding the neck of the deceased with the other

hand. It was the pressing of her neck and body to the earth by both the accused of much greater strength than the deceased, that resulted in her death. Even if for the sake of argument it is assumed that there is some variation, still, it would be so immaterial and inconsequential that it would not give any benefit to the accused. It is a settled principle by a series of decisions of this Court that while appreciating the variation between the medical evidence and ocular evidence, primacy is given to the oral evidence of the witnesses. [Paras 16, 17 and 18] [1046-B-C; 1046-F; 1047-A-B]

Kapildeo Mandal and Ors. v. State of Bihar **(2008) 16 SCC 99: 2007 (12) SCR 668;** *State of U.P. v. Krishan Gopal* **(1998) 4 SCC 302 and** *Bhajan Lal @ Harbhajan Singh & Ors. v. State of Haryana* **(2011) 7 SCC 421: 2011 (7) SCR 1 - relied on.**

4.1. The further plea of the defence that no serologist report was obtained in relation to the Daranti, Ext. 2 and blood stained pyjama, Ext. Ka 5, and therefore, the prosecution case should fail, also cannot be accepted. No doubt both these exhibits were not sent to the laboratory for obtaining serologist report, but the absence thereof per se would not give any advantage to the accused. This is merely a defect in investigation. A defective investigation, unless affects the very root of the prosecution case and is prejudicial to the accused, should not be an aspect of material consideration by the court. PW5 has duly proved the recovery of Daranti, Ext. 2 and the blood stained pyjama, Ext. Ka 5 and has duly stood the test of cross-examination in court. Both these articles were recovered by the investigating officer PW6 and the recoveries have been duly established before the court. The recoveries having been proved and the case of the prosecution being duly supported by two eye-witnesses, PW2 and PW3 and two witnesses, PW4 and PW5 who were present immediately after the occurrence,

have proved the case of the prosecution beyond any reasonable doubt. The defect in the investigation or omission on the part of the investigating officer, cannot prove to be of any advantage to the accused. [Paras 19, 21] [1047-D-G; 1053-C-D]

4.2. However, the definite lapse on the part of the investigating officer cannot be overlooked by the Court. The Director General of Police, Uttarakhand, is directed to take disciplinary action against Sub-Inspector, PW6, whether he is in service or has since retired, for serious lapse in conducting investigation. [Paras 21, 22] [1053-E-F]

Dayal Singh and Others. v. State of Uttaranchal **2012 (7) SCALE 165 - relied on.**

Case Law Reference:

(1954) SCR 145	**relied on**	**Para 11**
2006 (2) SCR 200	**relied on**	**Para 12**
2008 (11) SCR 1048	**relied on**	**Para 13**
1964 (7) SCR 397	**relied on**	**Para 14**
2007 (12) SCR 668	**relied on**	**Para 18**
(1998) 4 SCC 302	**relied on**	**Para 18**
2011 (7) SCR 1	**relied on**	**Para 18**
2012 (7) SCALE 165	**relied on**	**Para 20**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1856 of 2009.

From the Judgment & Order dated 07.04.2008 of the High Court of Uttarakhand at Nainital in Criminal Appeal No. 757 of 2001.

S. Janani, Sunando Raha, Deepak Goel for the Appellant.

Neelam Singh, Jatinder Kumar Bhatia for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The present appeal is directed against the judgment of the High Court of Uttarakhand at Nainital dated 7th April, 2008 passed in Criminal Appeal No. 757 of 2001.

2. We may notice the facts giving rise to the present appeal which in any case fall within a narrow compass. One Smt. Taradevi, the deceased was married to one Gajaram. From this marriage, she had two children namely Rampal and Guddu (PW4). After the unfortunate death of her husband Gajaram, she used to live with her younger son Guddu. The elder son Rampal was married and had been living separately with his family though in the same village. Gajoo, the accused/appellant, is the brother-in-law of deceased Taradevi i.e. her husband's younger brother. He was also staying separate, though near the house of Taradevi. After the demise of her husband, there were some disputes regarding the division of property between the deceased, on the one hand, and her elder son, Rampal and brother-in-law, Gajoo on the other. The dispute was related to the agricultural land. It is stated that Gajoo and Rampal both did not want to give any land to Taradevi.

3. On the night of 1st July, 1987, a 'Satyanarayan Katha' had been organised by Chetu Ram at his house in the village Kotda Kalyanpur. A number of residents of the village had gone to attend the Katha. PW2, Asharam and PW3, Kewalram along with other people were returning back to their homes at midnight. On their way back both PW2 and PW3 heard moaning sounds when they reached near the house of Taradevi. PW2 and PW3 were carrying their torches and in the light of the torches they saw that accused Gajoo was armed

with a Daranti, Ext. 2 with which he was hitting the deceased and accused Rampal had held her down, in the Aangan (courtyard) of her house. On being challenged, both these witnesses were threatened by Gajoo stating that they should go away from there. These two witnesses are stated to have neither raised any alarm nor disclosed the incident to anyone. The next morning, information of the incident was given by PW4 to his maternal uncle Bhadu Ram, who was examined as PW1. Upon receiving information, the matter was reported by PW1 to the police in the morning of 2nd July, 1987. PW1 had lodged the written report vide Ext. Ka-1 at Police Station, Sahaspur at about 10.30 in the morning. On the basis of Ext. Ka-1, the FIR, a Check Report, Ext. Ka-16, was prepared. Sub-Inspector Brahma Singh, PW6 started investigation in the matter. He reached the place of incident and did Panchayatnama of the corpse of Taradevi. After performing autopsy on the body of the deceased, vide Ext. Ka-6, he noticed that there were wounds on the corpse and prepared a Report Ext. Ka-8. Then he sent the body for post-mortem examination to Dehradun. Blood stained soil, Ext-3 and plain soil samples, Ext-4 were collected from the spot, and a site plan, Ext. Ka-12 was prepared. Dr. U.K. Chopra of Doon Hospital on 3rd July, 1987 prepared the Post-Mortem Report, Ext. Ka-10 and found the following injuries on the body of the deceased;

"(i) Incised wound 4 cm x ½ cm muscle deep, 1 cm below the chin.

(ii) Incised wound 5 cm x 1 cm muscle deep, 2 cm below injury No. 1.

(iii) Three abraded contusions in the middle of the neck, sizes 1.5 cm x 1 cm; 2 cm x 1 cm; 1.5 cm x 1 cm.

(iv) Abrasion 3 cm x 2 cm on the back of the left elbow.

(v) Abrasion 3 cm x 2 cm on the back of the shoulder.

(vi) Abrasion 4 cm x 3 cm on the back of the right lumber region."

4. Dr. Chopra in his report Ext. Ka-10 also recorded the following findings:

"On internal examination, under injury No. (iii) sub cutaneous tissue in the middle of the neck found congested. Hyoid bone found fractured. The larynx and trachea were found congested. Both lungs were found congested."

5. PW2 and PW3 who were examined as eye-witnesses have fully supported the case of the prosecution. As already noticed, according to them, when they were on their way back from the house of Chetu Ram after taking part in 'Satyanarain Katha', they heard the cries of deceased, Taradevi. When they reached near the house of Taradevi, in the light of torches that they were carrying, they saw that Gajoo and Rampal were throttling her in the Aangan (courtyard) of her house and Gajoo was holding Daranti, Ext. 2 in his hands. When they tried to intervene, they were threatened. PW5, Gudru has proved recovery of Ext. 2 which was used in the crime and recovery memo, Ext. Ka-11 was prepared. After the death of his mother, PW4, Guddu, minor son of the deceased had gone to his uncle's house to inform him about his mother's death and thereafter, his uncle lodged the report to the police. He stated that he too had gone to attend the Katha at the house of Chetu Ram and in the morning, when he returned, he saw his mother dead. He partly supported the case of prosecution as he affirmed that there was a dispute with regard to the land between his mother and uncle Gajoo, but stated that he did not know as to who had killed his mother. Investigation Officer, PW6, in the witness box narrated the entire case of the prosecution and the investigation conducted by him.

6. The Investigating Officer filed the report before the Court in terms of Section 172(3) of the Criminal Procedure Code,

charging the accused/appellant Gajoo and Rampal, both under Section 302 Indian Penal Code, 1860 (for short 'IPC'). They faced trial before the Court of Sessions Judge and were convicted for the offence under Section 302 IPC vide judgment dated 2nd July, 1990. The trial court awarded life imprisonment to the accused Gajoo, as the accused Rampal had died during the pendency of the appeal.

7. Aggrieved by the judgment of the trial court, the accused preferred an appeal before the High Court which came to be dismissed vide judgment dated 7th April, 2008. The High Court confirmed both the judgment of conviction and order of sentence passed by the trial court, giving rise to the present appeal.

8. While impugning the judgment under appeal and praying for an order of acquittal, the learned counsel appearing for the appellant has primarily and with some emphasis contended that;

1. PW2 and PW3, the so-called eye-witnesses, are not genuine and are related to PW1. Their presence at the place of occurrence is doubtful.

2. With the motive of grabbing the entire land, PW1 has falsely implicated both the accused.

3. There are clear and material contradictions between the medical and oral evidence i.e. Ext. Ka-10 and statements of PW2 and PW3, and even the cause of death is not clear, which essentially must go to the benefit of the accused.

4. The Daranti and blood stained pyjama which were recovered, were not sent for FSL examination and no serological report was obtained.

9. In support of his contention, the learned counsel for the appellant had laid a lot of emphasis on the statement of PW4.

According to him, PW4 had not completely stated the case of the prosecution, and therefore, the accused was entitled to acquittal.

10. In the cross-examination, PW4 has made certain statements which no doubt, do not support the case of the prosecution. He stated that he had not given the names of the murderers to his uncle. The statement of PW4 has to be read collectively along with the statement of PW1, PW2 and PW3. PW4 was a minor, when he saw his mother dead in the year 1987. His statement was recorded on 22nd January, 1990 i.e. more than two and a half years after the date of occurrence. We are unable to see any serious contradictions or untruthfulness in the statement of this witness. Even if his statement has to be evaluated as it is on record, he had stated the facts that when he returned from the house of Chetu Ram after attending the Katha, he saw his mother lying dead and thereafter he went and informed his uncle who subsequently lodged the report with the police the next morning and in view of the statement of PW2 and PW3, the accused were arrested. We fail to understand as to what advantage the accused intends to draw from this statement of PW4. It was not the case of the prosecution that PW4 was an eye-witness or had seen the accused persons murdering his mother. The trial court, on that behalf had recorded that in view of the death of his mother as well as the co-accused, his elder brother, Rampal, he might not have stated certain facts correctly before the Court. We do not see any reason for making such a remark in the judgment. There are no material or other contradictions in the statements of these four witnesses. PW2 is stated to be related to PW1 who in turn is related to the deceased. Also, PW3 is related to the deceased. Thus, according to the submission on behalf of the accused all of them become interested witnesses who have attempted to falsely implicate the appellant. The statement of these witnesses, therefore, cannot be relied upon, they being relatives and interested witnesses of the deceased and other witnesses.

11. We are not impressed with this argument. The appreciation of evidence of such related witnesses has been discussed by this Court in its various judgments. In the case of *Dalip Singh v. State of Punjab* [(1954 SCR 145], while rejecting the argument that witnesses who are close-relatives of the victim should not be relied upon, the Court held as under:-

> "26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

12. Similar view was taken by this Court in the case of *State of A.P. v. S. Rayappa and Others* [(2006) 4 SCC 512]. The court observed that it is now almost a fashion that public is reluctant to appear and depose before the court, especially in criminal cases and the cases for that reason itself are dragged for years and years. The Court also stated the principle that, "by now, it is a well-established principle of law that testimony of a witness otherwise inspiring confidence cannot be discarded on the ground that he being a relation of the deceased is an interested witness. A close relative who is a very natural witness cannot be termed as interested witness.

The term interested postulates that the person concerned must have some direct interest in seeing the accused person being convicted somehow or the other either because of animosity or for some other reasons."

13. This Court has also taken the view that related witness does not necessarily mean or is equivalent to an interested witness. A witness may be called 'interested' only when he or she derives some benefit from the result of litigation; in the decree in a civil case, or in seeing an accused person punished. {Ref. *State of Uttar Pradesh v. Kishanpal and Others* [(2008) 16 SCC 73]}

14. In the case of *Darya Singh & Ors. v. State of Punjab* [AIR 1965 SC 328], the Court held as under:-

> "6....On principle, however, it is difficult to accept the plea that if a witness is shown to be a relative of the deceased and it is also shown that he shared the hostility of the victim towards the assailant, his evidence can never be accepted unless it is corroborated on material particulars."

15. Once, the presence of PW2 and PW3 is shown to be natural, then to doubt their statement would not be a correct approach in law. It has unequivocally come on record through various witnesses, including PW4, that there was a 'Satyanarayan Katha' at the house of Chetu Ram which was attended by various villagers. It was on their way back at midnight when PW2 and PW3 had seen the occurrence in dark with the help of the torches that they were carrying. The mere fact that PW2 happens to be related to PW1 and to the deceased, would not result in doubting the statement of these witnesses which otherwise have credence, are reliable and are duly corroborated by other evidence. In such cases, it is only the members of the family who come forward to depose. Once it is established that their depositions do not suffer from material contradictions, are trustworthy and in consonance with

the above-stated principles, the Courts would not be justified in overlooking such valuable piece of evidence.

16. Coming to the next submission on behalf of the accused that there is contradiction between the ocular and medical evidence, it is contended that according to PW2 and PW3, the deceased was killed by use the of *Daranti* that the accused/appellant Gajoo was carrying, while according to the medical evidence, the death resulted from asphyxia. This argument is based upon misreading of the evidence. PW2 and PW3 had seen in the dark i.e. in the limited light of the torches that they were carrying, that Rampal was holding the deceased while Gajoo was inflicting injuries on her body with the help of *Daranti*. As per the Post Mortem Report, Ext. Ka-10, two injuries have been noticed under the chin which are; incised wound 4 cm x ½ cm muscle deep, incised wound 5 cm x 1 cm muscle deep and the second injury is just below the first injury. Injury No. (iii) recorded in the post mortem report is very material. According to the doctor, there were three abraded contusions of different sizes, in the middle of the neck. The doctor has specifically recorded that both lungs were congested, the larynx and trachea were found congested and the expert judgment of the doctor based on these factors was that death occurred due to asphyxia because of strangulation.

17. Rampal was pushing down the deceased on the earth in the *Aangan* while Gajoo had inflicted the injuries. The injuries evidently were inflicted by accused Gajoo holding *Daranti* in one hand and holding the neck of the deceased with the other hand. It was the pressing of her neck and body to the earth by both the accused of much greater strength than the deceased, that resulted in her death.

18. We have also noticed that there is no variation between the medical evidence and the ocular evidence, and once they are co-jointly read, it does not falsify either the statement of the witnesses, PW2 and PW3 or the Post-Mortem Report, Ext. Ka-

10. In fact, both of them must be read as complimentary to each other. Even if for the sake of argument we assume that there is some variation, still, it would be so immaterial and inconsequential that it would not give any benefit to the accused. It is a settled principle by a series of decisions of this Court that while appreciating the variation between the medical evidence and ocular evidence, primacy is given to the oral evidence of the witnesses. Reference can be made to the judgments of this Court in the case of *Kapildeo Mandal and Ors. v. State of Bihar* [(2008) 16 SCC 99], *State of U.P. v. Krishan Gopal* [(1998) 4 SCC 302], *Bhajan Lal @ Harbhajan Singh & Ors. v. State of Haryana* [(2011) 7 SCC 421].

19. Now, we turn to the last submission on behalf of the accused that no serologist report was obtained in relation to the Daranti, Ext. 2 and blood stained pyjama, Ext. Ka 5, and therefore, the prosecution case should fail. This argument does not impress us at all. No doubt both these exhibits were not sent to the laboratory for obtaining serologist report, but the absence thereof per se would not give any advantage to the accused. This is merely a defect in investigation. A defective investigation, unless affects the very root of the prosecution case and is prejudicial to the accused, should not be an aspect of material consideration by the court. PW5 has duly proved the recovery of Daranti, Ext. 2 and the blood stained pyjama, Ext. Ka 5 and has duly stood the test of cross-examination in court. Both these articles were recovered by the investigating officer Brahma Singh, PW6 and the recoveries have been duly established before the court. The recoveries having been proved and the case of the prosecution being duly supported by two eye-witnesses, PW2 and PW3 and two witnesses, PW4 and PW5 who were present immediately after the occurrence, have proved the case of the prosecution beyond any reasonable doubt.

20. In regard to the defective investigation, this Court in the case of *Dayal Singh and Others. v. State of Uttaranchal*

[2012 (7) SCALE 165] while dealing with the cases of omissions and commissions by the investigating officer, and duty of the Court in such cases held as under:-

> "22. Now, we may advert to the duty of the Court in such cases. In the case of *Sathi Prasad v. The State of U.P.* [(1972) 3 SCC 613], this Court stated that it is well settled that if the police records become suspect and investigation perfunctory, it becomes the duty of the Court to see if the evidence given in Court should be relied upon and such lapses ignored. Noticing the possibility of investigation being designedly defective, this Court in the case of *Dhanaj Singh @ Shera & Ors. v. State of Punjab* [(2004) 3 SCC 654], held, "in the case of a defective investigation the Court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective."
>
> 23. Dealing with the cases of omission and commission, the Court in the case of *Paras Yadav v. State of Bihar* [AIR 1999 SC 644], enunciated the principle, in conformity with the previous judgments, that if the lapse or omission is committed by the investigating agency, negligently or otherwise, the prosecution evidence is required to be examined de hors such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand in the way of evaluating the evidence by the courts, otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party. In the case of *Zahira Habibullah Sheikh & Anr. Vs. State of Gujarat & Ors.* [(2006) 3 SCC 374], the Court noticed the importance of the role of witnesses in a criminal trial. The importance and primacy of the quality of trial process can be observed from the words of Bentham, who states that witnesses are the eyes and ears

of justice. The Court issued a caution that in such situations, there is a greater responsibility of the court on the one hand and on the other the courts must seriously deal with persons who are involved in creating designed investigation. The Court held that legislative measures to emphasize prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in proceedings before the Courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair, as noted above, to the needs of the society. On the contrary, efforts should be to ensure fair trial where the accused and the prosecution both get a fair deal. Public interest in proper administration of justice must be given as much importance if not more, as the interest of the individual accused. The courts have a vital role to play. (Emphasis supplied)

24. With the passage of time, the law also developed and the dictum of the Court emphasized that in a criminal case, the fate of proceedings cannot always be left entirely in the hands of the parties. Crime is a public wrong, in breach and violation of public rights and duties, which affects the community as a whole and is harmful to the society in general.

25. Reiterating the above principle, this Court in the case of *National Human Rights Commission v. State of Gujarat* [(2009) 6 SCC 767], held as under:

> "The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interest of society is not to be treated completely with disdain and as persona non grata. The courts have always been considered to have an overriding duty to maintain

> public confidence in the administration of justice-often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators."

26. In the case of *State of Karnataka v. K. Yarappa Reddy* [2000 SCC (Crl.) 61], this Court occasioned to consider the similar question of defective investigation as to whether any manipulation in the station house diary by the Investigating Officer could be put against the prosecution case. This Court, in Paragraph 19, held as follows:

> "19. But can the above finding (that the station house diary is not genuine) have any inevitable bearing on the other evidence in this case? If the other evidence, on scrutiny, is found credible and acceptable, should the Court be influenced by the machinations demonstrated by the Investigating Officer in conducting investigation or in preparing the records so unscrupulously? It can be a guiding

principle that as investigation is not the solitary area for judicial scrutiny in a criminal trial, the conclusion of the Court in the case cannot be allowed to depend solely on the probity of investigation. It is well-nigh settled that even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinised independently of the impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. The court must have predominance and pre-eminence in criminal trials over the action taken by the investigation officers. Criminal Justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit the investigating officer's suspicious role in the case."

27. In *Ram Bali v. State of Uttar Pradesh* [(2004) 10 SCC 598], the judgment in *Karnel Singh v. State of M.P.* [(1995) 5 SCC 518] was reiterated and this Court had observed that 'in case of defective investigation the court has to be circumspect while evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigation officer if the investigation is designedly defective'.

28. Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. Then alone can law and order be maintained. The Courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the judge. During the course of the trial,

the learned Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the Court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not sub-served. For truly attaining this object of a 'fair trial', the Court should leave no stone unturned to do justice and protect the interest of the society as well.

29. This brings us to an ancillary issue as to how the Court would appreciate the evidence in such cases. The possibility of some variations in the exhibits, medical and ocular evidence cannot be ruled out. But it is not that every minor variation or inconsistency would tilt the balance of justice in favour the accused. Of course, where contradictions and variations are of a serious nature, which apparently or impliedly are destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused. The Courts, normally, look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution. In *Kamaljit Singh v. State of Punjab* [2004 Cri.LJ 28], the Court, while dealing with discrepancies between ocular and medical evidence, held, "It is trite law that minor variations between medical evidence and ocular evidence do not take away the primacy of the latter. Unless medical evidence in its term goes so far as to completely rule out all possibilities whatsoever of injuries taking place in the manner stated by the eyewitnesses, the testimony of the eyewitnesses cannot be thrown out."

30. Where the eye witness account is found credible and trustworthy, medical opinion pointing to alternative

possibilities may not be accepted as conclusive. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by examining the terms of science, so that the court, although not an expert, may form its own judgment on those materials after giving due regard to the expert's opinion, because once the expert opinion is accepted, it is not the opinion of the medical officer but that of the Court. {Plz. See *Madan Gopal Kakad v. Naval Dubey & Anr.* [(1992) 2 SCR 921: (1992) 3 SCC 204]}."

21. The present case, when examined in light of the above principles, makes it clear that the defect in the investigation or omission on the part of the investigating officer, cannot prove to be of any advantage to the accused. No doubt the investigating officer ought to have obtained serologist's report both in respect of Ext. 2 and Ext. 5 and matched it with the blood group of the deceased. This is a definite lapse on the part of the investigating officer which cannot be overlooked by the Court, despite the fact that it finds no merit in the contention of the accused.

22. For the reasons afore-recorded, we dismiss this appeal being without any merit. However, we direct the Director General of Police, Uttarakhand, to take disciplinary action against Sub-Inspector, Brahma Singh, PW6, whether he is in service or has since retired, for such serious lapse in conducting investigation.

23. The Director General of Police shall take a disciplinary action against the said officer and if he has since retired, the action shall be taken with regard to deduction/stoppage of his pension in accordance with the service rules. The ground of limitation, if stated in the relevant rules, will not operate as the inquiry is being conducted under the direction of this Court.

B.B.B. Appeal dismissed.

BHARTIYA SEVA SAMAJ TRUST TR. PRES. & ANR.
v.
YOGESHBHAI AMBALAL PATEL & ANR.
(Civil Appeal No. 6463 of 2012)

SEPTEMBER 14, 2012

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

Service Law - Appointment - In challenge, for being illegal - Primary school - Respondent-teacher had been terminated from service on the ground that he did not possess the eligible qualification - High Court set aside the termination order holding that it was in utter disregard of the statutory provisions of s.40B of the Act - In appeal before Supreme Court, appellant-employer conceded that s.40B had been violated, but pleaded that the order of High Court had revived the illegal appointment of respondent and such illegality cannot be permitted to perpetrate - Held: The court should not set aside the order which appears to be illegal, if its effect is to revive another illegal order - It is for the reason that in such an eventuality the illegality would perpetuate and it would put a premium to the undeserving party/person -- Further, the Legislature in its wisdom after consultation with the expert body fixes the eligibility for a particular discipline taught in a school - The eligibility so fixed requires very strict compliance and any appointment made in contravention thereof must be held to be void in the ordinary circumstances - However, in the instant case, some teachers appointed alongwith respondent in pursuance of the same advertisement and possessing the same qualification as respondent still working with the same management - Evidence on record showed that appellant acted with malice - If a party has committed a wrong, he cannot be permitted to take the benefit of his own wrong - It was not merely a case of discrimination rather it was a clear

case of victimisation of respondent by the school Management for raising his voice against exploitation - Order of High Court therefore not interfered with - Bombay Primary Education (Gujarat Amendment) Act, 1986 - s.40B and Schedule F, Clause 6.

Education - Elementary and primary education - Right to free and compulsory education of children - Obligation of the State - Held: Imparting elementary and basic education is a constitutional obligation on the State as well as societies running Educational Institutions - Provision of free and compulsory education of satisfactory quality to children from disadvantaged and weaker sections is not merely the responsibility of schools run or supported by the appropriate Governments, but also of schools which are not dependant on Government funds - Constitution of India, 1950 - Arts. 21, 21A, 45 and 51A.

Education - Requirement of trained teachers - Held: Education and particularly elementary/basic education has to be qualitative and for that trained teachers are required.

Maxims - 'allegans suam turpitudinem non est audiendus', 'Commodum ex injuria sua nemo habere debet'; and 'nullus commodum capere potest de injuria sua propria'.

Respondent No.1 was an Assistant Teacher in a primary school run by the appellant-trust. It was alleged that he did not possess the eligibility for the said post and proper procedure had not been followed for making his appointment. The appellant-trust terminated the services of respondent no.1 on the ground that his appointment was in contravention of the statutory provisions of the Bombay Primary Education (Gujarat Amendment) Act, 1986 and particularly, in violation of the Schedule attached thereto. Respondent no.1 filed application challenging his termination order before the

Gujarat Primary Education Tribunal and asked for reinstatement with back wages. The Tribunal allowed the application of respondent No.1. Aggrieved, the appellant filed application before the High Court which dismissed the same on grounds, that the termination was in utter disregard of the statutory provisions of Section 40B of the Bombay Primary Education (Gujarat Amendment) Act, 1986 which requires to serve a show cause notice to the employee and seeking approval of the statutory authorities before giving effect to the order of termination.

In the instant appeal, though conceding that the statutory provisions of Section 40B of the Act had been violated, the appellant pleaded that this Court should not permit an illegality to perpetrate as respondent No.1 had been appointed illegally and he did not possess the eligibility for the post. The appellant submitted that respondent no.1 possesses the qualification of B.Sc.; B.Ed., but the required qualification for a Primary School Teacher was Primary Teachers Certificate (PTC) as provided in Clause (6) of Schedule F to the said Act as applicable to all Primary Schools in the State of Gujarat and thus, respondent no.1 did not possess the qualification making him eligible for the post. The appellant contended that in order to enforce the statutory requirement, this Court should set aside the impugned judgment as it revived the illegal appointment of respondent no.1.

Dismissing the appeal, the Court

HELD: 1. It is a settled legal proposition that the court should not set aside the order which appears to be illegal, if its effect is to revive another illegal order. It is for the reason that in such an eventuality the illegality would perpetuate and it would put a premium to the undeserving party/person. [Para 8] [1065-G-H]

Gadde Venkateswara Rao v. Government of Andhra Pradesh & Ors. **AIR 1966 SC 828: 1966 SCR 172;** *Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar & Ors.,* **AIR 1999 SC 3609: 1999 (3) Suppl. SCR 518;** *Mallikarjuna Mudhagal Nagappa & Ors. v. State of Karnataka & Ors.* **AIR 2000 SC 2976: 2000 (3) Suppl. SCR 102;** *Chandra Singh v. State of Rajasthan* **AIR 2003 SC 2889: 2003 (1) Suppl. SCR 674 and** *State of Uttaranchal & Anr. v. Ajit Singh Bhola & Anr.* **(2004) 6 SCC 800: 2004 (2) Suppl. SCR 627 - relied on.**

2.1. Further, imparting elementary and basic education is a constitutional obligation on the State as well as societies running educational institutions. The policy framework behind education in India is anchored in the belief that the values of equality, social justice and democracy and the creation of a just and humane society can be achieved only through provision of inclusive elementary education to all. Provision of free and compulsory education of satisfactory quality to children from disadvantaged and weaker sections is, therefore, not merely the responsibility of schools run or supported by the appropriate Governments, but also of schools which are not dependent on Government funds. Every generation looks up to the next generation with the hope that they shall build up a nation better than the present. Therefore, education which empowers the future generation should always be the main concern for any nation. [Para 15] [1068-B-C-E-F]

2.2. Right to education flows directly from Article 21 of the Constitution and is one of the most important fundamental rights. There is a need to earnestly implement Article 21A. Without education a citizen may never come to know of his other rights. Since there is no corresponding constitutional right to higher education - the fundamental stress has to be on primary and

elementary education, so that a proper foundation for higher education can be effectively laid. Hence, education is an issue, which has been treated at length in the Indian Constitution. It is a well accepted fact that democracy cannot be flawless; but, one can strive to minimize these flaws with proper education. Dissemination of learning with search for new knowledge with discipline all round must be maintained at all costs. [Para 16] [1068-F-H; 1069-A-C]

Ashoka Kumar Thakur v. Union of India **(2008) 6 SCC 1: 2008 (4) SCR 1 - relied on.**

State of Orissa & Anr. v. Mamata Mohanty **(2011) 3 SCC 436: 2011 (2) SCR 704;** *Andhra Kesari Education Society v. Director of School Education & Ors.* **AIR 1989 SC 183: 1988 (3) Suppl. SCR 893;** *Bandhua Mukti Morcha v. Union of India & Ors.* **1984 SC 802: 1984 (2) SCR 67;** *Miss. Mohini Jain v. State of Karnataka & Ors.* **AIR 1992 SC 1858: 1992 (3) SCR 658 and** *Unni Krishnan, J.P. & Ors. v. State of Andhra Pradesh & Ors.* **AIR 1993 SC 2178: 1993 (1) SCR 594 - referred to.**

3.1. Education and particularly elementary/basic education has to be qualitative and for that trained teachers are required. The Legislature in its wisdom after consultation with the expert body fixes the eligibility for a particular discipline taught in a school. Thus, the eligibility so fixed require very strict compliance and any appointment made in contravention thereof must be held to be void. [Para 18] [1069-G]

3.2. In ordinary circumstances, the instant case could be decided in the light of the aforesaid backdrop. However, the High Court has given full details of the teachers who had been appointed alongwith the respondent No.1 in pursuance of the same advertisement and possessing the same qualification of B.Sc.;B.Ed./

B.A.;B.Ed.They are still working with the same management. The High Court further recorded a finding that the list of such persons was merely illustrative and not exhaustive. [Para 19, 20] [1069-H; 1070-A-B-D]

State of Tamil Nadu & Ors. v. K. Shyam Sunder & Ors. **(2011) 8 SCC 737: 2011 (11) SCR 1094 - relied on.**

4.1. A person alleging his own infamy cannot be heard at any forum, what to talk of a Writ Court, as explained by the legal maxim 'allegans suam turpitudinem non est audiendus'. If a party has committed a wrong, he cannot be permitted to take the benefit of his own wrong. This concept is also explained by the legal maxims 'Commodum ex injuria sua nemo habere debet'; and 'nullus commodum capere potest de injuria sua propria'. [Para 21] [1070-E-G]

4.2. In the instant case, it is evident that the appellant acted with malice and it is held that it was not merely a case of discrimination rather it is a clear case of victimisation of respondent No.1 by School Management for raising his voice against exploitation. There is no cogent reason whatsoever to interfere with the order of the High Court. [Paras 22, 23] [1071-A-B; 1070-H]

G.S. Lamba & Ors. v. Union of India & Ors., **AIR 1985 SC 1019: 1985 (3) SCR 431;** *Narender Chadha & Ors. v. Union of India & Ors.* **AIR 1986 SC 638: 1986 (1) SCR 211;** *Molly Joseph @ Nish v. George Sebastian @ Joy* **AIR 1997 SC 109: 1996 (6) Suppl. SCR 497;** *Jose v. Alice & Anr.* **(1996) 6 SCC 342: 1996 (6) Suppl. SCR 768;** *T. Srinivasan v. T. Varalakshmi (Mrs.)* **AIR 1999 SC 595;** *Eureka Forbes Ltd. v. Allahabad Bank & Ors.* **(2010) 6 SCC 193: 2010 (5) SCR 990 and** *Inderjit Singh Grewal v. State of Punjab & Anr.* **(2011) 12 SCC 588: 2011 (10) SCR 557 - relied on.**

Case Law Reference:

1966 SCR 172	**relied on**	**Para 8**
1999 (3) Suppl. SCR 518	**relied on**	**Para 8**
2000 (3) Suppl. SCR 102	**relied on**	**Para 8**
2003 (1) Suppl. SCR 674	**relied on**	**Para 8**
2004 (2) Suppl. SCR 627	**relied on**	**Para 8**
2011 (2) SCR 704	**referred to**	**Para 9**
1988 (3) Suppl. SCR 893	**referred to**	**Para 10**
1984 (2) SCR 67	**referred to**	**Para 11**
1992 (3) SCR 658	**referred to**	**Para 12**
1993 (1) SCR 594	**referred to**	**Para 13**
2008 (4) SCR 1	**relied on**	**Para 16**
2011 (11) SCR 1094	**relied on**	**Para 17**
1985 (3) SCR 431	**relied on**	**Para 21**
1986 (1) SCR 211	**relied on**	**Para 21**
1996 (6) Suppl. SCR 497	**relied on**	**Para 21**
1996 (6) Suppl. SCR 768	**relied on**	**Para 21**
AIR 1999 SC 595	**relied on**	**Para 21**
2010 (5) SCR 990	**relied on**	**Para 21**
2011 (10) SCR 557	**relied on**	**Para 21**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6463 of 2012.

From the Judgment and Order dated 26.07.2012 of the High Cout of Gujarat at Ahmedabad in Letters Patent Appeal

No. 1367 of 2008 in Special Civil Application No. 6346 of 2006.

Percy Kavina, D.N. Ray, Lokesh K. Choudhary, Sumita Ray for the Appellants.

Yogeshbhai Ambalal Patel (In-Person).

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the impugned judgment and order dated 26.7.2012 passed by the High Court of Gujarat, Ahmedabad in Letters Patent Appeal No.1367 of 2008 in Special Civil Application No.6346 of 2006.

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

A. The appellant Trust runs a Primary School wherein a large number of students are getting education and a large number of teachers are imparting education. Respondent No.1 was appointed as an Assistant Teacher on 1.7.1993 alongwith a large number of persons in pursuance of the advertisement inviting application for the posts.

B. The appellant Trust issued a show cause notice dated 26.3.1998 to the respondent No.1 as why his services should not be terminated and alongwith the said notice he was also given the cheque towards salary for the month of March 1998. He was asked to submit reply to the said notice within 15 days. The notice was issued on the ground that he did not possess the eligibility for the said post and proper procedure had not been followed for making the appointment.

C. The respondent No.1 did not submit any reply to the aforesaid notice. Thus, the appellant Trust passed the order dated 30.4.1998 terminating his services on the ground that his appointment was in contravention of the statutory provisions of

Bombay Primary Education (Gujarat Amendment) Act, 1986 (hereinafter referred to as the 'Act') and particularly, in violation of the Schedule attached thereto. Alongwith the order of termination, he was also served a cheque for a sum of Rs.1710/- towards the salary for the month of April 1998 and was directed to hand over the charge to the Principal.

D. Aggrieved, the respondent No.1 challenged the aforesaid order by filing Application No.69/98 before the Gujarat Primary Education Tribunal on 11.5.1998 and asked for quashing of the said order and for reinstatement with all back wages. The appellant contested the said application and submitted the written statement etc. Parties were given the liberty by the Tribunal to examine and cross-examine the witnesses examined by the parties. The Tribunal vide judgment and order dated 21.1.2006 allowed the application of the respondent No.1 directing the appellant to reinstate him and also to pay him the back wages.

E. Aggrieved, the appellant filed Special Civil Application No.6346 of 2006 before the High Court of Gujarat challenging the said order of the Tribunal dated 21.1.2006.

F. The learned Single Judge vide order dated 13.11.2008 dismissed the said application filed by the appellant Trust on various grounds, inter-alia, that the termination was in utter disregard of the statutory provisions of Section 40B of the Act which requires to serve a show cause notice to the employee and seeking approval of the statutory authorities before giving effect to the order of termination.

G. Aggrieved, the appellant challenged the said judgment and order by filing Letters Patent Appeal No.1367 of 2008 which has been dismissed by order dated 1.12.2008.

Hence, this appeal.

3. Shri Percy Kavina, learned Senior Advocate appearing on behalf of the appellant, has submitted that the respondent

No.1 possesses the qualification of B.Sc.; B.Ed., but the required qualification for a Primary School Teacher is Primary Teachers Certificate (PTC) as provided in Clause (6) of Schedule F to the Act as applicable to all Primary Schools in the State of Gujarat. Thus, the respondent did not possess the qualification making him eligible for the post. Once the order is bad in its inception, it cannot be sanctified by lapse of time. The order of termination ought not to have been interfered with as the order setting aside the same had revived the wrong order of appointment, which is not permissible in law. The courts below must have ensured strict compliance of the statutory provisions of the Act and have swayed with unwarranted sympathy with the respondent No.1. Thus, the appeal deserves to be allowed.

4. On the contrary, the respondent No.1 appeared in person as a Caveator and has submitted that he had applied in pursuance of an advertisement wherein the eligibility i.e. qualification was shown as B.Sc.;B.Ed/B.A.;B.Ed. The vacancies had been advertised in local newspaper having wide circulation. Most of the teachers in the School run by the appellant had been appointed though they possessed the same qualification i.e., B.Sc.;B.Ed./B.A.;B.Ed. A large number of candidates had applied for the post alongwith respondent no.1 possessing the same qualification and they had been selected. None of them has been removed. The respondent No.1 had been given hostile discrimination as the teachers having the same qualification duly appointed alongwith respondent No.1 are still working in the appellant's School. Respondent No.1 had been chosen to be removed for extraneous reasons and had been deprived of his legitimate dues. His selection was made by the Committee consisting of the representatives of the appellant Trust as well as Government officials after being fully satisfied regarding the eligibility of the respondent No.1. The appellant Trust cannot be permitted either to make discrimination amongst employees or to take the benefit of its own mistake and that too at such a belated stage. The appeal

lacks merit and is liable to be dismissed.

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

Section 40B of the Act reads as under:-

Section 40B: Dismissal removal or reduction in rank of teachers:- (1)(a) No teacher of a recognized private primary school shall be dismissed or removed or reduced in rank nor service be otherwise terminated until -

i) he has been given by the manager an opportunity of showing cause against the action proposed to be taken in regard to him; and

ii) the action proposed to be taken in regard to him has been approved in writing by the administrative officer of the school board in the jurisdiction of which the private school is situated.

(b) The administrative officer shall communicate to the manager of the school in writing his approval of the action proposed, within a period of forty five days from the date of receipt by the administrative officer of such proposal.

(2) Where the administrative officer fails to communicate either approval or disapproval within a period of forty five days specified in clause (b) of sub-section (1), the proposed action shall be deemed to have been approved by the administrative officer on the expiry of the said period."

6. The Tribunal as well as the High Court, after appreciating the evidence on record, recorded the findings to the effect that there had been two fold violation of Section 40B of the Act, firstly, no notice was issued to the respondent No.1 and secondly, no approval from the competent authority was sought for by the School management.

7. Shri Percy Kavina, learned Senior Advocate appearing on behalf of the appellant, has fairly conceded to the effect that the said statutory provisions of Section 40B of the Act had been violated on both counts.

In view of the above, the facts and circumstances of the case do not warrant review of the orders passed by the High Court as well as by the Tribunal. However, Shri Percy Kavina has insisted that this Court should not permit an illegality to perpetrate as the respondent No.1 had been appointed illegally and he did not possess the eligibility for the post. The Primary School children have to be taught by qualified persons and this Court has consistently held that B.Sc.; B.Ed./B.A.;B.Ed. is not equivalent to PTC which is the required qualification in clause (6) of Schedule F attached to the Act. Clause (6) of Schedule F reads as under:-

> *"Clause 6. Qualification* - The Management shall appoint only trained teacher who have passed the Secondary School Certificate Examination and also the Primary Training Certificate Examination.
>
> For special subjects, teachers shall be recruited in accordance with the qualification laid down by the Government for such teacher under the vacancies in the District Education Committees or Municipal School Boards in the State from time to time."

Thus, it has been submitted by Shri Percy Kavina that in order to enforce the statutory requirement, this Court should set aside the impugned judgment and order as it has revived the illegal appointment of the respondent No.1.

8. It is a settled legal proposition that the court should not set aside the order which appears to be illegal, if its effect is to revive another illegal order. It is for the reason that in such an eventuality the illegality would perpetuate and it would put a premium to the undeserving party/person. (Vide: *Gadde Venkateswara Rao v. Government of Andhra Pradesh & Ors.,* AIR 1966 SC 828; *Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar & Ors.,* AIR 1999 SC 3609; *Mallikarjuna Mudhagal Nagappa & Ors. v. State of Karnataka & Ors.,* AIR 2000 SC 2976; *Chandra Singh v. State of Rajasthan,* AIR 2003 SC 2889; and *State of Uttaranchal & Anr. v. Ajit Singh Bhola & Anr.,* (2004) 6 SCC 800).

9. In *State of Orissa & Anr. v. Mamata Mohanty,* (2011) 3 SCC 436, this Court while considering the similar issue where teachers had been appointed without possessing the eligibility has held that if the appointment order itself is bad in its inception, it cannot be rectified and a person lacking eligibility cannot be appointed unless the statutory provision provides for relaxation of eligibility in a particular statute and order of relaxation has been passed in terms of the said order.

10. In *Andhra Kesari Education Society v. Director of School Education & Ors.,* AIR 1989 SC 183, this Court recognised the importance of eligibility fixed by the Legislature in the said case, pointing out that, as those persons have to handle with the tiny tods, therefore, the teacher alone could bring out their skills and intellectual activities. He is the engine of the educational system. He is a superb instrument in awakening the children to cultural values. He must possess potentiality to deliver enlightened service to the society. His quality should be such as could inspire and motivate into action the benefiter. He must keep himself abreast of ever-changing conditions. He is not to perform in wooden and unimaginative way; he must eliminate unwarranted tendencies and attitudes and infuse nobler and national ideas in younger generation; and his involvement in national integration is more important; indeed, indispensable.

11. In *Bandhua Mukti Morcha v. Union of India & Ors.,* 1984 SC 802, this Court held that Article 21 read with Articles 39, 41 and 42 provides for protection and preservation of health

and strength also of tender age children against abuse of opportunities and further provides for providing the educational facilities.

12. In *Miss. Mohini Jain v. State of Karnataka & Ors.,* AIR 1992 SC 1858, this Court while dealing with this issue held that without making "right to education" under Article 41 of the Constitution a reality, the fundamental rights under Chapter III shall remain beyond the reach of the large majority which are illiterate. The State is under an obligation to make an endeavour to provide educational facilities at all levels to its citizens. The right to education, therefore, is concomitant to the fundamental rights enshrined under Part III of the Constitution to provide educational institutions at all levels for the benefit of the citizens. The Educational Institutions must function to the best advantage of the citizens. Opportunity to acquire education cannot be confined to the richer section of the society.

13. In *Unni Krishnan, J.P. & Ors. v. State of Andhra Pradesh & Ors.,* AIR 1993 SC 2178, this Court considered a large number of judgments on this issue and came to the conclusion that the right to education is contained in as many as three Articles in Part IV, viz., Articles 41, 45 and 46, which shows the importance attached to it by the founding-fathers. Even some of the Articles in Part III, viz., Articles 29 and 30 speak of education. The Court further held that right to compulsory and free education up to the age of 14 years is a fundamental right of every child.

14. In view to have greater emphasis, the 86th Amendment in the Constitution of India was made in 2002 introducing the provision of Article 21-A, declaring the right to free and compulsory education of the children between the age of 6 to 14 years as a fundamental right. Correspondingly, the provisions of Article 45 have been amended making it an obligation on the part of the State to impart free education to the children. Amendment in Article 51-A of the Constitution

inserting the clause-'k' has also been made making it obligatory on the part of the parents to provide opportunities for education to their children between the age of 6 to 14 years.

15. Thus, in view of the above, it is evident that imparting elementary and basic education is a constitutional obligation on the State as well as societies running educational institutions. When we talk of education, it means not only learning how to write and read alphabets or get mere information but it means to acquire knowledge and wisdom so that he may lead a better life and become a better citizen to serve the nation in a better way.

The policy framework behind education in India is anchored in the belief that the values of equality, social justice and democracy and the creation of a just and humane society can be achieved only through provision of inclusive elementary education to all. Provision of free and compulsory education of satisfactory quality to children from disadvantaged and weaker sections is, therefore, not merely the responsibility of schools run or supported by the appropriate Governments, but also of schools which are not dependent on Government funds.

Every generation looks up to the next generation with the hope that they shall build up a nation better than the present. Therefore, education which empowers the future generation should always be the main concern for any nation.

16. Right to education flows directly from Article 21 and is one of the most important fundamental rights. In *Ashoka Kumar Thakur v. Union of India* (2008) 6 SCC 1, while deciding the issue of reservation, this Court made a reference to the provisions of Articles 15(3) and 21A of the Constitution, observing that without Article 21A the other fundamental rights are rendered meaningless. Therefore, there has to be a need to earnestly on implementing Article 21A.

Without education a citizen may never come to know of

his other rights. Since there is no corresponding constitutional right to higher education - the fundamental stress has to be on primary and elementary education, so that a proper foundation for higher education can be effectively laid.

Hence, we see that education is an issue, which has been treated at length in our Constitution. It is a well accepted fact that democracy cannot be flawless; but, we can strive to minimize these flaws with proper education.

Democracy depends for its very life on a high standard of general, vocational and professional education. Dissemination of learning with search for new knowledge with discipline all round must be maintained at all costs.

17. This Court in *State of Tamil Nadu & Ors. v. K. Shyam Sunder & Ors.,* (2011) 8 SCC 737 held as under:

> "In the post constitutional era, attempts have been made to create an egalitarian society by removing disparity among individuals and in order to do so, education is the most important and effective means. There has been an earnest effort to bring education out of commercialism/ merchantilism.
>
> The right of a child should not be restricted only to free and compulsory education but should be extended to have quality education without any discrimination on economic, social and cultural grounds".

18. In view of the above, education and particularly that of elementary/basic education has to be qualitative and for that the trained teachers are required. The Legislature in its wisdom after consultation with the expert body fixes the eligibility for a particular discipline taught in a school. Thus, the eligibility so fixed require very strict compliance and any appointment made in contravention thereof must be held to be void.

19. In ordinary circumstances, the instant case could be

decided in the light of the aforesaid backdrop. However, the Division Bench of the High Court has given full details of the teachers who had been appointed alongwith the respondent No.1 in pursuance of the same advertisement and possessing the same qualification of B.Sc.;B.Ed./B.A.;B.Ed. They are still working with the same management and some of them had been as under:

(i) Mrs. Rekhaben Virabhai Patel

(ii) Mrs. Urmilaben Chandrakantbhai Mistry

(iii) Mr. Dilipbhai Naranbhai Patel

(iv) Mrs. Ritaben Shaileshbhai Joshi

20. The High Court further recorded a finding that the list of such persons was merely illustrative and not exhaustive.

21. A person alleging his own infamy cannot be heard at any forum, what to talk of a Writ Court, as explained by the legal maxim 'allegans suam turpitudinem non est audiendus'. If a party has committed a wrong, he cannot be permitted to take the benefit of his own wrong. (Vide: *G. S. Lamba & Ors. v. Union of India & Ors.,* AIR 1985 SC 1019; *Narender Chadha & Ors. v. Union of India & Ors.,* AIR 1986 SC 638; *Molly Joseph @ Nish v. George Sebastian @ Joy,* AIR 1997 SC 109; *Jose v. Alice & Anr.,* (1996) 6 SCC 342; and *T. Srinivasan v. T. Varalakshmi (Mrs.),* AIR 1999 SC 595).

This concept is also explained by the legal maxims 'Commodum ex injuria sua nemo habere debet'; and 'nullus commodum capere potest de injuria sua propria'. (See also: *Eureka Forbes Ltd. v. Allahabad Bank & Ors.,* (2010) 6 SCC 193; and *Inderjit Singh Grewal v. State of Punjab & Anr.,* (2011) 12 SCC 588).

22. Thus, it is evident that the appellant has acted with malice alongwith respondent and held that it was not merely a

case of discrimination rather it is a clear case of victimisation of respondent No.1 by School Management for raising his voice against exploitation.

23. After going through the material on record and considering the submissions made by learned counsel for the appellant and the respondent No.1-in-person, we do not find any cogent reason whatsoever to interfere with the aforesaid findings of fact.

24. The appeal lacks merit and is, accordingly, dismissed.

B.B.B. Appeal dismissed.

STATE OF GUJARAT & ORS.
v.
ARVINDKUMAR T. TIWARI & ANR.
(Civil Appeal No. 6468 of 2012)

SEPTEMBER 14, 2012

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

SERVICE LAW:

Appointment on compassionate ground - Eligibility - Relaxation - Held: Compassionate appointment cannot be claimed as a matter of right - A claim to be appointed on such a ground has to be considered in accordance with rules, regulations or administrative instructions governing the subject, taking into consideration the financial condition of family of deceased - Eligibility criteria for a class IV post being 10th standard, and the applicant being 8th fail, was not eligible to apply for the post - The income of the family was also above the financial limit - In view of the settled position, it is neither desirable, nor permissible in law, for the Court to issue direction to relax the eligibility criteria and appoint the applicant merely on humanitarian grounds.

Service Law - 'Eligibility' - Connotation of - Explained - Held: Fixing the eligibility for a particular post falls within the exclusive domain of the legislature/executive and cannot be the subject matter of judicial review, unless found to be arbitrary, unreasonable or has been fixed without keeping in mind the nature of service - Courts and tribunal do not have the power to issue direction to make appointment by way of granting relaxation of eligibility or in contravention thereof.

Respondent No. 1, applied for the post of Peon on compassionate ground as his father, an ASI of Police,

died in harness on 9.4.1999. His application was first rejected on the ground that the family had an income over and above the limit fixed for the purpose and, subsequently, on the ground that he did not meet the examinations minimum eligibility for the post as he had not passed 10th standard examinations which was a necessary pre-requisite for a class IV post. On a Special Civil Application, being filed by respondent no. 1, it was held that since his father died in 1999, the subsequent provision prescribing 10th pass for class IV post was not applicable and his case was directed to be considered afresh accordingly. The Division Bench of the High Court declined to interfere.

Allowing the appeal, filed by the department, the Court

HELD: 1.1 It is a settled legal proposition that the compassionate appointment cannot be claimed as a matter of right. It is not simply another method of recruitment. A claim to be appointed on such a ground has to be considered in accordance with the rules, regulations or administrative instructions governing the subject, taking into consideration the financial condition of the family of the deceased. The objective of providing of compassionate employment is to enable the family of the deceased to overcome the sudden financial crisis it finds itself facing, and not to confer any status upon it. [para 5] [1078-E-G]

Union of India & Ors. v. Shashank Goswami & Anr., **AIR 2012 SC 2294 - relied on.**

1.2 The eligibility for the post may at times is misunderstood to mean qualification. In fact, eligibility connotes the minimum criteria for selection, that may be laid down by the executive authority/legislature by way of any statute or rules, while the term qualification, may

connote any additional norms laid down by the authorities. Before a candidate is considered for a post or even for admission to the institution, he must fulfill the eligibility criteria. Lacking eligibility for the post cannot be cured at any stage and appointing such a person would amount to serious illegality and not mere irregularity. [para 6 and 11] [1078-H; 1079-A-B; 1081-B]

Dr. Preeti Srivastava & Anr. v. State of M.P. & Ors., **1999 (1) Suppl. SCR 249 = AIR 1999 SC 2894;** *State of Haryana v. Subhash Chandra Marwah & Ors.,* **1974 (1) SCR 165 = AIR 1973 SC 2216;** *J.C. Yadav v. State of Haryana,* **1990 (2) SCR 470 = AIR 1990 SC 857; and** *Ashok Kumar Uppal & Ors. v. State of J & K & Ors.,* **1998 (1) SCR 164 = AIR 1998 SC 2812 - referred to**

2.1 Fixing the eligibility for a particular post falls within the exclusive domain of the legislature/executive and cannot be the subject matter of judicial review, unless found to be arbitrary, unreasonable or has been fixed without keeping in mind the nature of service, for which appointments are to be made, or has no rational nexus with the object(s) sought to be achieved by the statute. The courts and tribunal do not have the power to issue direction to make appointment by way of granting relaxation of eligibility or in contravention thereof. [para 8 and 9] [1079-G; 1080-C-D]

State of J & K v. Shiv Ram Sharma & Ors., **AIR 1999 SC 2012;** *Praveen Singh v. State of Punjab & Ors.,* **(2000) 8 SCC 436;** *State of Orissa & Anr. v. Mamta Mohanty,* **(2011) 3 SCC 436;** *State of Orissa & Anr. v. Mamta Mohanty,* **2011 (2) SCR 704 = (2011) 3 SCC 436,** *State of M.P. & Anr. v. Dharam Bir,* **1998 (3) SCR 511 = (1998) 6 SCC 165 - relied on.**

Prit Singh v. S.K. Mangal & Ors. **1992 (1) Suppl. SCR**

337 = 1993(1) SCC (Supp.) 714; and *Pramod Kumar v. U.P. Secondary Education Services Commission & Ors.,* **2008 (4) SCR 559 = AIR 2008 SC 1817 - referred to**

2.2 This Court is, therefore, of the considered opinion that since 1991, the eligibility criteria for a Class IV post was set as the passing of the 10th standard examinations, and as respondent no. 1 had been unable to pass even the 8th standard examinations, he was not eligible to apply for the said post. Even otherwise, if the direction of the High Court is complied with and the case is considered as per the un-amended provisions in existence prior to 2005, the financial limit fixed therein, would automatically be applicable. It is neither desirable, nor permissible in law, for this Court to issue direction to relax the said eligibility criteria and appoint respondent No.1 merely on humanitarian grounds. [Para 13, 14] [1082-A-D]

Case Law Reference:

AIR 2012 SC 2294	**relied on**	**para 5**
1999 (1) Suppl. SCR 249	**referred to**	**para 6**
1974 (1) SCR 165	**referred to**	**para 7**
1990 (2) SCR 470	**referred to**	**para 7**
1998 (1) SCR 164	**relied on**	**para 7**
1998 (3) SCR 511	**relied on**	**para 8**
AIR 1999 SC 2012	**relied on**	**para 9**
(2000) 8 SCC 436	**relied on**	**para 9**
2011 (2) SCR 704	**relied on**	**para 10**
1992 (1) Suppl. SCR 337	**referred to**	**para 11**
2008 (4) SCR 559	**referred to**	**para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6468 of 2012.

From the Judgment and Order dated 04.02.2008 of the High Court of Gujarat at Ahmedabad in Letters Patent Appeal No. 49 of 2008.

Shomil Sanjanwala, Hemantika Wahi, Jesal for the Appellants.

Laxmi Arvind, Poonam Prasad, Pradeep Kumar Mathur, Amardeep Sharma for the Resondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the impugned judgment and order dated 4.2.2008 passed in Letters Patent Appeal No.49/2008 by the High Court of Gujarat at Ahmedabad.

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

a) The father of respondent No.1 who was working in the Police Department, State of Gujarat as the Assistant Sub-Inspector of Police, died in harness on 9.4.1999. Immediately thereafter, respondent No.1 filed an application for employment on compassionate ground, for the post of Peon. As he had completed his education only upto the 8th standard, the said application was rejected vide order dated 13.10.2000, on the ground that the family of the deceased was not suffering from any financial constraints and was getting an adequate amount of pension, which was, in fact, over and above the income limit fixed by the Government for this purpose. The said application was considered by the Additional Director General of Police by way of passing order dated 23.6.2003, directing that the application of respondent No.1 be reconsidered, ignoring the abovementioned issue regarding financial condition. The said

application was rejected vide order dated 3.7.2005, on the ground that the applicant did not meet the minimum eligibility requirement for the said post, as he had not passed the 10th standard, which was a necessary pre-requisite for the consideration of the application of respondent No.1 for a Class IV post on compassionate ground.

b) Aggrieved, respondent No.1 preferred Special Civil Application No.5630/2007, which was disposed of vide judgment and order dated 2.3.2007, considering the fact that there was a subsequent notification dated 16.3.2005, which provided for the minimum qualification requirement of 10th standard pass, as the eligibility criteria for employment to a Class IV post. However, it was held that, as the said employee had died in the year 1999, the amended provision would not apply to his case. Therefore, direction was issued to consider his case without being influenced by the earlier order, in light of the new policy/circular/rules.

c) Aggrieved, the said order was challenged before the Division Bench, by the appellant, which was rejected vide impugned judgment and order dated 4.2.2008. Hence, this appeal.

3. Shri Shomil Sanjanwala, learned counsel appearing for the State of Gujarat, has submitted that the High Court erred in observing that the new policy/rules do not apply retrospectively, and that the case of respondent No.1 should be considered in light of the then existing rules, i.e., the rules which were in force prior to 2005. Earlier, employment on compassionate ground in the Department of Police was governed by way of Circular dated 16.12.1991, which provided that employment in Class III or Class IV posts, shall be accorded on compassionate ground to deserving candidates on the basis of their educational qualification.

4. Mrs. Laxmi Arvind, learned Amicus Curiae, appearing for respondent No.1 opposed the appeal, contending that the

matter has been considered by the court below in a correct perspective and does not therefore, invite any interference. The father of the respondent died on 9.4.1999, and a period of more than 13 years has lapsed since then. The respondent has been unsuccessful in getting such employment, and has now attained the age of 36 years simply waiting for the said job by approaching one forum or the other, even though the purpose for which compassionate employment was introduced, was to redeem the bereaved family from financial constraints from which it is likely to suffer, owing to the death of its sole bread earner, and thus, should be accorded immediately. The court should, therefore, issue direction to offer employment to the said post of peon, to respondent No.1 under all circumstances on humanitarian grounds. The appeal lacks merit and is liable to be dismissed.

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

It is a settled legal proposition that compassionate appointment cannot be claimed as a matter of right. It is not simply another method of recruitment. A claim to be appointed on such a ground, has to be considered in accordance with the rules, regulations or administrative instructions governing the subject, taking into consideration the financial condition of the family of the deceased. Such a category of employment itself, is an exception to the constitutional provisions contained in Articles 14 and 16, which provide that there can be no discrimination in public employment. The object of compassionate employment is to enable the family of the deceased to overcome the sudden financial crisis it finds itself facing, and not to confer any status upon it. (Vide: *Union of India & Ors. v. Shashank Goswami & Anr.,* AIR 2012 SC 2294).

6. The eligibility for the post may at times be misunderstood to mean qualification. In fact, eligibility connotes the minimum criteria for selection, that may be laid down by the

executive authority/legislature by way of any statute or rules, while the term qualification, may connote any additional norms laid down by the authorities. However, before a candidate is considered for a post or even for admission to the institution, he must fulfill the eligibility criteria. (Vide: *Dr. Preeti Srivastava & Anr. v. State of M.P. & Ors.,* AIR 1999 SC 2894).

7. The appointing authority is competent to fix a higher score for selection, than the one required to be attained for mere eligibility, but by way of its natural corollary, it cannot be taken to mean that eligibility/norms fixed by the statute or rules can be relaxed for this purpose to the extent that, the same may be lower than the ones fixed by the statute. In a particular case, where it is so required, relaxation of even educational qualification(s) may be permissible, provided that the rules empower the authority to relax such eligibility in general, or with regard to an individual case or class of cases of undue hardship. However, the said power should be exercised for justifiable reasons and it must not be exercised arbitrarily, only to favour an individual. The power to relax the recruitment rules or any other rule made by the State Government/Authority is conferred upon the Government/Authority to meet any emergent situation where injustice might have been caused or, is likely to be caused to any person or class of persons or, where the working of the said rules might have become impossible. (Vide: *State of Haryana v. Subhash Chandra Marwah & Ors.,* AIR 1973 SC 2216; *J.C. Yadav v. State of Haryana,* AIR 1990 SC 857; and *Ashok Kumar Uppal & Ors. v. State of J & K & Ors.,* AIR 1998 SC 2812).

8. The courts and tribunal do not have the power to issue direction to make appointment by way of granting relaxation of eligibility or in contravention thereof. In *State of M.P. & Anr. v. Dharam Bir,* (1998) 6 SCC 165, this Court while dealing with a similar issue rejected the plea of humanitarian grounds and held as under:

"The courts as also the tribunal have no power to override

the mandatory provisions of the Rules on sympathetic consideration that a person, though not possessing the essential educational qualifications, should be allowed to continue on the post merely on the basis of his experience. Such an order would amount to altering or amending the statutory provisions made by the Government under Article 309 of the Constitution."

9. Fixing eligibility for a particular post or even for admission to a course falls within the exclusive domain of the legislature/executive and cannot be the subject matter of judicial review, unless found to be arbitrary, unreasonable or has been fixed without keeping in mind the nature of service, for which appointments are to be made, or has no rational nexus with the object(s) sought to be achieved by the statute. Such eligibility can be changed even for the purpose of promotion, unilaterally and the person seeking such promotion cannot raise the grievance that he should be governed only by the rules existing, when he joined service. In the matter of appointments, the authority concerned has unfettered powers so far as the procedural aspects are concerned, but it must meet the requirement of eligibility etc. The court should therefore, refrain from interfering, unless the appointments so made, or the rejection of a candidature is found to have been done at the cost of 'fair play', 'good conscious' and 'equity'. (Vide: *State of J & K v. Shiv Ram Sharma & Ors.,* AIR 1999 SC 2012; and *Praveen Singh v. State of Punjab & Ors.,* (2000) 8 SCC 436).

10. In *State of Orissa & Anr. v. Mamta Mohanty,* (2011) 3 SCC 436, this Court has held that any appointment made in contravention of the statutory requirement i.e. eligibility, cannot be approved and once an appointment is bad at its inception, the same cannot be preserved, or protected, merely because a person has been employed for a long time.

11. A person who does not possess the requisite qualification cannot even apply for recruitment for the reason

that his appointment would be contrary to the statutory rules is, and would therefore, be void in law.

Lacking eligibility for the post cannot be cured at any stage and appointing such a person would amount to serious illegibility and not mere irregularity.

Such a person cannot approach the court for any relief for the reason that he does not have a right which can be enforced through court. (See: *Prit Singh v. S.K. Mangal & Ors.,* 1993(1) SCC (Supp.) 714; and *Pramod Kumar v. U.P. Secondary Education Services Commission & Ors.,* AIR 2008 SC 1817).

12. The claim of the respondent was earlier rejected on the ground that, the family had adequate financial status and the amount of pension being given was actually over and above the limit fixed by the appellant issuing the guidelines. Subsequently, when the case was reconsidered upon the direction of the court, it was found that the respondent did not meet the requisite eligibility criteria i.e., 10th standard certificate. Admittedly, the respondent is 8th standard fail, and thus, he can be considered only as 7th standard pass and we must therefore consider, whether he could have been offered appointment to a Class IV post.

13. Clause 9 thereof, provides that no relaxation in educational qualification(s) for the purpose of giving compassionate appointment to the dependant(s) of a deceased employee, would be permissible. However, such relaxation can be granted if there exists some requirement of minimum qualification(s) with respect to the said post.

Clause 11 thereof, provides that a dependant can, in fact, be given appointment on compassionate ground, on the basis of the pass marks obtained by him in the new Secondary School Certificate and in view thereof, as respondent No.1 is admittedly only 8th standard (fail), he is therefore, ineligible for the post.

Even otherwise, if the direction of the High Court is complied with and the case is considered as per the un-amended provisions in existence prior to 2005, the financial limits fixed therein, would automatically be applicable. His application dated 11.5.1999 reveals that his date of birth is 1.3.1976, and further that he has studied only upto the 8th standard (fail).

14. In view of the above, we are of the considered opinion that since 1991, the eligibility criteria for a Class IV post was set as, the passing of the 10th standard, and as the said respondent had been unable to pass even the 8th standard, he was most certainly, not eligible to apply for the said post. In view of the law referred to hereinabove, it is neither desirable, nor permissible in law, for this court to issue direction to relax the said eligibility criteria and appoint respondent No.1 merely on humanitarian grounds.

15. Thus, the question framed by this Court with respect to whether the application for compassionate employment is to be considered as per existing rules, or under the rules as existing on the date of death of the employee, is not required to be considered.

16. In view of the above, the appeal succeeds and is allowed. The judgment and order impugned herein is set aside. No order as to costs.

R.P. Appeal allowed.

TULSHIRAM SAHADU SURYAWANSHI & ANR.
v.
STATE OF MAHARASHTRA
(Criminal Appeal No. 507 of 2008)

SEPTEMBER 14, 2012.

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

PENAL CODE, 1860:

ss. 302/34, 304-B/34 and 498-A/34 - Murder of a married woman in matrimonial home, for dowry - Circumstantial evidence - Conviction and sentence of life imprisonment awarded by trial court to all the three accused, namely, the husband of deceased and his parents, affirmed by High Court - SLP of husband already dismissed - Appeal by his parents - Held: Medical evidence supported prosecution case - Ill-treatment meted out to deceased by all the three accused established - Recoveries proved - The circumstances constitute a chain even stronger than an eye-witness account and, therefore, conviction of appellants is fully justified - Evidence Act, 1872 - ss. 106 and 114.

The appellants-couple and their son (A-3) were prosecuted for ill-treating their daughter-in-law, the wife of A-3, for not fulfilling their demand of dowry, and for committing her murder by drowning her into a well after tying her hands and feet. The trial court convicted all the three accused u/ss 302/34, 304-B/34 and 498-A/34 and sentenced each of them to imprisonment for life. The High Court upheld the judgment. The SLP filed by A-3 was dismissed.

Dismissing the appeal, the Court

HELD: 1.1 It is not in dispute that the conviction of

the appellants (A-1 and A-2) is based on circumstantial evidence. In Sharad Birdhichand Sarda's case*, this Court after referring to various earlier decisions, formulated the conditions to be fulfilled before a case against an accused can be said to be fully established based on circumstantial evidence. [Para 4-5] [1090-D-E]

******Sharad Birdhichand Sarda vs. State of Maharashtra,* **1985 (1) SCR 88 = (1984) 4 SCC 116 - relied on**

1.2 In the instant case, the first circumstance relied upon by the prosecution is that all the three accused ill-treated the deceased. A perusal of the evidence of PW-1 (father of the deceased) shows that his daughter was treated well only for a period of 5 months from the date of her marriage and thereafter, all of the accused started ill-treating her by way of beating and by not providing sufficient food. He also stated that A-3, who at the relevant time was employed as a driver, on the instigation of A-1 and A-2, was demanding Rs.50,000/- for purchase of a jeep. PW-2, who acted as the mediator in the marriage of the deceased with A3, lodged the complaint (Exh. 26) and explained about the ill-treatment meted out to the deceased at her matrimonial home. It was he who intimated the police that the dead body of the deceased was seen floating in the well. He stated that all the 3 accused were living together and his house was at a distance of 2 kms. away from their house. He also stated that all the accused used to demand Rs.50,000/- from the deceased and they also used to beat and abuse her. From the evidence of PWs 1 and 2, it is clearly established that all the 3 accused ill-treated the deceased. [Para 9-11] [1092-D-E, H; 1093-A-B, C-E]

1.3 The second circumstance heavily relied on by the prosecution is the distance between the house of the accused and the well wherein the body of the deceased was found to be floating. It was PW-2, who first noticed the dead body of the deceased in the well and filed a

complaint to the police. He stated that A-3 along with another came to his house and reported about missing of the deceased and enquired about her. Thereafter, PW-2, along with others, started searching her for the whole night. He also stated that when he attempted to go near the well, the accused prevented him from doing so. It was only on the next day, when PW-2 carried out further search for the deceased, that he came to know from his nephew that the body of the deceased was found lying in the well and after seeing the dead body he filed a complaint to the police. The assertion of PW-2 that he was prevented from going to the side of the well by the accused fully establishes another circumstance which shows that all the accused were responsible for the death of the deceased. Further, without the support and assistance of A-1 and A-2, it would not be possible for A3 alone to carry the deceased to the well which is at a distance of 400 ft. from their house. [Para 12] [1093-F-H; 1094-A-C]

1.4 Another important circumstance relied on and proved by the prosecution is that the legs and hands of the deceased were tied at the time of throwing her into the well. PW-1 stated that when the dead body of the deceased was removed from the well, he noticed that the hands and legs of the deceased were tied by means of the border of a saree. He proved article Nos. 5, 6 and 7 as the pieces of the border of the saree with which the hands and legs of the deceased were tied. This fact was also strengthened by the evidence of PW-2 and supported by PW-6, the doctor who conducted the post mortem (Ext. 35) on the dead body. PW-6 further opined that the tying of the hands and legs was not possible by the victim herself. She also opined that the death was due to drowning. From the evidence of PWs 1, 2 and 6, it is clear that the legs and hands of the deceased were tied by the use of the border of a saree. It has also come in evidence that it would not be possible for A-3 alone to tie

both the legs and hands without the assistance of A1 and A2 who were present in the house. [Para 13-14] [1094-C-E, G-H; 1095-A-C]

1.5 Another circumstance relied on and proved by the prosecution is the recovery of the border of the saree which is an important piece of evidence and the same was established by PW-7, the panch witness for the memorandum. He stated that he was called at the Police Station for the recording of panchnama. PW-7 also proved Ext. 40 as the panchnama recorded for the said purpose which bears his signature. He further deposed about the handing over of the border of the saree by A-2 to the Police. The Police recorded the panchnama of the seizure of the border of the saree and PW-7 also admitted his signature therein. In addition to the evidence of PW-7, another resident of the locality was examined as PW-5, who deposed that the dead body was taken out from the well in his presence and he noticed that the hands and legs of the deceased were tied by means of a red colour border of a saree. The police drew inquest in his presence. He also signed the memorandum which is Exh. 29. From the evidence of PW-1, PW-2, PW-6 (the Doctor, who conducted the post mortem) PWs 5 and 7 (the panch witnesses) and in the light of the principles regarding s.27 of the Evidence Act, it has been established that the material object, namely, the border of the saree used for tying legs and hands of the deceased was correctly identified and marked and the same has been rightly relied on by the prosecution and accepted by the courts below. The evidence of both PWs 5 and 7 fully supports the contents of memorandum which are Ext. Nos. 29 and 40 respectively. [Para 15-17] [1095-D-E, F-H; 1096-A, 1097-C-D]

Anter Singh vs. State of Rajasthan, **(2004) 10 SCC 657 = 2004 (2) SCR 123 - referred to.**

1.6 The evidence led by the prosecution also shows that at the relevant point of time, the deceased was living with all the 3 accused. Thus, the appellants, their son-A3 and the deceased were the only occupants of the house and it was, therefore, incumbent on the appellants to have tendered some explanation in order to avoid any suspicion as to their guilt. [Para 18] [1097-E-F]

1.7 All these factors are undoubtedly circumstances which constitute a chain even stronger than an eye-witness account and, therefore, this Court is of the opinion that the conviction of the appellants is fully justified. [Para 18] [1097-F]

2.1 It is settled law that presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. This position is strengthened in view of s. 114 of the Evidence Act, 1872. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process, the court shall have regard to the common course of natural events, human conduct etc in addition to the facts of the case.[Para 19] [1097-G-H; 1098-A-B]

2.2 In these circumstances, the principles embodied in s.106 of the Evidence Act can also be utilized. It is made clear that this Section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but it would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. [Para 19] [1098-B-D]

State of West Bengal vs. Mir Mohammed Omar, **(2000) 8 SCC 382 = 2000 (2) Suppl. SCR 712 - relied on.**

3. In the instant case, this Court does not find any serious flaw in the investigation which can affect the case. On the other hand, the prosecution has established all the circumstances by placing acceptable evidence. On the facts and in the circumstances of the case, the conclusion arrived at by the trial court and the High Court is affirmed. [Para 20-21] [1099-A-C]

Case Law Reference:

1985 (1) SCR 88	**relied on**	**para 5**
2004 (2) SCR 123	**referred to**	**Para 17**
2000 (2) Suppl. SCR 712	**relied on**	**Para 19**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 507 of 2008.

From the Judgment & Order dated 09.04.2007 of the Court of Judicature of Bombay, Bench at Aurangabad in Crl. Appeal No. 238 of 2005.

Harinder Mohan Singh, Shabana for the Appellants.

Shankar Chillarge, Asha Gopalan Nair for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. This appeal has been preferred against the final judgment and order dated 09.04.2007 passed by the High Court of Judicature at Bombay, Bench at Aurangabad, in Criminal Appeal No. 238 of 2005 whereby the Division Bench of the High Court dismissed the appeal filed by the appellants herein.

2. Brief facts:

(a) The present appeal pertains to the death of one Ashabai, resident of Chanda Taluk, Karjat District, Ahmednagar. She was married to one Nitin Tulshiram Suryawanshi-Accused No. 3 herein (special leave petition with respect to this accused has already been dismissed on 02.11.2007). Tulshiram Sahadu Suryawanshi (A-1) and Sindhubai Suryawanshi (A-2) are the parents of A-3. At the relevant time, A-3 was working as a driver.

(b) Sampat Madhavrao Suryawanshi (PW-2) is the relative of Kisan Bhanudas Sule (PW-1)-the father of the deceased and was the mediator of the said marriage. On 28.02.2003, the dead body of Ashabai was found to be floating in the well of one Sarjerao Suryawanshi with both the legs and hands tied by means of the border of a Saree. PW-2 lodged a complaint against the appellants herein with regard to the above incident with the Karjat P.S., Ahmednagar, alleging the ill-treatment meted out to the deceased in order to fulfill the demand of Rs. 50,000/- for the purchase of a Jeep.

(c) On 28.02.2003, on the basis of the said complaint, Accidental Death No. 3 of 2003 and, after investigation, Crime No. 24 of 2003 was registered at the said police station.

(d) After filing of the charge sheet, the case was committed to the Court of Sessions and numbered as Sessions Case No. 102 of 2004. On 03.08.2004, the 5th Adhoc Additional Sessions Judge, Ahmednagar, framed charges against the appellants under Sections 302, 498-A read with Section 34 of the Indian Penal Code, 1860 (in short 'the IPC'). Again, on 28.09.2004, an additional charge of Section 304-B read with Section 34 of the IPC was also framed against the appellants.

(e) By order dated 10.01.2005, the 5th Adhoc Additional Sessions Judge, convicted all the accused persons and sentenced them to undergo rigorous imprisonment under various heads mentioned above including life sentence and all the sentences were to run concurrently.

(f) Being aggrieved, the appellants preferred an appeal being Criminal Appeal No. 238 of 2005 before the High Court of Bombay. By impugned order dated 09.04.2007, the Division Bench of the High Court while confirming the order of conviction and sentence passed by the Sessions Court, dismissed the appeal filed by the appellants herein.

(g) Aggrieved by the decision of the High Court, the appellants herein have filed this appeal by way of special leave before this Court.

3. Heard Mr. Harinder Mohan Singh, learned amicus curiae for the appellants-accused and Mr. Shankar Chillarge, learned counsel on behalf of the Respondent-State.

4. It is not in dispute that the conviction of the appellants A-1 and A-2 is based on circumstantial evidence, hence, we have to see how far the prosecution has established the chain and able to prove its case beyond reasonable doubt.

Circumstantial Evidence:

5. In *Sharad Birdhichand Sarda vs. State of Maharashtra,* (1984) 4 SCC 116, this Court after referring to various earlier decisions, formulated the following conditions to be fulfilled before a case against an accused can be said to be fully established based on circumstantial evidence:-

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra* where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

6. Keeping these principles in mind, let us analyze the circumstances relied on by the prosecution.

7. As mentioned earlier, the case of the prosecution is that A3-husband of the deceased and A-1 and A-2 - parents of A3 killed the deceased by throwing her into the well by tying her hands and legs with the border of a Saree because of the non-fulfillment of the demand of Rs.50,000/- made by the accused persons for the purchase of a Jeep as A3 was a driver. The father of the deceased was examined as PW-1. PW-2 acted as a mediator in the settlement of marriage of the deceased

with A3. The doctor, who performed the post mortem on the deceased, was examined as PW-6.

8. The circumstances relied on by the prosecution are:-

i) all the accused ill-treated the deceased;

ii) the well in which the body of the deceased was recovered is situated at a distance of 400 ft. from the house;

iii) legs and hands of the deceased were tied using a border of a saree; and

iv) recovery of the said border of the saree.

9. Kisan Bhanudas Sule (PW-1) - the father of the deceased, in his evidence, has stated that the deceased-Ashabai was his only daughter and she was married to A3. A-1 and A-2 are parents of A3. According to him, after marriage, Ashabai went to reside with the accused and she was treated decently for a period of 5 months but, thereafter, they started ill-treating her by beating and by not providing sufficient food. He also stated that A-3, on the instigation of A-1 and A-2, was demanding Rs.50,000/- for the purchase of a jeep. According to him, at the relevant time, A3 was employed as a driver and Ashabai had disclosed the demand as well as the ill-treatment to PW-1 whenever he had gone to her house to meet her. When PW-1 brought her daughter to his home on the occasion of Sakrant, she informed him that she would not go back to her matrimonial home as her husband had threatened her not to come back without Rs. 50,000/-. A perusal of the evidence of PW-1 shows that her daughter Ashabai was treated well only for a period of 5 months from the date of her marriage and after the said period, all of them started ill-treating her by way of beating and by not providing sufficient food. In his Chief-examination, he has implicated all the three accused by stating that "they started ill-treatment……."

10. PW-2, who acted as the mediator in the marriage of

the deceased with A3, lodged a complaint (Exh. 26) and explained about the ill-treatment meted out to the deceased at her matrimonial home. It was he who intimated the police that the dead body of the deceased-Ashabai was seen floating in a well belonging to one Sarjerao Suryawanshi. On the basis of the said information, on 28.02.2003 at 4.15 p.m., Accidental Death No. 3 of 2003 was registered. After investigation and on the basis of the Post Mortem Report (Exh. 35), Police Inspector Shinde (PW-8) attached to Karjat P.S. registered a case being Crime No. 24 of 2003 under Sections 302 and 498-A read with Section 34 of IPC. PW-2 has also stated that all the 3 accused were living together and his house is at a distance of 2 kms. away from the house of the accused and he asserted that he was the mediator for the performance of marriage between the deceased and A3. He also deposed that the deceased was treated well for 4-5 months after the marriage and, thereafter, all the accused started ill-treating her. He also stated that all the accused used to demand Rs.50,000/- from her and they also used to beat and abuse her.

11. From the evidence of PWs 1 and 2, the first circumstance that all the 3 accused ill-treated the deceased is clearly established and rightly relied on and accepted by the trial Court and the High Court.

12. The second circumstance heavily relied on by the prosecution is the distance between the house of the accused and the well wherein the body of the deceased was found to be floating. It was PW-2, who first noticed the dead body of the deceased in the well and filed a complaint to the police. PW-2 has stated that A-3 and one Prahlad came to his house and reported about missing of Ashabai (the deceased) and enquired whether she had come to his house. Thereafter, PW-2, along with others, started searching her for the whole night in order to verify her whereabouts. He also stated that when he attempted to go near the well, the accused prevented him from going to the well belonging to one Sarjerao Suryawanshi. It

further shows that only on the next day, when PW-2 carried out further search for Ashabai, he came to know from his nephew that the body of Ashabai was found lying in the well and after seeing the dead body, he filed a complaint to the police. The assertion of PW-2 that he was prevented from going to the side of the well by the accused fully establish another circumstance which shows that all the accused were responsible for the death of the deceased. Further, without the support and assistance of A-1 and A-2, it would not be possible to carry the deceased by A3 alone to the well which is at a distance of 400 ft.

13. Another important circumstance relied on and proved by the prosecution is that the legs and hands of the deceased were tied at the time of throwing her into the well. PW-1, in his evidence has stated that, after coming to know of her absence in the matrimonial home, based on the complaint of PW-2, the dead body of the deceased was removed from the well by means of a wooden cot. He further noticed that the hands and legs of Ashabai were tied by means of the border of a saree. PW-1 further proved Article Nos. 5, 6 and 7 as the pieces of the border of the saree with which the hands and legs of the deceased-Ashabai were tied. This fact was also strengthened by the evidence of PW-2. After getting information from his nephew that body of Ashabai was found lying in the well of Sarjerao, PW-2, after verification, made a complaint to the police and, because of the same, police came to the spot and carried on further formalities. He further deposed that "her hands and legs were tightly tied. The hands and legs were tied by means of the border of a saree….." He also affirmed that after seeing the body of Ashabai with her legs and hands tied, he went to Karjat P.S. and filed a complaint therein.

14. In addition to the evidence of PWs 1 and 2 about tying of the legs and hands of the deceased by use of the border of a Saree, Dr. Rajashri Pagaria (PW-6), who conducted the Post Mortem (Exh. 35) on the dead body of the deceased found that the lower extremities and ankle joints were tied by means of a

piece of saree and the upper extremities were found to be tightened by means of a cloth at the wrist joint. She further opined that the tying of the hands and legs was not possible by the victim herself. She explained that external injuries were post mortem and aquatic injuries. Her stomach was found to be containing about 200 ml. of water. The large intestine contained fecal matter. She also opined that the death was due to drowning. From the evidence of PWs 1, 2 and 6, it is clear that the legs and hands of the deceased were tied by the use of the border of a saree. It has also come in evidence that it would not be possible for A-3 alone to tie both the legs and hands without the assistance of A1 and A2 who were present in the house. It has been further noticed that except the three accused and the deceased, none were residing in their house.

15. Another circumstance relied on and proved by the prosecution is the recovery of the border of the saree which is an important piece of evidence and the same was established by Amrut Akhade (PW-7) - panch witness for the memorandum. PW-7, in his evidence, stated that on 05.03.2003, he was called at P.S. Karjat for the recording of panchnama. He further deposed that all the accused were present there and A-2 gave a statement before him that all the accused tied the legs and hands of the deceased and threw her into the well. After taking down the statement, the police obtained thumb impression of A-2 and signature of PW-7. According to him, she also disclosed that she would give out the clothes by means of which her hands and legs were tied. PW-7 also proved Exh. 40 as the panchnama recorded for the said purpose which bears his signature. Another pancha to the said panchnama was Hanumant Shelke and the same was also read over to him. He further deposed that he along with police and another Pancha went to the basti of Sindubai (A-2) in a police jeep. Sindubhai (A-2) asked the police to stop the jeep and then she handed over the border of the saree which was kept in a chapper (top portion). The Police recorded the panchnama of the seizure of

the border of the saree and PW-7 also admitted his signature therein.

16. In addition to the evidence of PW-7, one Dada S. Suryawanshi, resident of Rehkuri, Tal. Karjat, Dist. Ahmednagar, was examined as PW-5. In his evidence, he deposed that the dead body was taken out from the well in his presence with the help of a wooden cot. He further noticed that hands and legs of the deceased were tied by means of a red colour border of a saree. The police drew inquest in his presence. He also signed the memorandum which is Exh. 29. He denied the suggestion that Sampat and other persons got into the well, tied the hands and legs of the deceased and then the dead body was taken out.

17. This Court, in *Anter Singh vs. State of Rajasthan,* (2004) 10 SCC 657, held that even if panch witness turned hostile, the evidence of the person who effected the recovery would not stand vitiated. After considering the scope and ambit of Section 27 of the Evidence Act, 1872 this Court enumerated the following principles to be adhered to.

"16. The various requirements of the section can be summed up as follows:

(1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with the question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.

(2) The fact must have been discovered.

(3) The discovery must have been in consequence of some information received from the accused and not by the accused's own act.

(4) The person giving the information must be accused of any offence.

(5) He must be in the custody of a police officer.

(6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to."

(7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible."

From the evidence of PW-1, PW-2, PW-6 - the Doctor, who conducted the post mortem, PWs-5 and 7 - the panch witnesses and in the light of the principles enumerated above, we are satisfied that the material object, namely, the border of the saree used for tying legs and hands of the deceased was correctly identified and marked and the same has been rightly relied on by the prosecution and accepted by the courts below. The evidence of both PWs 5 and 7 fully support the contents of memorandum which is Exh. Nos. 29 and 40 respectively.

18. The evidence led in by the prosecution also shows that at the relevant point of time, the deceased was living with all the 3 accused. In other words, the appellants, their son-A3 and the deceased were the only occupants of the house and it was, therefore, incumbent on the appellants to have tendered some explanation in order to avoid any suspicion as to their guilt. All the factors referred above are undoubtedly circumstances which constitute a chain even stronger than the account of a eye-witness and, therefore, we are of the opinion that conviction of the appellants is fully justified.

19. It is settled law that presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the Court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above position is strengthened in

view of Section 114 of the Evidence Act, 1872. It empowers the Court to presume the existence of any fact which it thinks likely to have happened. In that process, the Courts shall have regard to the common course of natural events, human conduct etc in addition to the facts of the case. In these circumstances, the principles embodied in Section 106 of the Evidence Act can also be utilized. We make it clear that this Section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but it would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the Court to draw a different inference. It is useful to quote the following observation in *State of West Bengal vs. Mir Mohammed Omar,* (2000) 8 SCC 382:

"38. Vivian Bose, J., had observed that Section 106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. In Shambhu Nath Mehra v. State of Ajmer the learned Judge has stated the legal principle thus:

"This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are 'especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience.

The word 'especially' stresses that. It means facts that are pre-eminently or exceptionally within his knowledge."

20. In the light of the above principles, in the present case, we have not come across any serious flaw in the investigation which had affected the case. On the other hand, we are satisfied that the prosecution has established all the circumstances by placing acceptable evidence. We are also satisfied that the chain is complete and without the involvement and assistance of A-1 and A-2, A3 alone could not have tied the hands and legs of the deceased with the border of the saree and threw her into the well which is at a distance of 400 ft. from their house.

21. In the light of the above discussion, we fully agree with the conclusion arrived at by the trial Court and the High Court, consequently, the appeal fails and the same is dismissed.

R.P. Appeal dismissed.

DR. SUNIL CLIFFORD DANIEL

v.

STATE OF PUNJAB

(Criminal Appeal No. 2001 of 2010)

SEPTEMBER 14, 2012

(DR. B.S. CHAUHAN AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ)

PENAL CODE, 1860:

ss. 302 and 201 - Murder - Circumstantial evidence - Conviction and sentence of imprisonment for life awarded by courts below - Held: The statement of prosecution witnesses, the medical evidence, the serological report, the conduct of the accused remaining absconding, and the recoveries made pursuant to disclosure statement of the accused on his arrest, make the chain of circumstances complete leading to the guilt of the accused - There is no reason to interfere with the concurrent findings recorded by two courts below - Evidence - Circumstantial evidence - Code of Criminal Procedure, 1973 - s. 313.

CODE OF CRIMINAL PROCEDURE, 1973:

s. 313 - Examination of accused - Held: It is obligatory on the part of the accused while being examined u/s 313, to furnish some explanation with respect to the incriminating circumstances associated with him, and the court must take note of such explanation even in a case of circumstantial evidence, to decide as to whether or not the chain of circumstances is complete - In the instant case, the accused could not furnish any explanation as to how the blood stained clothes were found in his room.

ss. 162 (1) and 162 (2) - Statement made to police officer

- Held: There is a prohibition in peremptory terms and law requires that a statement made before the Investigating Officer should not be signed by the witness - However, in the event that a police officer, ignorant of the statutory requirement asks a witness to sign his statement, the same would not stand vitiated - At the most, the court will inform the witness, that he is not bound by the statement made before the police - However, the prohibition contained in s. 162(1) is not applicable to any statements made u/s 27 of Evidence Act, as explained by the provision u/s 162(2) - Merely because the recovery memo was not signed by the accused, will not vitiate the recovery itself, as every case has to be decided on its own facts - In the instant case, it cannot be said that the recoveries are vitiated.

CRIMINAL LAW:

Motive - Held: In a case of circumstantial evidence, motive assumes great significance and importance, for the reason that the absence of motive would put the court on its guard and cause it to scrutinize each piece of evidence very closely in order to ensure that suspicion, emotion or conjecture do not take the place of proof.

The appellant was prosecuted for committing the murder of his wife and throwing her dead body at a distant place. The case of the prosecution was that the appellant and the deceased, both qualified doctors and working in the same hospital, were living in separate hostels. On 9.3.1996, the appellant handed over a set of blood stained clothes to the Medical Superintendent (PW1) stating that when he reached his room, he found the same therein. PW-1 informed the said fact to the police on the same day. PW-2, the mother of the deceased, residing in a different city (Jagadhari) reached the place of her daughter on 10.3.1996 and when she found her missing, she lodged an FIR on the same day

at 9.40 p.m., expressing her apprehension that the appellant might have abducted her with the intention to kill her. PW-13, the ASI entrusted with the investigation went to the appellant's hostel, but found his room locked from outside and could not trace him anywhere. PW-1 then handed over the blood stained clothes to the I.O. On 11.3.1996, the SHO (PW-14), on receiving a wireless message from a Police Chowki at about 20 kms away from the city, went alongwith PW-2 there and recovered the dead body of the deceased which was found lying in the bushes. The post-mortem report disclosed that the deceased died of strangulation and also had grievous injuries. The case u/s 364 IPC was converted to one u/ss 302 and 201 IPC. The trial court found the appellant guilty on both the counts and sentenced him to imprisonment for life and 2 years' RI respectively. The High Court dismissed the appeal of the accused.

Dismissing the appeal, the Court

HELD:

1.1 In Sharad Birdhichand Sarda's case*, this court held that the onus is on the prosecution to prove that the chain is complete and that falsity or untenability of the defence set up by the accused cannot be made the basis for ignoring any serious infirmity or lacuna in the case of the prosecution. The Court further indicated the conditions which must be fully established before a conviction can be made on the basis of circumstantial evidence. [Para 17] [1121-C-D]

Sharad Birdhichand Sarda v. State of Maharashtra,* **1985 (1) SCR 88= AIR 1984 SC 1622 - relied on.

1.2 In the instant case, a conjoint reading of the complete evidence and material on record, suggests that:

(i) The deceased had informed her mother (PW-2) residing in a different city, on 6.3.1996 that she would reach there on 7.3.1996. However, she did not make it there. Therefore, PW.2 came to the place of deceased to search for her on 10.3.1996. [para 39] [1129-F-H]

(ii)On 9.3.1996, the appellant handed over certain blood stained clothes to PW.1, the Medical Superintendent, stating that he had found the same in his room, when he returned from the hospital. PW.1, informed the police about the said incident, on the same date. [para 39] [1130-A-B]

(iii)On 10.3.1996, PW.2 filed a complaint about the incident and an FIR was lodged. The Investigating Officer went to the room of the appellant, as well as of the deceased, in their respective hostels but the rooms were found to be locked from the outside. He then made an attempt to search for the appellant but was unable to trace him. [Para 39] [1130-B-C]

Admittedly, the appellant, after handing over the said blood stained clothes to PW.1 on 9.3.1996, became untraceable as a result of which, he could only be arrested on 11.3.1996, at 6.00 p.m. This circumstance was not taken into consideration by the courts below. However, act of absconding, on the part of the accused, alone does not necessarily lead to a final conclusion regarding his guilt. [Para 18-19] [1122-D-F]

Matru v. State of U.P., **1971 (3) SCR 914 = AIR 1971 SC 1050;** *State thr. CBI v. Mahender Singh Dahiya,* **2011 (1) SCR 1104 = (2011) 3 SCC 109; and** *Sk. Yusuf v. State of West Bengal,* **2011 (8) SCR 83 = AIR 2011 SC 2283 = referred to.**

(iv) On 11.3.1996, PW.1 was informed that the

deceased had been missing from the hostel since 9.3.1996. On the same day, PW.14, SHO, received a wireless message from the Police Chowki that the dead body of a female was lying in the bushes near an area of thoroughfare, closeby. He then rushed to the place alongwith PW.2, and recovered the dead body of the deceased. [para 39] [1130-D-F]

(v) During the course of the investigation, PW.14, the SHO came to know that the appellant had borrowed the car of CW.2 which was parked in the same compound. It was taken into possession by the police, and a mat having blood stains on it, was recovered and sealed. [para 39] [1130-F-G]

(vi) On 12.3.1996, experts were called and the room of the appellant was searched. Blood stains were found on the floor, which were scraped off and alongwith the same, a pair of chappals, also having blood stains on them, were recovered. The said articles were sealed. [para 39] [1130-H; 1131-A]

(vii) The appellant was arrested on 11.3.1996 and he made a disclosure statement in the presence of police officials and also one 'RS', the panch witness, and the panchnama was prepared and in it, he stated that, he would help in the recovery of articles, used while committing the murder of the deceased. He led the police party and aided in making recoveries of a gunny bag, a dumb-bell and one tie, as the same had been hidden below garbage and bushes. The same were duly recovered and panchnama was prepared. All the materials so recovered were then sent for FSL/ serological report, and the report received stated that all the said articles contained human blood etc. except for a few, wherein the blood had dis-integrated and as a result of which, no report could be submitted. [para 39] [1131-A-D]

(viii) On 11.3.1996, the dead body of the deceased, was sent for post-mortem examination and various articles of the deceased, including her bangles etc. were taken into possession by the police. [para 39] [1131-D-E]

(ix) In his statement, u/s 313 Cr.P.C., the appellant changed his version from the one given to PW.1, stating that the blood stained clothes handed over by him, were found in the balcony, interconnecting various rooms, as against his original statement wherein he had disclosed that he had found them in his room. He could not furnish any explanation with respect to how the blood stained clothes were found in his room. [Para 39] [1131-F]

It is obligatory on the part of the accused while being examined u/s 313 Cr.P.C. to furnish some explanation with respect to the incriminating circumstances associated with him, and the court must take note of such explanation even in a case of circumstantial evidence, to decide as to whether or not, the chain of circumstances is complete. [Para 37] [1129-B-C]

Musheer Khan v. State of Madhya Pradesh, **(2010) 2 SCC 748 = 2010 (2) SCR 119 and** *The Transport Commissioner, A.P., Hyderabad & Anr. v. S. Sardar Ali & Ors.,* **AIR 1983 SC 1225 = 1983 (3) SCR 729 - relied on.**

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

(x) PW.8, the taxi driver, deposed that, he had gone to meet the appellant on 9.3.1996, who told him that he wanted to go to Jagadhari. At that time, he was told to come later, as the wife of the appellant had purportedly gone to collect her salary. Admittedly, the appellant and his wife, the deceased, were living separately and they did not have a cordial relationship. In such a fact-situation, the appellant would not have hired a taxi to go

to Jagadhari. More so, if the deceased was living separately, it was not possible for the appellant to say that his wife had gone to collect her salary. The evidence of CW.2, makes it clear that the appellant had in fact taken his car, used it for one and a half hours, and then brought the same back, and parked it in the hostel compound, after which he handed over the keys for the same to CW.2. [para 39] [1131-G-H; 1132-A-C]

(xi) The nature of the injuries mentioned in the post-mortem report makes it crystal clear that the deceased died of strangulation i.e. asphyxia, and she also had several injuries on her head, which could have been caused by a dumb bell, which was one of the materials recovered and found to have blood stains on it. [para 39] [1132-D]

(xii) As the appellant had a strained relationship with his wife, he no doubt wanted to get rid of her. Although he has claimed that the petitions for divorce by mutual consent were pending before the court, he has never submitted any documents with respect to this before the court. Thus, inference may be drawn that the appellant did in fact wish to get rid of his wife. [Para 39] [1132-E-F]

In a case of circumstantial evidence, motive assumes greater significance and importance, for the reason that the absence of motive would put the court on its guard and cause it to scrutinize each piece of evidence very closely in order to ensure that suspicion, emotion or conjecture do not take the place of proof. Thus, in light of the settled legal proposition, the courts below rightly came to the conclusion on this aspect. [Para 20, 23] [1122-H; 1123-A-B, F]

Subedar Tewari v. State of U.P. & Ors., **AIR 1989 SC 733 and** *Suresh Chandra Bahri v. State of Bihar,* **1994 (1) Suppl. SCR 483 = AIR 1994 SC 2420 - referred to.**

(xiii) As the recoveries of the blood stained gunny bag, dumb-bell, tie etc. were made on the basis of the disclosure statement of the appellant himself, the chain of circumstances is, therefore, complete. [Para 39] [1132-F-G]

Most of the articles recovered and sent for preparation of FSL and serological reports contained human blood. However, on the rubber mat recovered from the car of CW.2 and one other item, there can be no positive report in relation to the same as the blood on such articles has dis-integrated. This Court has observed that a failure by the serologist to detect the origin of the blood due to dis-integration of the serum, does not mean that the blood stuck on the object would not have been human blood at all. Sometimes it is possible, either because the stain is too insufficient, or due to haematological changes and plasmatic coagulation, that a serologist may fail to detect the origin of the blood. However, in such a case, unless the doubt is of a reasonable dimension, which a judicially conscientious mind may entertain, with some objectivity, no benefit can be claimed by the accused, in this regard. [Para 28-29] [1125-E-F; 1126-A-C]

Gura Singh v. State of Rajasthan, **AIR 2001 SC 330 = 2000 (5) Suppl. SCR 408;** *Prabhu Babaji Navie v. State of Bombay,* **AIR 1956 SC 51 and** *Raghav Prapanna Tripathi v. State of U.P.,* **AIR 1963 SC 74 = 1963 SCR 239** *Jagroop Singh vs. State of Punjab* **2012 AIR 2600;** *John Pandian vs. State represented by Inspector of Police, Tamil Nadu* **(2010) 14 SCC 129;** *State, Govt. of NCT of Delhi v. Sunil & Anr.,* **2000 (5) Suppl. SCR 144 = (2001) 1 SCC 652;** *Musheer Khan v. State of Madhya Pradesh,* **2010 (2) SCR 119 = (2010) 2 SCC 748 = and** *The Transport Commissioner, A.P., Hyderabad & Anr. v. S. Sardar Ali & Ors.,* **1983 (3) SCR 729 = AIR 1983 SC 1225 - relied on.**

Sattatiya @ Satish Rajanna Kartalla Vs State Of Maharashtra **2008 AIR 1184 - distinguished**

2.1 It is evident from s.162(1) CrPC that there is a prohibition in peremptory terms and law requires that a statement made before the Investigating Officer should not be signed by the witness. The same was found to be necessary for the reason that a witness will then be free to testify in court, unhampered by anything which the police may claim to have elicited from him. In the event that a police officer, ignorant of the statutory requirement, asks a witness to sign his statement, the same would not stand vitiated. At the most, the court will inform the witness that he is not bound by the statement made before the police. [Para 25] [1124-B-D]

2.2 However, the prohibition contained in s. 162(1) Cr.P.C. is not applicable to any statements made u/s 27 of the Indian Evidence Act, 1872, as explained by the provision u/s 162(2) Cr.P.C. Merely because the recovery memo was not signed by the accused, will not vitiate the recovery itself, as every case has to be decided on its own facts. In the event that the recoveries are made pursuant to the disclosure statement of the accused, then, despite the fact that the statement has not been signed by him, there is certainly some truth in what he said, for the reason that the recovery of the material objects was made on the basis of his statement. Therefore, it cannot be said that in the instant case, the recoveries are vitiated. [Para 25-27] [1124-D-E; G-H; 1125-A-D]

Golakonda Venkateswara Rao v. State of Andhra Pradesh, **2003 (2) Suppl. SCR 96 = AIR 2003 SC 2846 - relied on.**

Jackaran Singh v. State of Punjab, **AIR 1995 SC 2345 and** *State of Rajasthan v. Teja Ram* **1999 (2) SCR 29 = AIR**

1999 SC 1776; *State of Maharashtra v. Suresh,* **1999 (5) Suppl. SCR 215 = (2000) 1 SCC 471 - referred to.**

3. In the facts and circumstances of the case, there is no reason to interfere with the concurrent findings recorded by the courts below. [Para 40] [1132-G-H]

Case Law Reference:

1985 (1) SCR 88	**relied on**	**Para 17**
1971 (3) SCR 914	**referred to**	**Para 19**
2011 (1) SCR 1104	**referred to**	**Para 19**
2011 (8) SCR 83	**referred to**	**Para 19**
AIR 1989 SC 733	**referred to**	**Para 21**
1994 (1) Suppl. SCR 483	**referred to**	**Para 22**
AIR 1995 SC 2345	**referred to**	**Para 24**
1999 (2) SCR 29	**referred to**	**Para 25**
2003 (2) Suppl. SCR 96	**relied on**	**Para 26**
2000 (5) Suppl. SCR 408	**relied on**	**Para 29**
AIR 1956 SC 51	**relied on**	**Para 29**
1963 SCR 239	**relied on**	**Para 29**
AIR 2008 SC 1184	**distinguished**	**Para 30**
(2010) 14 SCC 129	**relied on**	**Para 32**
2000 (5) Suppl. SCR 144	**relied on**	**Para 34**
2010 (2) SCR 119	**relied on**	**Para 37**
1983 (3) SCR 729	**relied on**	**Para 37**
1999 (5) Suppl. SCR 215	**referred to**	**para 38**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2001 of 2010.

From the Judgment & Order dated 01.04.2009 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 399-DB of 2000.

Kanchan Kaur Dhodi for the Appellant.

Jayant K. Sud, AAG, Vishal Dabas, Priya Shahdeo, Kuldip Singh, Mohit Mudgil for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the impugned judgment and order dated 1.4.2009, passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 399-DB of 2000, by which it has affirmed the judgment and order dated 21.8.2000 passed by the Sessions Judge, Ludhiana in Sessions Case No. 28 of 1996, convicting the appellant under Sections 302 and 201 of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC'), and awarded him a sentence to undergo RI for life and to pay a fine of Rs.2,000/- and in default of this, to undergo further RI for a period of 3 months. The appellant has further been sentenced to undergo RI for two years and to pay a fine of Rs.1,000/- and in default of this, to undergo further RI for a period of 2 months under Section 201 IPC. It has further been directed that the sentences would run concurrently.

2. The facts and circumstances giving rise to this appeal are as under:

A. The appellant got married to Dr. Loyalla Shagoufta, deceased, on 29.10.1993. Both of them being qualified doctors, were working in the Christian Medical College (hereinafter referred to as 'CMC'), Hospital Ludhiana. The relationship between the husband and wife became strained and they have been living separately since June 1994.

B. As per the appellant, a petition for divorce by mutual consent was filed on 20.2.1996, under Section 28 of the Special Marriage Act, 1954 in the Court of the District Judge, Ludhiana, and both parties therein, appeared before the District Judge, Ludhiana on the first motion of the case. However, they were asked to wait for the second motion.

C. On 9.3.1996, the appellant handed over a set of blood stained clothes to Dr. B. Pawar, the Medical Superintendent, (PW.1), stating that when he came to his room that day, the same were found therein. Dr. B. Pawar (PW.1), informed the police about the said incident on the same date.

D. Dr. Loyalla Shagoufta, wife of the appellant, had informed her mother Smt. Victoria Rani (PW.2), who was living in Jagadhari, District Yamunanagar, by way of a telephone call on 6.3.1996, that she would visit her on 8.3.1996. However, she did not reach Jagadhari on 8.3.1996. Victoria Rani (PW.2), then came to Ludhiana on 10.3.1996, and found that her daughter was missing. Smt. Victoria Rani (PW.2) then lodged FIR No. 16 of 1996 on 10.3.1996, at 9.40 p.m. wherein being the complainant, she expressed her apprehension that the appellant herein, had abducted her daughter with the intention of killing her.

E. In the meanwhile, Dr. Namrata Saran, one of the residents of the hostel in which the deceased resided, also informed Dr. B. Pawar (PW.1), Medical Superintendent that the deceased had in fact been missing from the hostel since 9.3.1996. After an enquiry it came to light that the deceased was on leave from 9.3.1996 to 16.3.1996.

F. Piara Singh, ASI (PW.13), took up the investigation of the case and went to the appellant's hostel, however, his room No.2010, was found to be locked. A police party searched for the appellant, among several other places, in the house of Mr. Rana, one of his relatives, but he could not be traced/found

anywhere. Dr. B. Pawar (PW.1) handed over the blood stained clothes given to him by the appellant, to the I.O.

G. On 11.3.1996, Vir Rajinder Pal (PW.14), SHO, Police Station, Ludhiana received a wireless message at 9.00 a.m., from the Police Chowki at Lalton Kalan, which is about 20 k.m. away from the main city, informing him that the dead body of a female had been found, lying in the bushes, near the main road. The Investigating Officer took Victoria Rani (PW.2) with him, while accompanied by other police personnel, and recovered the body of the deceased from the said place.

H. Immediately after the recovery of the dead body, Vir Rajinder Pal (PW.14), visited the room of the appellant in the hostel and conducted a thorough search of the same, in the presence of Dr. B. Pawar (PW.1), Medical Superintendent.

I. The post-mortem of the deceased was conducted by a Medical Board consisting of three doctors, including Dr. U.S. Sooch (PW.11), on 11.3.1996. He opined that the deceased had died by way of strangulation and a corresponding ligature mark was found on her neck. She also had several grievous injuries to her head.

J. On 11.3.1996, the Investigating Officer came to know, in the course of interrogation that, the appellant had used the car of one Dr. Pauli (CW.2), and that a blood stained mat was lying in the dicky of the said car. The police hence took possession of the said car and mat, and sent the mat for preparation of an FSL report.

K. The appellant was arrested on 11.3.1996, and his room in the hostel was searched yet again, by one Ashok Kumar, Head Constable from the Forensic Department, who scraped some blood stained earth from the floor of the room. He also found a pair of blood stained white V-shaped, Hawaii chappals. Photographs of the said room were also taken. During

interrogation, the appellant made a disclosure statement on 13.3.1996 to the effect that he would be able to help in the recovery of some relevant material from a place where he had hidden it. The appellant then led the police party to a place behind Old Jail, Ludhiana. From there, after removing some garbage etc., one blood stained gunny bag, a blood stained dumb-bell and one blood stained tie, were recovered.

L. The said recovered articles alongwith the clothes etc., found on the body of the deceased at the time of the post-mortem, and the blood stained clothes given by the appellant to Dr. B. Pawar (PW.1), which were subsequently handed over to the Investigating Officer, were sent for FSL report.

M. The FSL and serological report was then received, and it revealed that, all the articles recovered by the police during investigation, including the blood stained floor of his room, a part of the Hawaii chappals, and the recovered tie, contained human blood, with the sole exception of the mats found in the dicky of the car. The blood stains herein, had dis-integrated and it was therefore not possible to ascertain whether the same also contained human blood.

N. The police completed the investigation of the case and submitted a charge sheet against the appellant. The case was converted from one under Section 364, to one under Sections 302 and 201 IPC. The appellant was thus charged, but as he pleaded not guilty, he claimed trial. The prosecution examined 15 witnesses and two court witnesses were also examined under Section 311 of Criminal Procedure Code, 1973 (hereinafter called as 'Cr.P.C.').

O. After the conclusion of the trial and appreciation of the evidence in full, the learned Sessions Judge, vide judgment and order dated 21.8.2000 found the appellant guilty on both counts and hence awarded him the aforementioned punishments.

P. Aggrieved, the appellant preferred Criminal Appeal

No.399-DB of 2000 before the High Court, which was dismissed by the impugned judgment and order dated 1.4.2009.

Hence, this appeal.

3. Mrs. Kanchan Kaur Dhodi, learned counsel appearing for the appellant, submitted that the investigation was not conducted fairly. She stated that the appellant herein, had no motive whatsoever to commit the murder of his wife, and that they were going to separate very soon, as both parties had filed an application seeking divorce, by mutual consent. Further, no recovery was made from the room of the appellant in the hostel, rather the objects recovered had been planted. The appellant did not make any disclosure statement. Thus, even the recovery made from the place in close vicinity of the Old Jail, was not made in accordance with law, as there was no independent witness with respect to the said recoveries, and the recovery memo also, was never signed by the appellant. It is therefore, a case of circumstantial evidence. The courts below failed to appreciate that the chain of circumstances is not complete. Hence, the appeal deserves to be allowed.

4. Per contra, Shri Jayant K. Sud, AAG, appearing for the State of Punjab, has opposed the appeal, contending that the circumstances in the present case, point towards the guilt of the appellant without any exception. The deceased was surely killed in the room of the appellant. Recoveries were clearly made in view of the disclosure statement made by the appellant. Law does not require the recovery memo to be signed by the accused. He also stated that the appellant disappeared after the said incident and could only be arrested after a period of two days. It is the appellant alone who could explain the circumstances surrounding the purpose for which he had borrowed the car of Dr. Pauli (CW.2), and why he had wanted to hire a taxi to go to Jagadhari, as admittedly, his relations with his wife had been very strained. The appeal clearly lacks merit and is therefore liable to be dismissed.

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

6. Dr. U.S. Sooch (PW.11), was among the members of the Board of Doctors, who conducted the post-mortem of the body of the deceased on 11.3.1996, at 5.00 p.m. and found the following injuries on her person:

> "1. Well defined ligature mark 9" x 3.4" placed horizontally on the front of neck and both lateral sides of the neck, in the middle of neck and on the right side of the neck reaching below the lobule of the right ear. On exploration of the ligature the subcutaneous tissue was ecchymosed with laceration of underneath muscles and the hyoid bone was fractured. The larynx and trachea were congested.
>
> 2. An abrasion ½ " x ½" on the tip of the chin.
>
> 3. Abrasion ¾" x ½" and 1" below the angle, of left mandible.
>
> 4. Lacerated wound 2, ½" x 1" x bone deep obliquely placed on the right fronto parietal region and 1" inside the hair line near the midline.
>
> 5. Lacerated wound with badly crushed margins 2, ½" x ½" bone deep on the right occipital region.
>
> 6. Defused swelling 3" x 2" on the right occipital region across the midline.
>
> Therefore, it is evident from the aforementioned injuries, as also from the medical report, that the deceased Loyalla Shagoufta was, without a doubt, a victim of homicide.

7. Dr. B. Pawar (PW.1), Medical Superintendent, deposed to the extent that the deceased was supposed to be on leave from 9.3.1996 to 16.3.1996, and that on the date of the said incident, she was not present in her hostel. Further, the

appellant had reported to him, that when he came back to his room, he had found some blood stained clothes therein. The clothes were thereafter collected in a bag, and were kept in the office of Dr. B. Pawar (PW.1), and the possession of the same, was subsequently taken, by the police.

8. Smt. Victoria Rani (PW.2), mother of the deceased supported the case of the prosecution. She deposed that her daughter's marriage with the appellant had been quite strained, since no child could be born out of the wedlock and hence, they had started living separately. Her daughter had informed her by way of a telephone call, that she would visit Jagadhari on 7.3.1996, but she never came. Therefore, the complainant, Victoria Rani (PW.2), came to Ludhiana to search for her daughter, but she was found to be missing. Thus, she submitted a complaint to the police, on the basis of which, an FIR was lodged, wherein, she expressed her doubts with regard to the intention of the appellant, as in her opinion, he had been wanting to get rid of her daughter, and therefore, he could have kidnapped her for the purpose of killing her and fulfilling his purpose, once and for all.

9. Some of the witnesses, particularly Sarabjit Singh (PW.7), Security Guard of the hospital, Anil Kumar (PW.9), a Cook, working in the canteen of the Junior Doctor's Hostel and Joginder Singh (PW.12), did not support the case of the prosecution and turned hostile. However, the evidence of Kirpal Dev Singh (PW.8), is highly relevant. He deposed in court that he was providing services of a taxi and would park the same in the premises of CMC Hospital, Ludhiana. On 8.3.1996, the Canteen Contractor Joshi, had asked him to talk to Dr. Sunil of CMC, who wished to hire his taxi to go to Jagadhari. Accordingly, he went to speak to the appellant and became aware of the fact that the appellant wished to travel to Jagadhari on 9.3.1996. He then went to the appellant's hostel with his taxi on 9.3.1996, but was told by him that his wife had presently gone to collect her salary from Lalton Kalan and therefore, asked him to come again at 10.00 a.m. Thus, the said witness

went to the doctor's place again, at 10.00 a.m. but he was yet again asked to come later, this time at 11.30 a.m. It was then, that the said witness told the doctor that he was no longer willing to go to Jagadhari and he may engage another taxi, for this purpose.

10. Piara Singh, ASI (PW.13), deposed that he came to know about the said incident and henceforth went to CMC Hospital, Ludhiana, on 10.3.1996, after receiving the complaint made by Victoria Rani (PW.2). However, he found room No. 2010 of the said hostel occupied by the appellant to be locked from the outside. He then went alongwith a police party, to the room of the deceased but found that, this too had been locked from the outside. The witness then attempted to search for the appellant, and for this purpose, he also went to the house of Mr. Rana, who was a relative of the appellant and was living in close proximity to the hospital in Ludhiana itself, but the appellant could not be found either here. He continued his search at various other places, including hotels but was unable to find the accused.

On 11.3.1996, he stated that he had accompanied Vir Rajinder Pal (PW.14), and had therefore participated in the recovery of the dead body of deceased Dr. Loyalla Shagoufta from Lalton Kalan. He further deposed that on 13.3.1996, one gunny bag, one iron dumb bell and one tie were recovered in the presence of panch witness, Randhir Singh. A disclosure statement was also made by the appellant, in his presence to the effect that, these articles were related to the murder of the deceased and he had offered to help recover the same.

11. After recording the evidence led by the prosecution, the statement of the appellant was recorded under Section 313 Cr.P.C. The appellant denied all the allegations made by the prosecution and pleaded innocence. He stated that the blood stained clothes had been left in the balcony of his room, when he was not present therein and that he had produced the said

clothes before Dr. B. Pawar (PW.1), Medical Superintendent, prior to the lodging of the FIR.

12. Vir Rajinder Pal (PW.14), supported the case of the prosecution in full, giving complete details from the very beginning of the incident, as he was posted as the SHO, Police Station, Ludhiana on 10.3.1996. He deposed regarding the recoveries made from the room of the accused, after the checking of the room and the preparation of seizure memos. The keys of the car parked in the premises of CMC hospital, one blood stained mat, duly attested by the panch witnesses, and a photocopy of the registration certificate of the said car, were taken into possession, as also the recovery of the blood stained clothes, which were handed over to him by Dr. B. Pawar (PW.1). He further deposed with regard to how the appellant was arrested as also about the items that were recovered from his body, the recovery of the blood stained floor from the appellant's room and the V-shaped pair of Hawaii chappals. The articles were all sealed and sent for FSL. He finally deposed regarding the manner in which the body was recovered, how the panchnama of recovery was prepared, and also about the manner in which, the post-mortem was conducted.

13. Dr. Pauli (CW.2), deposed that on 9.3.1996, he was contacted by the appellant at 6.00 p.m. and was told by him that his wife was missing, as a result of which, the appellant was in need of his car. Dr. Pauli (CW.2), therefore, gave his car to the appellant, bearing registration No. CH01-5653. The appellant returned after a duration of 1½ hours, parked the car outside the hostel, and handed over the key to the said witness. The possession of the said car was taken by the police on 11.3.1996, and the blood stained rubber mat was then recovered from the dicky of the car. The said mat was sealed and taken away by the Investigating Officer (PW.14).

14. The trial court after appreciating the evidence on record came to the following conclusions:

"However, various pieces of circumstantial evidence discussed above i.e. blood scratching lifted from the hostel room in occupation of accused production of various blood stained clothes by the accused before the Medical Superintendent of the Hospital and the recovery of blood stained neck tie and dumb-bell on the basis of a disclosure statement suffered by the accused and the blood stained car mat recovered in the case leave no manner of doubt that Dr. Mrs. Loyalla Shagoufta was first done to death in the hostel room no. 2010 in occupation of the accused by strangulating her as well as causing various injuries to her and thereafter the accused appeared to Dr. Pauli CW.2 to remove the traces of evidence appearing against him and was liable for the murder of Dr. Mrs. Loyalla Shagoufta deceased as well as for causing dis-appearance of the evidence.

Dr. Loyalla Shagoufta in fact appeared to have been murdered in the hostel room in occupation of the accused. Various blood stains recovered from that room are a clear pointer to the fact that she was murdered in that room. None else could commit the crime in that room except with the knowledge and consent of the accused when the accused alone was in occupation of that room and was responsible for the crime committed in that room. Production of various blood stained clothes by the accused before the Medical Superintendent of the Hospital also goes to show that he was fully involved in the crime. On the fateful evening he also borrowed car from Dr. Pauli CW.2, which was used by him in removal of the dead body from the place of crime and the recovery of a blood stained mat from that car also goes to show that he in fact removed the dead body in that car. All this shows that he in fact murdered his wife Dr. Mrs. Loyalla Shagoufta and later on removed her dead body to cause dis-appearance as well as for causing dis-appearance of the evidence against him."

So far as the motive is concerned, the court came to the conclusion that there was sufficient motive to kill the deceased, as the appellant wanted to now get rid of the deceased. More so, the appellant could not explain how the deceased happened to meet her death in his room. The court noted that though there were minor discrepancies in the story, the same were not fatal to the case of the prosecution and added that the case of the prosecution was fully supported by the FSL report and therefore, on such grounds, convicted the appellant.

15. The High Court concurred with the finding of the trial court observing as under:

"Non-production of copy of Divorce Petition shows that the appellant-accused had the motive to eliminate the deceased. Admission of the appellant-accused before Dr. B. Pawar that blood stained clothes were found lying in his room and later on change of stand when examined under Section 313 Cr.P.C. that the blood stained clothes were lying in the balcony of the Junior Doctor's Hospital show that the prosecution story inspires confidence. Firstly, Dr. Shagoufta was murdered. Blood stained clothes were recovered from the room and by arranging car of Dr. Pauli dead body was thrown in the area of village Lalton Kalan. Dead body lying near the road is suggesting that the appellant-accused was in hurry to dispose of the dead body, that is why, after 1½ hours key of the car was returned to Dr. Pauli. Tie, dumb-bell and gunny bag were recovered as per disclosure statement and the recovered articles were found to be stained with blood. On 9.3.1996, Dr. Yogesh through Sarabjit Singh, Security Guard summoned the appellant-accused to Operation Theatre, but nothing on the file that the appellant-accused had attended the Operation Theatre to assist Dr. Yogesh. PW.7 Sarabjit Singh had gone to the room of the appellant-accused with the request that services of the appellant-accused are needed in the

Operation Threatre. Sarabjit Singh is not related to the deceased. So, there was no idea to disbelieve him.

As per post-mortem examination, death was due to strangulation as well as by causing various injuries. Neck tie recovered as per disclosure statement suffered by the appellant-accused was found to be stained with blood."

16. The instant case is a case of blind murder and is based entirely on circumstantial evidence, as there is no eye-witness to the said incident.

17. In *Sharad Birdhichand Sarda v. State of Maharashtra,* AIR 1984 SC 1622, it was held by this court that, the onus is on the prosecution to prove, that the chain is complete and that falsity or untenability of the defence set up by the accused, cannot be made the basis for ignoring any serious infirmity or lacuna in the case of the prosecution. The Court then proceeded to indicate the conditions which must be fully established before a conviction can be made on the basis of circumstantial evidence. These are:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established;

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence so complete as not

to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused".

Thus, in a case of circumstantial evidence, the prosecution must establish each instance of incriminating circumstance, by way of reliable and clinching evidence, and the circumstances so proved must form a complete chain of events, on the basis of which, no conclusion other than one of guilt of the accused can be reached. Undoubtedly, suspicion, however grave it may be, can never be treated as a substitute for proof. While dealing with a case of circumstantial evidence, the court must take utmost precaution whilst finding an accused guilty, solely on the basis of the circumstances proved before it.

18. Admittedly, the appellant, after handing over the said blood stained clothes to Dr. B. Pawar (PW.1), on 9.3.1996, became untraceable as a result of which, he could only be arrested on 11.3.1996, at 6.00 p.m. Though this circumstance was not taken into consideration by the courts below, the learned standing counsel appearing for the State has relied upon it very strongly indeed before us.

19. This Court has considered this issue time and again and held that the mere act of absconding, on the part of the accused, alone does not necessarily lead to a final conclusion regarding the guilt of the accused, as even an innocent person may become panic stricken and try to evade arrest, when suspected wrongly of committing a grave crime; such is the instinct of self-preservation. (See: *Matru v. State of U.P.,* AIR 1971 SC 1050; *State thr. CBI v. Mahender Singh Dahiya,* (2011) 3 SCC 109; and *Sk. Yusuf v. State of West Bengal,* AIR 2011 SC 2283).

In view of the above, we do not find any force in the submissions advanced by the learned counsel for the State.

20. In a case of circumstantial evidence, motive assumes

great significance and importance, for the reason that the absence of motive would put the court on its guard and cause it to scrutinize each piece of evidence very closely in order to ensure that suspicion, emotion or conjecture do not take the place of proof.

21. In *Subedar Tewari v. State of U.P. & Ors.,* AIR 1989 SC 733, this Court observed as under:

> *"The evidence regarding existence of motive which operates in the mind of an assassin is very often than (sic) not within the reach of others. The motive may not even be known to the victim of the crime. The motive may be known to the assassin and no one else may know what gave birth to the evil thought in the mind of the assassin."*

22. Similarly, in *Suresh Chandra Bahri v. State of Bihar,* AIR 1994 SC 2420, this court held as under:

> *"In a case of circumstantial evidence, the evidence bearing on the guilt of the accused nevertheless becomes untrustworthy and unreliable because most often it is only the perpetrator of the crime alone who knows as to what circumstances prompted him to adopt a certain course of action leading to the commission of the crime. Therefore, if the evidence on record suggest sufficient/necessary motive to commit a crime it may be conceived that the accused had committed it."*

23. Thus, if the issue is examined in light of the aforesaid settled legal proposition, we may concur with the courts below on the said aspect.

24. In *Jackaran Singh v. State of Punjab,* AIR 1995 SC 2345, this Court held that:

> *"The absence of the signatures or the thumb impression of an accused on the disclosure statement recorded under Section 27 of the Evidence Act detracts materially from the authenticity and the reliability of the disclosure statement."*

25. However, in *State of Rajasthan v. Teja Ram,* AIR 1999 SC 1776, this Court examined the said issue at length and considered the provisions of Section 162(1) Cr.P.C., Section 162(1) reads, a statement made by any person to a police officer in the course of an investigation done, if reduced to writing, be not signed by the person making it. Therefore, it is evident from the aforesaid provision, that there is a prohibition in peremptory terms and law requires that a statement made before the Investigating Officer should not be signed by the witness. The same was found to be necessary for the reason that, a witness will then be free to testify in court, unhampered by anything which the police may claim to have elicited from him. In the event that, a police officer, ignorant of the statutory requirement asks a witness to sign his statement, the same would not stand vitiated. At the most, the court will inform the witness, that he is not bound by the statement made before the police. However, the prohibition contained in Section 162(1) Cr.P.C. is not applicable to any statements made under Section 27 of the Indian Evidence Act, 1872 (hereinafter called 'Evidence Act'), as explained by the provision under Section 162(2) Cr.P.C. The Court concluded as under:

> *"The resultant position is that the Investigating Officer is not obliged to obtain the signature of an accused in any statement attributed to him while preparing seizure memo for the recovery of any article covered by Section 27 of the Evidence Act. But if any signature has been obtained by an Investigating Officer, there is nothing wrong or illegal about it."*

26. In *Golakonda Venkateswara Rao v. State of Andhra Pradesh,* AIR 2003 SC 2846, this court once again reconsidered the entire issue, and held that merely because the recovery memo was not signed by the accused, will not vitiate the recovery itself, as every case has to be decided on its own facts. In the event that the recoveries are made pursuant to the disclosure statement of the accused, then, despite the fact that the statement has not been signed by him, there is

certainly some truth in what he said, for the reason that, the recovery of the material objects was made on the basis of his statement. The Court further explained this aspect by way of its earlier judgment in *Jackaran Singh* (supra) as, in this case, there was a dispute regarding the ownership of a revolver and the cartridge recovered therein. The prosecution was unable to lead any evidence to show that the crime weapon belonged to the said appellant and observations were made by this Court in the said context. The court held as under:

> *"The fact that the recovery is in consequence of the information given is fortified and confirmed by the discovery of wearing apparel and skeletal remains of the deceased which leads to believe that the information and the statement cannot be false."*

27. In view of the above, the instant case is squarely covered by the ratio of the aforesaid judgments, and the submission advanced in this regard is therefore, not acceptable.

28. Most of the articles recovered and sent for preparation of FSL and serological reports contained human blood. However, on the rubber mat recovered from the car of Dr. Pauli (CW.2) and one other item, there can be no positive report in relation to the same as the blood on such articles has dis-integrated. All other material objects, including the shirt of the accused, two T-shirts, two towels, a track suit, one pant, the brassier of the deceased, bangles of the deceased, the under-garments of the deceased, two tops, dumb bell, gunny bag, tie etc. were found to have dis-integrated.

29. A similar issue arose for consideration by this Court in *Gura Singh v. State of Rajasthan,* AIR 2001 SC 330, wherein the Court, relying upon earlier judgments of this Court, particularly in *Prabhu Babaji Navie v. State of Bombay,* AIR 1956 SC 51; *Raghav Prapanna Tripathi v. State of U.P.,* AIR 1963 SC 74; and *Teja Ram* (supra) observed that a failure by

the serologist to detect the origin of the blood due to dis-integration of the serum, does not mean that the blood stuck on the axe would not have been human blood at all. Sometimes it is possible, either because the stain is too insufficient, or due to haematological changes and plasmatic coagulation, that a serologist may fail to detect the origin of the blood. However, in such a case, unless the doubt is of a reasonable dimension, which a judicially conscientious mind may entertain, with some objectivity, no benefit can be claimed by the accused, in this regard.

30. Learned counsel for the appellant has placed very heavy reliance on the judgment of this Court in *Sattatiya @ Satish Rajanna Kartalla v. State of Maharashtra,* AIR 2008 SC 1184, wherein it was held that in case the Forensic Science Laboratory Report/Serologist Report is unable to make out a case, that the blood found on the weapons/clothes recovered, is of the same blood group as that of the deceased, the same should be treated as a serious lacuna in the case of the prosecution.

The appellant cannot be allowed to take the benefit of such an observation in the said judgment, for the reason that in the aforementioned case, the recovery itself was doubted and, in addition thereto, the non- matching of blood groups was treated to be a lacunae and not an independent factor, deciding the case.

31. A similar view has been reiterated in a recent judgment of this court in Criminal Appeal No. 67 of 2008, *Jagroop Singh v. State of Punjab,* decided on 20.7.2012, wherein it was held that, once the recovery is made in pursuance of a disclosure statement made by the accused, the matching or non-matching of blood group (s) loses significance.

32. In *John Pandian v. State represented by Inspector of Police, Tamil Nadu,* (2010) 14 SCC 129, this Court held:

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

(Emphasis added)

33. In view of the above, the Court finds it impossible to accept the submission that, in the absence of the report regarding the origin of the blood, the accused cannot be convicted, upon an observation that it is only because of lapse of time that the classification of the blood cannot be determined. Therefore, no advantage can be conferred upon the accused, to enable him to claim any benefit, and the report of dis-integration of blood etc. cannot be termed as a missing link, on the basis of which, the chain of circumstances may be presumed to be broken.

34. When the appellant herein made a disclosure statement, a panchnama was prepared and recovery panchnamas were also made. The evidence on record revealed that the same were duly signed by two police officials, and one independent panch witness, namely, Randhir Singh Jat, who was admittedly, not examined. Therefore, a question arose regarding the effect of non-examination of the said panch witness, and also the sanctity of the evidence, in respect of recovery made only by two police officials.

35. The issue was considered at length by this Court in *State, Govt. of NCT of Delhi v. Sunil & Anr.,* (2001) 1 SCC 652, wherein this Court held as under:

"....But if no witness was present or if no person had agreed to affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so prepared by the police officer must be treated as tainted and the recovery evidence unreliable. The court has to consider the evidence of the investigating officer who deposed to the fact of recovery based on the statement elicited from the accused on its own worth.

We feel that it is an archaic notion that actions of the police officer should be approached with initial distrust.....At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature. Hence when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the accused, through cross-examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact that no other independent person was present at the time of recovery. But it is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions."

36. One Randhir Singh Jat had been the Panch witness for the disclosure Panchnama and Recovery Panchnama. He has not been examined by the prosecution. No question was put to the Investigating Officer (PW.14), in his cross-

examination, as to why the prosecution had withheld the said witness. The I.O. was the only competent person to answer the query. It is quite possible that the witness was not alive or traceable.

37. It is obligatory on the part of the accused while being examined under Section 313 Cr.P.C. to furnish some explanation with respect to the incriminating circumstances associated with him, and the Court must take note of such explanation even in a case of circumstantial evidence, to decide as to whether or not, the chain of circumstances is complete. The aforesaid judgment has been approved and followed in *Musheer Khan v. State of Madhya Pradesh,* (2010) 2 SCC 748. (See also: *The Transport Commissioner, A.P., Hyderabad & Anr. v. S. Sardar Ali & Ors.,* AIR 1983 SC 1225).

38. This Court in *State of Maharashtra v. Suresh,* (2000) 1 SCC 471, held that, when the attention of the accused is drawn to such circumstances that inculpate him in relation to the commission of the crime, and he fails to offer an appropriate explanation or gives a false answer with respect to the same, the said act may be counted as providing a missing link for completing the chain of circumstances. We may hasten to add that we have referred to the said decision, only to highlight the fact that the accused has not given any explanation whatsoever, as regards the incriminating circumstances put to him under Section 313 Cr.P.C.

39. In view of the above, a conjoint reading of the complete evidence and material on record, suggests as under:

(i) The deceased Loyalla Shagoufta had informed her mother residing in Jagadhari, on 6.3.1996 that she would reach there on 7.3.1996. However, she did not make it there. Therefore, Victoria Rani (PW.2), that is, mother of the deceased, came to Ludhiana to search for her daughter on 10.3.1996.

(ii) On 9.3.1996, the appellant handed over certain blood stained clothes to Dr. B. Pawar (PW.1), Medical Superintendent, stating that he had found the same, in his room, when he returned from the hospital. Dr. B. Pawar (PW.1), informed the police about the said incident, on the same date.

(iii) On 10.3.1996, Victoria Rani (PW.2), filed a complaint about the incident and an FIR was lodged. The Investigating Officer went to the room of the appellant, as well as of the deceased, in their respective hostels but the rooms were found to be locked from the outside. He then made an attempt to search for the appellant at the residence of his relative Mr. Rana, and also in other dhabas and hotels, but was unable to trace him, despite his efforts to do so.

(iv) On 11.3.1996, Dr. Namrata Saran, informed Dr. B. Pawar (PW.1) that the deceased had been missing from the hostel since 9.3.1996.

On the same day, Vir Rajinder Pal (PW.14), SHO, received a wireless message from the Police Chowki at Lalton Kalan, that the dead body of a female was lying in the bushes near an area of thoroughfare, closeby. He then rushed to the place alongwith Victoria Rani (PW.2), and recovered the dead body of the deceased and went on to prepare the panchanama etc. The room of the appellant was searched, but no recovery was made from the room.

(v) During the course of the investigation, Vir Rajinder Pal (PW.14), SHO, realised that the appellant had borrowed the car of Dr. Pauli (CW.2). Thus, the said car which was parked in the same compound, was taken into possession by the police, and a mat having blood stains on it, was recovered and sealed.

(vi) On 12.3.1996, experts were called and the room of the appellant was searched. Blood stains were found on the floor, which were scraped off and alongwith the same, a pair of V-shaped Hawaii chappals, also having blood stains on them,

were recovered. The said articles were sealed.

(vii) The appellant was arrested on 11.3.1996, as he was produced by Joginder Singh (PW.12), and made a disclosure statement in the presence of police officials and also one Randhir Singh, the panch witness, and the panchnama was prepared and in it, he stated that, he would help in the recovery of articles, used while committing the murder of the deceased. On the basis of the said disclosure statement, he led the police party to the Old Ludhiana Jail and aided in making recoveries of a gunny bag, a dumb bell and one tie, as the same had been hidden below garbage and bushes. The same were duly recovered and panchnama was prepared. All the materials so recovered were then sent for FSL/serological report, and the report received stated that all the said articles contained human blood etc. except for a few, wherein the blood had dis-integrated and as a result of this, no report could be submitted.

(viii) On 11.3.1996, the dead body of the deceased, was sent for post-mortem examination by a Board of doctors including Dr. U.S. Sooch (PW.11), and various articles of the deceased, including her bangles etc. were taken into possession by the police.

(ix) In his statement, under Section 313 Cr.P.C., the appellant changed the version of his story, from the one given to Dr. B. Pawar (PW.1), stating that blood stained clothes handed over by him, were found in the balcony, interconnecting various rooms, as against his original statement wherein he had disclosed that he had found them in his room. He could not furnish any explanation with respect to how the blood stained clothes were found in his room.

(x) Kirpal Dev Singh (PW.8), a taxi driver, though did not identify the appellant in court, yet was not declared hostile by the prosecution, deposed that, on being asked by the canteen contractor Joshi, he had gone to meet the appellant on 9.3.1996, who told him that he wanted to go to Jagadhari. At

that time, he was told to come later, as the wife of the appellant had purportedly gone to collect her salary from Lalton Kalan. Admittedly, the appellant and his wife, the deceased were living separately and they did not have a cordial relationship. In such a fact-situation, the appellant would not have hired a taxi to go to Jagadhari. More so, if the deceased was living separately, it was not possible for the appellant to say that his wife had gone to Lalton Kalan, to collect her salary. The evidence of Dr. Pauli (CW.2), makes it clear that the appellant had in fact taken his car, used it for one and a half hours, and then brought the same back, and parked it in the hostel compound, after which he handed over the keys for the same to Dr. Pauli (CW.2).

(xi) The nature of the injuries mentioned in the post-mortem report makes it crystal clear that the deceased died of strangulation i.e. asphyxia, and she also had several injuries to her head, which could have been caused by a dumb bell, which was one of the materials recovered and found to have blood stains on it.

(xii) As the appellant had a strained relationship with his wife, he no doubt wanted to get rid of her. Although he has claimed that the petitions for divorce by mutual consent were pending before the court, he has never submitted any documents with respect to this before the court. Thus, inference may be drawn that the appellant did in fact wish to get rid of his wife.

(xiii) As the recoveries of the blood stained gunny bag, dumb bell, tie etc. were made on the basis of the disclosure statement of the appellant himself, the chain of circumstances is therefore, complete.

40. In view of the above, we do not find any reason to interfere with the concurrent findings recorded by the courts below. The appeal lacks merit and is therefore, dismissed accordingly.

R.P. Appeal dismissed.

STATE OF UTTARAKHAND & ORS.
v.
GURU RAM DAS EDUCATIONAL TRUST SOCIETY
(Civil Appeal No. 6621 of 2012)

SEPTEMBER 18, 2012

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

U.P. ZAMINDARI ABOLITION AND LAND REFORMS ACT, 1950:

ss. 154(1), 166 and 167 - Notice u/ss 166 and 167 to transferee-Educational Trust in respect of a portion of land transferred to it by Bhumidhar - Held: Keeping in view the definition of 'family' in the Explanation, the term 'any person' in sub-s.(1) of s.154 refers to a natural person and not a 'charitable institution' and, as such, the notice u/ss 166 and 167 issued to Educational Trust was not justified.

A notice u/ss 167 and 167 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 was issued to the respondent-Educational Trust in respect of 1.626 hectares out of 6.785 hectares of land transferred to it by the Bhumidhar. Ultimately, the Assistant Collector by his order dated 27.1.2006 held 1.626 hectares of land as surplus. The revision filed by the respondent was dismissed by the Commissioner. However, the writ petition of the respondent was allowed by the Single Judge of the High Court.

In the instant appeal filed by the State, the question for consideration before the Court was: "whether a charitable trust is covered by the expression 'any person' occurring in s. 154(1) of the 1950 Act."

Dismissing the appeal, the Court

HELD: 1.1 The expression used in s.154(1) is "to any

person where the transferee shall, as a result of such sale or gift, become entitled to land which together with land, if any, held by his family will in the aggregate, exceed 5.0586 hectares (12.50 acres) in Uttar Pradesh." A close look at the expression would show that the Legislature intended to cover only natural person. It is so because the words 'any person' are followed in the sentence by the words 'his family'. 'Family' is explained in the Explanation appended to s.154 which means the transferee, his or her wife or husband, as the case may be, and minor children and where transferee is a minor, his or her parents. This makes it clear that a legal person is not intended to be included in the expression 'any person'. The word 'person', in law, may include both a natural person and a legal person. Sometimes it is restricted to the former. Having regard to the text of s.154(1) and also the scheme of that provision, there remains no doubt that the expression 'any person' refers to a natural person and not a legal person. [Para 10] [1137-D-G]

1.2 Further, in 1997, the Legislature inserted Explanation by U.P. Act No. 20 of 1997 declaring that in sub-s. (1), the expression 'person' shall include and be deemed to have been included on June 15, 1976 a 'Co-operative Society'. Had the expression 'person' included legal person, no explanation was necessary. [Para 10] [1137-H; 1138-A-B]

1.3 Accordingly, as it must be held that a 'charitable institution' is not included within the meaning of the expression 'any person' occurring in s.154 of the 1950 Act and, therefore, the Assistant Collector was not justified in issuing notice to the respondent u/ss 166 and 167 of the 1950 Act. [Para 11] [1138-C-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6621 of 2012.

From the Judgment and Order dated 05.09.2008 of the High Court of Uttarakhand at Nainital in Writ Petition (MS) No. 1642 of 2006.

Rachana Srivastava, Utkarsh Sharma for the Appellants.

Shanti Bhushan, Sushendra K. Chauhan, Suman Gupta, Dr. Vipin Gupta for the Respondent.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. We have heard Ms. Rachana Srivastava, learned counsel for the petitioners, and Mr. Shanti Bhushan, learned senior counsel for the respondent.

2. Delay condoned.

3. Leave granted.

4. The controversy in this Appeal, by special leave, is in respect of land admeasuring 1.626 hectares situate in village Chalang, Dehradun out of 6.785 hectares which was transferred by the Bhumidhar to respondent, Guru Ram Das Educational Trust Society in 1992. A notice under Sections 166 and 167 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (for short, '1950 Act') was issued by the Assistant Collector First Class/Sub Divisional Magistrate, Dehradun to the respondent to show cause why the said land should not be entered into the revenue records in the name of the State Government and possession of the same be taken forcibly as the transfer in its favour was void. In response to the notice, the respondent filed its objections and set up diverse grounds. One of the objections raised by the respondent was that there was no prohibition under Section 154 of the 1950 Act on transfer by way of sale to a charitable trust for charitable purpose.

5. The Assistant Collector overruled the objections and, by his order dated January 27, 2006, came to the conclusion that the respondent held 1.626 hectares in excess of the

permissible limit and declared that the excess land admeasuring 1.626 hectares shall vest in the State Government.

6. Against the order of the Assistant Collector, the respondent filed a revision application before the Commissioner, Garhwal Division. The revisional authority dismissed the revision application preferred by the respondent Trust.

7. Not satisfied with the orders of the Assistant Collector and Commissioner, the respondent challenged these orders in a Writ Petition before the High Court of Uttarakhand. The single Judge of the High Court allowed the Writ Petition principally on the ground that the subject land was being used for non agricultural purpose for more than ten years and declaration under Section 143 of the 1950 Act was not necessary. He further held that the provisions of Section 154 were not applicable and, accordingly, quashed and set aside the orders of the Commissioner and Assistant Collector. It is against this order that the State of Uttaranchal (Now, Uttarakhand) and its functionaries have come up in appeal by special leave.

8. Section 154 of the 1950 Act, as it stood at the relevant time, read as under :-

"Section 154. Restriction on transfer by a bhumidhar.- (1) Save as provided in sub-section (2), no bhumidhar shall have the right to transfer by sale or gift, any land other than tea gardens to any person where the transferee shall, as a result of such sale or gift, become entitled to land which together with land, if any, held by his family will in the aggregate, exceed 5.0586 hectares (12.50 acres) in Uttar Pradesh.

(2) Subject to the provisions of any other law relating to the land tenures for the time being in force, the State Government may, by general or special order, authorise

transfer in excess of the limit prescribed in sub-section (1) if it is of the opinion that such transfer is in favour of a registered co-operative society or an institution established for a charitable purpose, which does not have land sufficient for its need or that the transfer is in the interest of general public.

Explanation.- For the purposes of this section, the expression 'family' shall mean the transferee, his or her wife or husband (as the case may be) and minor children, and where the transferee is a minor also his or her parents."

9. The question before us is - Whether a charitable trust is covered by the expression 'any person' occurring in Section 154(1) of the 1950 Act?

10. It may be immediately noticed that the expression used in Section 154(1) is "....to any person where the transferee shall, as a result of such sale or gift, become entitled to land which together with land, if any, held by his family will in the aggregate, exceed 5.0586 hectares (12.50 acres) in Uttar Pradesh." (emphasis supplied) A close look at the above expression would show that the Legislature intended to cover only natural person. It is so because the words 'any person' are followed in the sentence by the words 'his family'. 'Family' is explained in the explanation appended to Section 154 which means the transferee, his or her wife or husband, as the case may be, and minor children and where transferee is a minor, his or her parents. This makes it clear that a legal person is not intended to be included in the expression 'any person'. The word 'person', in law, may include both a natural person and a legal person. Sometimes it is restricted to the former. Having regard to the text of Section 154(1) and also the scheme of that provision, there remains no doubt that the expression 'any person' refers to a natural person and not an artificial person. This is fortified by the fact that in 1997 the Legislature inserted Explanation by U.P. Act No. 20 of 1997 declaring that in sub-

section (1) the expression 'person' shall include and be deemed to have been included on June 15, 1976 a 'Co-operative Society'. Had the expression 'person' included artificial person, no explanation was necessary. Since the expression 'person' in Section 154 did not include legal or artificial person, the Legislature brought in Co-operative Society by way of an Explanation. The Explanation came to be added in 1997 in a declaratory form to retrospectively bring 'Co-operative Society' within the meaning of expression 'any person'.

11. Accordingly, we hold, as it must be held, that a 'charitable institution' is not included within the meaning of the expression 'any person' occurring in Section 154 of the 1950 Act and, therefore, the Assistant Collector was not justified in issuing notice to the respondent under Sections 166 and 167 of the 1950 Act.

12. Though we are not in agreement with the reasoning of the High Court fully, but in view of what we have indicated above, no interference is called for in the impugned order.

13. Appeal is, accordingly, dismissed. No order as to costs.

R.P. Appeal dismissed.

RAJASTHAN STATE ROAD TRANSPORT CORPORATION
v.
PRESIDENT, RAJASTHAN ROADWAYS UNION & ANOTHER
(Civil Appeal No. 6639 of 2012)

SEPTEMBER 18, 2012

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

EMPLOYEES FAMILY PENSION SCHEME, 1971:

Pension Scheme - Employee not exercising option under the Scheme - Held: Notification dated 9.4.1971 issued by Regional Provident Fund Commissioner was circulated by the employer-Corporation by letter dated 30.7.1971 - Resultantly, several employees opted for the Scheme and a few of them, including the deceased, did not opt for the same - There is no reason to assume that the employees were unaware of the Scheme and the Notifications - Further, the wife of the deceased had received the entire Provident Fund amount - The dispute raised by the Employees' Union after nine years is absolutely untenable - Employees Provident Fund and Family Pension Scheme, 1952 - Labour Laws.

An employee of the appellant-Corporation recruited in 1962 died in 1982 while in service. He had not exercised the option under the Employees Family Pension Scheme, 1971 and, therefore, his wife accepted the Contributory Provident Fund and did not raise any claim for family pension. However, after nine years, the respondent-Union took up the claim of the wife of the deceased-employee for family pension and ultimately the Industrial Tribunal allowed the same holding that the employee was not informed of his right to exercise the option under the Scheme. The writ petition of the Corporation before the Single Judge and its appeal

before the Division Bench of the High Court remained unsuccessful.

In the instant appeal filed by the Corporation, the question for consideration before the Court was : whether the wife of a deceased-employee was entitled to get family pension under the Employees Family Pension Scheme, 1971 on the failure of the employee to exercise his option under the Scheme, especially when the claimant had already received the entire Provident Fund amount from the Fund maintained by the employer.

Allowing the appeal, the Court

HELD: 1.1 A reading of the Notification dated 9.4.1971 issued by the Regional Provident Fund Commissioner along with the communication letter dated 30.7.1971 issued by the appellant-Corporation, makes it evident that the Regional Provident Fund Commissioner and the appellant-Corporation had informed all the departments/unions, as well as the employees working under the Corporation to exercise their necessary option if they wanted to get the benefit of the Family Pension. Facts would indicate that several employees at that time had opted and few of them did not opt for that, since they were interested to get provident fund under the CPF Scheme and not the family pension under the Scheme, after the death of the employee. There is no reason to assume that the employees were unaware of the notification issued by the Regional Provident Fund Commissioner as well as the Corporation. Facts would also indicate that the wife of the deceased-employee has already received the entire provident fund amount since the employee had not opted under the Scheme. However, after nine years, respondent Union is raising a dispute which is absolutely untenable. [Para 14] [1146-G-H; 1147-A-C]

1.2 The Tribunal as well as the Single Judge and the

Division Bench of the High Court have committed a grave error in not properly appreciating the facts of the case and rendered a perverse finding which necessarily calls for interference. Accordingly, the award of the Tribunal as well as the judgments of the Single Judge and the Division Bench of the High Court are set aside. [Para 14-15] [1147-C-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6639 of 2012.

From the Judgment and Order dated 29.06.2011 of the High Court of Judicature for Rajasthan, Jaipur Bench, Jaipur in D.B. Civil Special Appeal (Writ) No. 960 of 2011 in S.B. Civil Writ Petition No. 2099 of 1999.

S.K. Bhattacharya for the Appellant.

B. Ramana Murthy 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 the widow of an employee is entitled to get family pension under the Employees Family Pension Scheme, 1971 (for short 'Scheme'), on the failure of the employer to exercise his option under the scheme, especially when the claimant has already received the entire Provident Fund amount, from the Fund maintained by the Corporation.

3. Respondent Union raised a claim on behalf of the widow of late Hari Singh for family pension under the Scheme before the State Government. The State Government referred the matter to the Labour and Industrial Tribunal, Jaipur (for short 'Tribunal') for adjudication of the claim. The Tribunal, after examining the Scheme, took the view that the employee was not informed of his right to exercise the option under the

Scheme, consequently, allowed the application and gave a direction to the appellant-Corporation to disburse family pension to the widow of Hari Singh, who was working as a Driver in the service of the Corporation.

4. The appellant-Corporation took up the matter before the High Court of Judicature of Rajasthan at Jaipur Bench by filing S.B. Civil Writ Petition No. 2099 of 1999, which was dismissed by the learned Single Judge and, later, confirmed by the Division Bench as well vide its judgment dated 29.6.2011 in D.B. Civil Special Appeal (Writ) No. 960 of 2011. Aggrieved by the same, appellant-Corporation has come up with this appeal.

5. Shri S. K. Bhattacharya, learned counsel appearing for the appellant-Corporation, submitted that the Tribunal as well as the Courts below have misunderstood the provisions of the Scheme and omitted to take note of all relevant and material facts for adjudication of the claim raised for family pension. Learned counsel submitted that there was a complete misreading of the facts which led to incorrect reasoning resulting into rendering a wrong judgment on facts as well as on law.

6. Shri B. Ramana Murthy, learned counsel appearing for the respondent Union, submitted that this Court shall not interfere with the concurrent findings rendered by all the authorities below and that no question of law has been raised for determination by this Court.

7. In order to examine the rival contentions raised by the parties, it is necessary to understand the facts of the case so that this Court can examine whether the Tribunal as well as the Courts below have rendered a perverse finding, which a reasonable person would not have arrived at under the facts and circumstances of a particular case.

8. The employee Hira Singh was appointed as a Driver in the service of the appellant-Corporation on 22.3.1962, and later,

he was promoted to the post of Assistant Traffic Inspector. In the year 1971, the Central Government introduced a scheme relating to family pension by making suitable amendments in the Employees Provident Fund and Family Pension Fund Act, 1952 (for short 'P.F. Act'). Employees desirous of availing of the benefit of the Scheme had to exercise their option under the Scheme and the last date for submission of the application for the said purpose was 1.9.1971. According to the appellant-Corporation, Hari Singh did not exercise that option under the Scheme and, while in service, he died on 30.5.1982. Contributory Provident Fund, as per the rules, was disbursed to the widow of the employee and the same was received as well. No claim for family pension was raised since the employee had not opted for the benefit of the Scheme.

9. Respondent Union, however, took up the claim of the widow after nine years by filing a petition before the State Government which, we have already indicated, was referred to the Tribunal and was decided in favour of the respondent Union.

10. We are, in this case, concerned with the question whether Hari Singh had opted for the benefit of the Scheme which came into force in the year 1971 and whether there was failure on the part of appellant-Corporation in promptly informing the employees of the existence of such a Scheme and their right to exercise option for family pension.

11. We find, on facts, that the Corporation had issued a notification on 30.7.1971 seeking necessary option from the employees. In pursuance of that notification, several employees had exercised their option for the Scheme and a few did not opt for that, since they were keen on getting the provident fund under the Central Provident Fund Scheme (for short 'CPF Scheme'). Hari Singh did not opt for the Scheme like several other employees, since he was keen on getting the provident fund under the CPF Scheme, rather than family pension under the Scheme.

12. Appellant-Corporation has produced the notification issued by them on 9.4.1971, as Annexure P/1, the operative part of which reads as follows:

> "I am to forward herewith a copy of the employees' Family Pension Scheme, 1971 which has come into force with effect from 1st March, 1971 for your information and explaining the provisions of the Family Pension-cum-Life Assurance Scheme to all the members of the Employees' Provident Fund.
>
> 2. According to para 4 of this scheme every employee, who is a member of the Employees' Provident Fund or of Provident Funds of factories and other establishments exempted under section 17 of the Act as on 28.2.1971 have to exercise their option in Form I (copies attached) within a period of three months from the 1st March 1971, and furnish the same to this office immediately after the specified time.
>
> 3. The employees who opt or who are entitled to become a member of the Family Pension Fund subsequently after 1st March, 1971 be asked to furnish the particulars concerning themselves and their family in Form 2 (copies attached) and the same may also be sent (along with option Form No. 1) where-ever necessary.
>
> 4. The option forms and Nomination forms may please be sent duly supported with the following statement:-
>
> | No. of members (Subscribers) as on 28.2.1971 | No. of members opted for Family Pension Scheme | No. of members opted to continue existing P.F. benefit |
> |---|---|---|
>
> 5. Further requirement of Forms No. 1 and 2 may be had either directly from this office or the Provident Fund Inspectors at Jaipur, Jodhpur & Ajmer.

6. The instructions regarding submission of other information and returns will follow:"

13. We notice that the above notification was sent to all the employees of the appellant-Corporation for information with a request that they should give wide publicity to the scheme and the notification was issued from the Office of the Regional Provident Fund Commissioner. Following the above notification, the Corporation also sent a communication dated 30.7.1971 to the Regional Manager/Administrative Officer/Depot Manager/Assistant Depot Manager, RSRTC and all the offices informing about the notification issued by the Regional Provident Fund Commissioner stating as follows:

"All the employees of the Raj. State Road Transport Corporation who are contributing towards the Provident Fund are eligible to become the members of family pension scheme 1971 and it is obligatory on the part of the employer to get the option referred to in sub-section (i) of para 1 exercised by every members to whom the option is given to become the member of this scheme before 31st August, 1971. I am, therefore, sending herewith one copy of Employees Family Pension Scheme, 1971 along with declaration forms and Option forms which are required to be explained to each subscriber of the Provident Fund and get the same signed by each employee contributing to the Provident Fund as on 1st March, 1971.

It shall be your duty under clause 4(3) of the scheme to see that the option from each subscriber of opted is a list of optees in the following proforma may also be prepared and the same may be sent along with declaration forms and option forms executed by the subscriber with special messenger by 31st August, 1971 positively.

List of optees of Family Pension Scheme 1971.

Name of Depot/Region/Office….

S.No.	Name of the employee along with Father's name	C.P.F. A/c No.	Pay including D.A.	P.F. amount @ 6 of pay including D.A.
1	2	3	4	5
	Family pension amount 11 of pay including D.A.	Total 5 + 6	P.F. subscription being deducted at present	Remarks
	6	7	8	9

Signature of Head of Office with seal

It is also requested that the scheme may kindly be explained to go through carefully and the relevant benefits be explained to all the subscribers while taking declarations and options form them so that they may consider to join the scheme and opt for the same in good numbers, and I shall also request you to kindly give the publicity of this scheme through the notice Board also.

Kindly acknowledge."

14. When we read the notification dated 9.4.1971 issued by the Regional Provident Fund Commissioner along with the communication letter dated 30.7.1971 issued by the appellant-Corporation, it is evident that the Regional Provident Fund Commissioner as well as appellant-Corporation had informed all the departments/unions, as well as employees working under the Corporation to exercise their necessary option if they wanted to get the benefit of the Family Pension. Facts would indicate

that several employees at that time had opted and few of them did not opt for that, since they were interested to get provident fund under the CPF Scheme and not the family pension under the Scheme, after the death of the employee. We have no reason to think that the employees were unaware of the notification issued by the Regional Provident Fund Commissioner as well as the Corporation. Facts would also indicate that the wife of Hari Singh had already received the entire provident fund amount and, since Hari Singh had not opted under the Scheme. However, after nine years, respondent Union is raising a dispute which, in our view, in absolutely untenable. The Tribunal as well as Courts below have committed a grave error in not properly appreciating the facts of the case and rendered a perverse finding which necessarily calls for interference.

15. Accordingly, we are inclined to allow this appeal and set aside the award of the Tribunal as well as the judgments of the learned single Judge and the Division Bench of the High Court. However, there will be no order as to costs.

R.P. Appeal allowed.

STATE OF RAJASTHAN AND ORS.
v.
AANJANEY ORGANIC HERBAL PVT. LTD.
(Civil Appeal Nos. 6741-6742 of 2012)

SEPTEMBER 20, 2012

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

Rajasthan Tenancy Act, 1955:

s.42(b) - Beneficial legislation to protect the interest of the members of Scheduled Caste and Scheduled Tribe - General restrictions on sale, gift and bequest of the interest of Scheduled Caste and Scheduled Tribe, in the whole or part of their holding - Object and effect of - Held: The reason for such general restrictions is not only to safeguard the interest of the members of Scheduled Caste and Scheduled Tribe, but also to see that they are not being exploited by the members of non-Scheduled Caste and Scheduled Tribe - However, at times, s.42(b) may go against the interest of the members of Scheduled Caste / Scheduled Tribe as well - There may be several situations where they intend to sell the property for purposes like marriage of son/daughter or to purchase a better property etc., but may not get a better competitive price, if the sale is made only among the members of Scheduled Caste / Scheduled Tribe - Provisions have been made in certain legislations enabling the members of Scheduled Caste and Scheduled Tribe to sell their lands to members of non-Scheduled Caste/Scheduled Tribe, on getting permission from the prescribed authority - Such a provision may be sometimes helpful to the members of Scheduled Caste / Scheduled Tribe to get a better price for their land but it is for the legislature to incorporate appropriate provision in the Rajasthan Tenancy Act.

s.42(b) - Transfer of land from a member of Scheduled

Caste to a juristic person, other than Scheduled Caste - Validity - Expression 'person' used in s.42(b) - Meaning of - Property purchased by respondent-private company from members of Scheduled Caste - Challenged as void, in view of s.42(b) - High Court held that respondent-private company being a juristic person, the sale effected by a member of Scheduled Caste to a juristic person, which does not have a caste, is not hit by s.42 - Held: The reasoning of the High Court is untenable and gives a wrong interpretation to the provision - The expression 'person' used in s.42(b) can only be a natural person and not a juristic person, otherwise, the entire purpose of that section will be defeated - The legislature clearly wanted to avoid a situation where respondent-company can purchase land from Scheduled Caste / Scheduled Tribe and then sell it to a non-Scheduled Caste and Scheduled Tribe - A thing which cannot be done directly cannot be done indirectly over-reaching the statutory restriction - The property purchased by respondent from the members of Scheduled Caste was void being hit by s.42(b) and was thus rightly denied mutation in the Revenue records - The State can, therefore, re-possess the lands and return the lands to the original owners who are members of the Scheduled Caste - General Clauses Act, 1897 - s.3(42) - Constitution of India, 1950 - Articles 341 and 342.

The respondent is a private limited company. It purchased land belonging to the members of Scheduled Caste vide a registered sale deed dated 26.9.2005. An application was preferred by the respondent before the Revenue Authorities for mutation of the property. The same was refused on basis of a circular dated 19.11.2005, which stated that mutation could be effected only if the transfer was between the members of Scheduled Caste/ Scheduled Tribe, as the case may be. Since the application for mutation was refused, the respondent filed Writ Petition which was allowed by a single Judge.

Aggrieved by the same, the State preferred an appeal before the Division Bench which was dismissed.

The question which arose for consideration in the instant appeal was whether the transfer of land from a member of Scheduled Caste to a juristic person, other than Scheduled Caste, is void, in view of the provisions of Section 42(b) of the Rajasthan Tenancy Act, 1955.

The respondent-company pleaded that the expression 'person', as such, is not defined in the Rajasthan Tenancy Act, 1955 and, therefore, one has to go by the definition of 'person' under the General Clauses Act, 1987, and, if so read along with Section 3(42) of the General Clauses Act, the expression 'person' used in clause (b) of Section 42 of the Rajasthan Tenancy Act takes in a juristic person as well and, therefore, if a member of Scheduled Caste sells his property to a juristic person, the sale cannot be declared as void, since a juristic person has no caste.

The State Government, on the other hand, contended that one cannot read Section 3(42) of the General Clauses Act into Section 42(b) of the Rajasthan Tenancy Act, out of context; and that the expression 'person' used in Section 42(b) of the Rajasthan Tenancy Act is a natural person and not a juristic person and if the transfer is by a member of Scheduled Caste or Scheduled Tribe to a person who is not a member of Scheduled Caste or Scheduled Tribe, then such a transfer is void under Section 42 of the Rajasthan Tenancy Act.

Allowing the appeals, the Court

HELD: 1.1. The Rajasthan Tenancy Act, 1955 is a beneficial legislation which takes special care to protect the interest of the members of Scheduled Caste and Scheduled Tribe. Section 42 provides some general

restrictions on sale, gift and bequest of the interest of Scheduled Caste and Scheduled Tribe, in the whole or part of their holding. The reason for such general restrictions is not only to safeguard the interest of the members of Scheduled Caste and Scheduled Tribe, but also to see that they are not being exploited by the members of non-Scheduled Caste and Scheduled Tribe. [Para 8] [1155-D-E]

1.2. Article 341 of the Constitution empowers the President by public notification to specify the castes, races or tribes which shall, for the purpose of the Constitution, be deemed to be Scheduled Castes in relation to that State or Union Territory etc. Article 342 of the Constitution deals with 'Scheduled Tribes'. The expressions 'Scheduled Castes' and "Scheduled Tribes', as found in Section 42(b) of the Act have to be read along with the constitutional provisions and, if so read, the expression 'who is not a member of the Scheduled Caste or Scheduled Tribe' would mean a person other than those who has been included in the public notification as per Articles 341 and 342 of the Constitution. The expression 'person' used in Section 42(b) of the Act therefore can only be a natural person and not a juristic person, otherwise, the entire purpose of that section will be defeated. If the contention of the respondent-company is accepted, it can purchase land from Scheduled Caste / Scheduled Tribe and then sell it to a non-Scheduled Caste and Schedule Tribe, a situation the legislature wanted to avoid. A thing which cannot be done directly can be not done indirectly over-reaching the statutory restriction. [Paras 12, 13 and 14] [1156-G; 1157-C-G-H; 1158-A-B]

1.3. The reasoning of the High Court that the respondent being a juristic person, the sale effected by a member of Scheduled Caste to a juristic person, which

does not have a caste, is not hit by Section 42 of the Act, is untenable and gives a wrong interpretation to the above mentioned provision. The Revenue Authorities rightly refused the mutation as per circular dated 9.11.2005. Condition No. 7(2) of the circular was rightly invoked by the Revenue Authorities in denying mutation. The above mentioned condition makes it amply clear that the mutation on the basis of registration shall be made only in the name of that particular person/vendee who is a member of Scheduled Caste/Scheduled Tribe and not in the name of any firm/society/company/legal institution wherein a person is office-bearer or member. When the above principles are applied to the transfer of land in question, it is clear that the sale deed effected on 26.9.2005 was void and therefore rightly denied mutation in Revenue records. Property, therefore purchased by the respondent from the members of Scheduled Caste vide sale deed dated 26.9.2005 and other sale deeds, therefore are void since hit by Section 42(b) of the Act and it is so declared. The State can, therefore, re-possess the lands and return the lands to the original owners who are members of Scheduled Caste. [Paras 15, 16 and 17] [1158-C-E; -G-H; 1159-A-C]

State of Maharashtra v. Indian Oil Corporation **(2004) 5 WLC (Raj.) 703 - referred to.**

2. However, at times, Section 42(b) of the Rajasthan Tenancy Act may go against the interest of the members of Scheduled Caste / Scheduled Tribe as well. There may be several situations where they intend to sell the property for purposes like marriage of son/daughter or to purchase a better property and so on, but in that event sometimes they may not get a better competitive price, if the sale is made only among the members of Scheduled Caste / Scheduled Tribe. One has come across legislations where provisions are made enabling them to

sell their lands to the members of non-Scheduled Caste/ Scheduled Tribe, on getting permission from the prescribed authority. Such a provision may be sometimes helpful to the members of Scheduled Caste / Scheduled Tribe to get a better price for their land but it is for the legislature to incorporate appropriate provision in the Rajasthan Act. [Para 18] [1159-C-F]

Case Law Reference:

(2004) 5 WLC (Raj.) 703 referred to Para 4

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 6741-6742 of 2012.

From the Judgment and Order dated 26.09.2008 of the High Court of Judicature for Rajasthan at Jodhpur in DB Civil Special Appeal (Writ) No. 896 of 2008.

WITH

C.A. No. 6743 of 2012.

Dr. Manish Singhvi, AAG, Irshad Ahmad for the Appellants.

P.P. Choudhary, Rajesh K. Bhardwaj, Dr. Vipin Gupta for the Respondent.

The Judgment of the Court was delivered by

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

2. We are, in this case, called upon to decide the question as to whether the transfer of land from a member of Scheduled Caste to a juristic person, other than Scheduled Caste, is void, in view of the provisions of Section 42(b) of the Rajasthan Tenancy Act, 1955 (for short 'the Act').

3. The High Court of Rajasthan has answered the above question in several cases holding that such a transfer would not be hit by the above mentioned provision, since the expression

'person' would not take in a 'juristic person' and that juristic person does not have a caste and, therefore, any transfer made by a Scheduled Caste person would not be hit by Section 42(b) of the Act.

4. In the impugned judgment, reliance has been placed on an earlier judgment of the High Court of Rajasthan in *State of Rajasthan v. Indian Oil Corporation* 2004 (5) WLC (Raj.) 703, which held as follows:

> "6. It goes without saying that though the Indian Oil Corporation is a juristic person but it does not have a caste. Thus the sale in favour of Indian Oil Corporation by a member of Scheduled Caste is not covered by the provisions of section 42 of the Rajasthan Tenancy Act. Thus taking into totality of the facts and circumstances, we feel that it is not a fit case where the delay of 480 days should be condoned. The special leave is rejected."

5. The judgment in *IOC* (supra) was challenged before this Court by the State of Rajasthan in C.C. No. 19386 of 2010 with an application for condonation of delay of 2798 days. This Court dismissed the petition with costs vide order dated 4.1.2011, since the delay was not properly explained.

6. We are informed that since the special leave petition, arising out of CC No. 19386 of 2010, was dismissed, the judgment in *IOC* (supra) is treated as law so far as the State of Rajasthan is concerned and being followed in various other similar cases. It is, therefore, necessary to examine the various legal issues raised before us so as to render an authoritative pronouncement on the question posed before us.

7. The respondent is a private limited company registered under the Indian Companies Act vide Registration Certificate of Incorporation dated 17.8.2005. The Company purchased 25 bighas of land in Khasra No. 840/651 situated in Village Jetasan Patwar area Jetasan Tehsil, Rajasthan, out of which

9.73 bighas belonged to the members of Scheduled Caste. That property was purchased on 26.9.2005 by a registered sale deed for a consideration of Rs.60,000/-. An application was preferred by the respondent before the Revenue Authorities for mutation of the property. The same was refused placing reliance on a circular dated 19.11.2005, which stated that mutation could be effected only if the transfer was between the members of Scheduled Caste/ Scheduled Tribe, as the case may be. Since the application for mutation was refused, the respondent herein filed S.B. Civil Writ Petition No. 169/2006, which was allowed by a learned single Judge. Aggrieved by the same, the State preferred an appeal before the Division Bench, being D.B. Civil Writ Special Appeal (Writ) No. DR (J) 1177/2008, which was also dismissed following the judgment in *IOC* (supra).

8. Heard learned counsel on either side. The Act is a beneficial legislation which takes special care to protect the interest of the members of Schedule Caste and Schedule Tribe. Section 42 provides some general restrictions on sale, gift and bequest of the interest of Scheduled Caste and Scheduled Tribe, in the whole or part of their holding. The reason for such general restrictions is not only to safeguard the interest of the members of Scheduled Caste and Scheduled Tribe, but also to see that they are not being exploited by the members of non-Scheduled Caste and Scheduled Tribe. The relevant provisions of Section 42(b) are extracted below for easy reference:

> "42. General restrictions on sale, gift & bequest - The sale, gift or bequest by a Khatedar tenant of his interest in the whole or part of his holding shall be void if
>
> (a) xxxxxxx deleted
>
> (b) Such sale, gift or bequest is by a member of a Scheduled Caste in favour of a person who is not a member of the Scheduled Caste, or by a member of a Scheduled Tribe in favour of a person who is not a member of the Scheduled Tribe."

9. Shri P.P. Choudhary, learned senior counsel appearing for the respondent, submitted that the expression 'person', as such, is not defined in the Act and, therefore, we have to go by the definition of 'person' under the General Clauses Act, 1987. The General Clauses Act defines the expression 'person' as follows:

> "3(42). 'Person' shall include any company or association of body or individuals, whether incorporated or not."

10. Learned senior counsel, therefore, submitted that, if it is so read along with Section 3(42) of the General Clauses Act, the expression 'person' used in clause (b) of Section 42 of the Act takes in a juristic person as well and, therefore, if a member of Scheduled Caste sells his property to a juristic person, the sale cannot be declared as void, since a juristic person has no caste.

11. Dr. Manish Singhvi, learned Additional Advocate General appearing for the State of Rajasthan, on the other hand, contended that we cannot read Section 3(42) of the General Clauses Act into Section 42(b) of the Act, out of context. Learned counsel submitted that the expression 'person' used in Section 42(b) of the Act is a natural person and not a juristic person and if the transfer is by a member of Scheduled Caste or Scheduled Tribe to a person who is not a member of Scheduled Caste or Scheduled Tribe, then such a transfer is void under Section 42 of the Act.

12. Article 341 of the Constitution empowers the President by public notification to specify the castes, races or tribes which shall, for the purpose of the Constitution, be deemed to be Scheduled Castes in relation to that State or Union Territory etc. Article 341 of the Constitution reads as follows:

> "341. Scheduled Castes.- (1) The President may with respect to any State or Union Territory, and where it is a State after consultation with the Governor thereof, by public

notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union Territory, as the case may be.

(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification."

13. Article 342 of the Constitution deals with 'Scheduled Tribes' and reads as follows:

"342. Scheduled Tribes. - (1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union Territory, as the case may be.

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification."

14. The expressions 'Scheduled Castes' and "Scheduled Tribes', we find in Section 42(b) of the Act have to be read along with the constitutional provisions and, if so read, the expression 'who is not a member of the Scheduled Caste or Scheduled Tribe' would mean a person other than those who has been included in the public notification as per Articles 341

and 342 of the Constitution. The expression 'person' used in Section 42(b) of the Act therefore can only be a natural person and not a juristic person, otherwise, the entire purpose of that section will be defeated. If the contention of the company is accepted, it can purchase land from Scheduled Caste / Scheduled Tribe and then sell it to a non-Scheduled Caste and Schedule Tribe, a situation the legislature wanted to avoid. A thing which cannot be done directly can be not done indirectly over-reaching the statutory restriction.

15. We are, therefore, of the view that the reasoning of the High Court that the respondent being a juristic person, the sale effected by a member of Scheduled Caste to a juristic person, which does not have a caste, is not hit by Section 42 of the Act, is untenable and gives a wrong interpretation to the above mentioned provision.

16. We are also of the view that the Revenue Authorities rightly refused the mutation as per circular dated 9.11.2005. Condition No. 7(2) of the circular was rightly invoked by the Revenue Authorities in denying mutation, which condition is extracted below for easy reference:

"7(2). If the khatedar of Scheduled Caste / Scheduled Tribe executes sale to such a person of Scheduled Caste / Scheduled Tribe who is office-bearer of any firm/society/ company/legal institution, then the mutation on the basis of registration shall be made only in the name of that particular person/vendee who is a member of Scheduled Caste/Scheduled Tribe and not in the name of that firm/ society/company/legal institution wherein he is office-bearer or member."

17. The above mentioned condition makes it amply clear that the mutation on the basis of registration shall be made only in the name of that particular person/vendee who is a member of Scheduled Caste/Scheduled Tribe and not in the name of any firm/society/company/legal institution wherein a person is

office-bearer or member. When we apply the above principles to the transfer of land in question, we have no hesitation to hold that the sale deed effected on 26.9.2005 was void and therefore rightly denied mutation in Revenue records. Property, therefore purchased by the respondent from the members of Scheduled Caste vide sale deed dated 26.9.2005 and other sale deeds, therefore are void since hit by Section 42(b) of the Act and it is so declared. The State can, therefore, re-possess the lands and return the lands to the original owners who are members of Scheduled Caste.

18. We may hasten to add, at times, Section 42(b) may go against the interest of the members of Scheduled Caste / Scheduled Tribe as well. There may be several situations where they intend to sell the property for purposes like marriage of son/daughter or to purchase a better property and so on, but in that event sometimes they may not get a better competitive price, if the sale is made only among the members of Scheduled Caste / Scheduled Tribe. We have come across legislations where provisions are made enabling them to sell their lands to the members of non-Scheduled Caste / Scheduled Tribe, on getting permission from the prescribed authority. Such a provision may be sometimes helpful to the members of Scheduled Caste / Scheduled Tribe to get a better price for their land but it is for the legislature to incorporate appropriate provision in the Rajasthan Act.

19. Consequently, the appeals are allowed and the judgments of the learned single Judge and the Division Bench of the High Court are set aside. However, there will be no order as to costs.

B.B.B. Appeals allowed.

M/S PAYAL VISION LTD.
v.
RADHIKA CHOUDHARY
(Civil Appeal No. 6734 of 2012)

SEPTEMBER 20, 2012

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

CODE OF CIVIL PROCEDURE, 1908:

O.12, r.6 - Judgment on admissions - Held: In a suit for recovery of possession from a tenant whose tenancy is not protected under the provisions of the Rent Control Act, plaintiff-landlord is required to establish the existence of jural relationship of landlord and tenant between parties and termination of tenancy either by lapse of time or by notice served - In the instant case, the averments made in the plaint and the written statement clearly establish admissions by tenant on both the aspects - Trial court was perfectly justified in decreeing the suit for possession filed by the appellant by invoking its powers under O.12 r.6 - Transfer of Property Act, 1882 - s.106.

EVIDENCE ACT, 1872 :

s.116 - Estoppel - Applicability of.

The plaintiff-appellant filed a suit for possession and recovery of mesne profit with the averments, inter alia, that it had let out the suit property along with the super structure to the defendant for residential requirement at a monthly rent of Rs.50,000/-; and that since the defendant made substantial super structural changes in the premises and did not comply with the terms of the lease agreement, a notice u/s 106 of the Transfer of Property Act, 1882 (TP Act) was served upon him

terminating the tenancy. After the defendant filed the written statement, the plaintiff filed an application under O.12 r.6, Code of Civil Procedure, 1908 praying for decree for possession on admissions. The trial court allowed the application and decreed the suit for possession holding that the jural relationship of the landlord and tenant was admitted between the parties and so was the rate of rent settled and the service of notice terminating the tenancy. However, in the first appeal of the tenant, the High Court set aside the judgment and decree passed by the trial court holding that there was no clear admission by the defendant either regarding relationship of landlord and tenant between the parties or the service of notice of termination of the tenancy upon the defendant, and remanded the matter back to it for disposal afresh.

Allowing the appeal filed by the landlord, the Court

HELD: 1.1 In a suit for recovery of possession from a tenant whose tenancy is not protected under the provisions of the Rent Control Act, all that is required to be established by the plaintiff-landlord is the existence of the jural relationship of landlord and tenant between the parties and the termination of the tenancy either by lapse of time or by notice served by the landlord u/s 106 of the T.P. Act. So long as these two aspects are not in dispute, the court can pass a decree in terms of O.12, r.6, CPC. Whether or not there is a clear admission upon the said two aspects is a matter to be seen in the fact situation prevailing in each case. In the instant case, the tenancy in question is not protected under the Rent Control Act having regard to the fact that the rate of rent is more than Rs. 3500/- per month. [Para 6-7 and 11] [1166-G-H; 1167-A-F; 1170-E]

Jeevan Diesels & Electricals Ltd. v. Jasbir Singh Chadha **(2010) 6 SCC 601 = 2010 (6) SCR 546 - relied on.**

1.2 When placed in juxtaposition, the averments made in the plaint and the written statement clearly spell out an admission by the defendant that the lease agreement dated 10.10.2001 was indeed executed between the parties. It is also evident that the monthly rent was settled at Rs.50,000/- which fact too is clearly admitted by the defendant although according to the defendant, the said amount represented rent for commercial use of the premises and not residential purposes as alleged by the plaintiff. [Para 10] [1169-C-D]

1.3 Suffice it to say that the averments made in the written statement clearly accept the existence of the jural relationship of landlord and tenant between the parties no matter the lease agreement was not duly registered. Whether the tenancy was for residential or commercial use of the property is wholly immaterial for the grant of a decree for possession. Even if the premises were let out for commercial and non-residential use, the fact remained that the defendant-respondent entered upon and is occupying the property as a tenant under the plaintiff. Further, the relationship of the landlord and the tenant remains unaffected even if the tenant has with or without the consent of the landlord made structural changes in the property when the tenancy was not protected by the rent law. [Para 10-11] [1169-D-F; 1170-C-D]

2. The defendant-tenant did not have the benefit of a secure term under a registered lease deed. The result was that the tenancy was only a month to month tenancy that could be terminated upon service of a notice in terms of s.106 of the T.P. Act. The plaintiff's case in the plaint was that a notice was served upon the tenant u/s 106 of the T.P. Act pointing out that the defendant-tenant had made substantial structural changes in the premises and had not complied with the terms of the lease agreement. In reply, the defendant has not chosen to deny even impliedly leave alone specifically that the notice dated

17.3.2003 was not served upon her. She has simply disputed the validity of notice on the ground that the same is not in accordance with s.106 of the T.P. Act. The order passed by the High Court was not supported on the plea of the notice being illegal for any reason. A copy of the notice in question is on the record and the same does not, suffer from any illegality so as to make it non-est in the eye of law. [Para 12-14] [1170-G-H; 1171-D-E; 1171-H; 1172-A]

3. In an order dated 17.2.1999 passed by the Revenue Authority under the Delhi Land Reforms Act, it was directed that the property would stand vested in the Gram Sabha if the plaintiff did not re-convert the land in question for agricultural purposes within three months. What is important is that the tenancy under the lease agreement dated 10.10.2001 started subsequent to the passing of the said order. Thus, the challenge to the title of the plaintiff qua the suit property was based on a document anterior to the commencement of the tenancy in question. It also meant that the challenge was in substance a challenge to the landlord's title on the date of the commencement of the tenancy. Section 116 of the Evidence Act, 1872, however, estops the tenant from doing so. [Para 15] [1172-C-F]

Mangat Ram v. Sardar Mehartan Singh **(1987) 4 SCC 319 and** *Anar Devi (Smt.) v. Nathu Ram* **(1994) 4 SSC 251 - relied on.**

Krishna Prasad v. Baraboni Coal Concern Ltd. **AIR 1937 PC 251 - referred to.**

4. The trial court was, perfectly justified in decreeing the suit for possession filed by the appellant by invoking its powers under O.12 r.6 of the Code. Inasmuch as the High Court took a different view ignoring the pleadings and the effect thereof, it committed a mistake. Therefore,

the impugned judgement and order of the High Court is set aside and the judgment and decree passed by the trial Court affirmed. [Para 17-18] [1174-B-D]

Karam Kapahi v. Lal Chand Public Charitable Trust **2010 (4) SCR 422 = (2010) 4 SCC 753 and** *Charanjit Lal Mehra v. Kamal Saroj Mahajan* **2005 (2) SCR 661= (2005) 11 SCC 279 - cited.**

Case Law Reference:

2010 (4) SCR 422	**Cited**	**Para 4**
2005 (2) SCR 661	**Cited**	**Para 4**
2010 (6) SCR 546	**relied on**	**Para 5**
(1987) 4 SCC 319	**relied on**	**Para 15**
(1994) 4 SSC 251	**relied on**	**Para 15**
AIR 1937 PC 251	**referred to**	**Para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6734 of 2012.

From the Judgment and Order dated 14.03.2011 of the High Court of Delhi at New Delhi in R.F.A. No. 81 of 2009.

Nagendra Rai, Abhay Kumar, Rupesh Kumar Pandey for the Appellant.

M.P. Raju, Nitin Bhardwaj, Ajit Kumar Gupta, Sachit Sripal for the Respondent.

The Judgment of the Court was delivered by

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

2. In a suit for possession and recovery of mesne profit filed by the plaintiff- appellant before the trial Court of Additional District Judge, Delhi, the plaintiff prayed for a decree for

possession in its favour on admissions, invoking the Court's powers under Order XII Rule 6 of the Code of Civil Procedure, 1908. The trial Court examined the prayer and held that the jural relationship of landlord and tenant was admitted between the parties and so was the rate of rent as settled by them. Service of a notice terminating the tenancy of the defendant-respondent also being admitted, the trial Court saw no impediment in decreeing the suit for possession of the suit property. The application filed by the plaintiff-appellant under Order XII Rule 6 of the CPC was accordingly allowed and the suit filed by the plaintiff to the extent it prayed for possession of the suit property decreed in its favour.

3. Aggrieved by the decree passed against the respondent, the respondent filed Regular First Appeal No. 81 of 2009 before the High Court of Delhi which was allowed by the High Court in terms of its order dated 14th March, 2011 reversing the judgment and decree passed by the trial Court and remanding the matter back to the said Court for disposal in accordance with law. The present appeal by special leave assails the correctness of the said judgment.

4. Mr. Nagendra Rai, learned counsel appearing on behalf of the appellant, strenuously argued that the High Court had fallen in error in holding that there was no clear admission by the defendant either regarding the existence of a relationship of landlord and tenant between the parties or the service of notice of termination of tenancy upon the defendant. He referred to the averments made in the plaint and the written statement to buttress his submission that the existence of the tenancy was unequivocally admitted, no matter the defendant-tenant had questioned the validity of the lease deed in her favour for want of stamp duty and registration as required under law. The fact that the lease deed was not registered did not, contended Mr. Rai, make any material difference so long that the defendant had been put in possession of the demised property pursuant to the said document and so long as she held

the same as a tenant. The rate of rent was also not disputed by the defendant nor was the service of notice of termination, which aspects alone were relevant and if admitted or proved, sufficient for the Court to decree the suit for the relief of possession. Mr. Rai submitted that the defendant had no doubt disputed the title of plaintiff-appellant and alleged that the land underlying the super structure had vested in the Gram Sabha but any such contention was not available to her in view of Section 116 of the Indian Evidence Act, 1872 that estopped a tenant from denying the title of the landlord. Relying upon the decisions of this Court in *Karam Kapahi v. Lal Chand Public Charitable Trust* (2010) 4 SCC 753 and *Charanjit Lal Mehra v. Kamal Saroj Mahajan* (2005) 11 SCC 279, Mr. Rai argued that the High Court ought to have refused any interference with the decree passed by the Court below especially when no triable issue arose for determination by the trial Court.

5. On behalf of the respondent, it was argued that the High Court was justified in holding that the written statement did not contain a clear and unequivocal admission of the relevant aspects, namely the existence of the jural relationship of landlord and tenant between the parties and the termination of the tenancy by service of a notice under Section 106 of the Transfer of Property Act, 1882. According to him, the High Court was also justified in relying upon the decision of this Court in *Jeevan Diesels & Electricals Ltd. v. Jasbir Singh Chadha* (2010) 6 SCC 601 while reversing the judgment and decree passed by the Court below.

6. In a suit for recovery of possession from a tenant whose tenancy is not protected under the provisions of the Rent Control Act, all that is required to be established by the plaintiff-landlord is the existence of the jural relationship of landlord and tenant between the parties and the termination of the tenancy either by lapse of time or by notice served by the landlord under Section 106 of the Transfer of Property Act. So long as these two aspects are not in dispute the Court can pass a decree in

terms of Order XII Rule 6 of the CPC, which reads as under:

> *"Judgment on admissions-(1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.*
>
> *(2) Whenever a judgment is pronounced under sub-rule (1) a decree shall be drawn upon in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced."*

7. The above sufficiently empowers the Court trying the suit to deliver judgment based on admissions whenever such admissions are sufficient for the grant of the relief prayed for. Whether or not there was an unequivocal and clear admission on either of the two aspects to which we have referred above and which are relevant to a suit for possession against a tenant is, therefore, the only question that falls for determination in this case and in every other case where the plaintiff seeks to invoke the powers of the Court under Order XII Rule 6 of the CPC and prays for passing of the decree on the basis of admission. Having said that we must add that whether or not there is a clear admission upon the two aspects noted above is a matter to be seen in the fact situation prevailing in each case. Admission made on the basis of pleadings in a given case cannot obviously be taken as an admission in a different fact situation. That precisely is the view taken by this Court in *Jeevan Diesels & Electricals Ltd.* (supra) relied upon by the High Court where this Court has observed:

> *"Whether or not there is a clear, unambiguous admission by one party of the case of the other party is essentially a question of fact and the decision of this question depends on the facts of the case. The question, namely, whether there is a clear admission or not cannot be decided on the basis of a judicial precedent. Therefore, even though the principles in Karam Kapahi (supra) may be unexceptionable they cannot be applied in the instant case in view of totally different fact situation."*

8. Coming then to the question whether there is any admission by the tenant-respondent regarding the existence of the jural relationship of landlord and tenant between the parties, it would be profitable to refer to the averments made by the plaintiff-appellant in para 2 of the plaint which is to the following effect:

> *"That the plaintiff had agreed to let out the entire property at Khasra No. 857 min. (1-03) Village Tehsil Mehrauli in the NCT of Delhi Gitorani alongwith superstructure including servant quarter and garage of the defendant to the defendant for residential requirement at a monthly rent of Rs.50,000/- (Rupees fifty thousand only) towards the rent for the demised premises exclusive of charges for the electricity appliances, fixtures and fittings for a period of three years commencing on 10th day of October 2001 vide lease agreement dated 10.10.2001."*

9. In the written statement filed by her, the defendant has while asserting that the averments made in para 2 above are vague, false and wrong asserted that the property in question was not let out for residential purposes as alleged by the tenant but was constructed for commercial use and let out for that purpose only. The execution of the lease deed dated 10th October, 2001 to which the plaintiff made a reference in para 2 of the plaint is also not denied. Although the defendant appears to be suggesting some collateral agreement also to have been orally entered into by the parties, the relevant portion of the written statement dealing with these aspects may at this stage be extracted:

"…… It is further denied that property was let out for residential purposes. As submitted in preceding paras the said property was constructed for use of commercial purposes and was let out for commercial purposes at commercial rent. Execution of Lease Deed is though not denied but is vehemently submitted that the said document was entered upon on the asking of the plaintiff whereas the terms were different than those incorporated in the lease deed."

10. When placed in juxtaposition the averments made in the plaint and the written statement clearly spell out an admission by the defendant that lease agreement dated 10th October 2001 was indeed executed between the parties. It is also evident that the monthly rent was settled at Rs.50,000/- which fact too is clearly admitted by the defendant although according to the defendant, the said amount represented rent for commercial use of the premises and not residential purposes as alleged by the plaintiff. Suffice it to say that the averments made in the written statement clearly accept the existence of the jural relationship of landlord and tenant between the parties no matter the lease agreement was not duly registered. Whether the tenancy was for residential or commercial use of the property is wholly immaterial for the grant of a decree for possession. Even if the premises were let out for commercial and not residential use, the fact remained that the defendant-respondent entered upon and is occupying the property as a tenant under the plaintiff. The nature of this use may be relevant for determination of mesne profits but not for passing of a decree for possession against the defendant.

11. Incidentally, the defendant appears to have raised in the written statement a plea regarding the nature and extent of the super structure also. While the plaintiff's case is that the super structure as it existed on the date of the lease deed had been let out to the defendant and the defendant had made structural changes without any authorisation, the defendant's

case is that the super structure was constructed by her at her own cost pursuant to some oral agreement between the parties. It is unnecessary for us to delve deep into that aspect of the dispute, for the nature and extent of superstructure or the legality of the changes allegedly made by the defendant is not relevant to the determination of the question whether the existence of tenancy is admitted by the defendant. At any rate, nature and extent of structure whether modified or even re-constructed by the defendant is a matter that can not alter the nature of the possession which the defendant holds in terms of the agreement executed by her. The relationship of the landlord and the tenant remains unaffected even if the tenant has with or without the consent of the landlord made structural changes in the property. Indeed if the tenancy was protected by the rent law and making of structural changes was a ground for eviction recognised by such law, it may have been necessary to examine whether the structure was altered and if so with or without the consent of the parties. That is not the position in the present case. The tenancy in question is not protected under the Rent Control Act having regard to the fact that the rate of rent is more than Rs. 3500/- per month. It is, therefore, of little significance whether any structural change was made by the defendant and if so whether the same was authorised or otherwise. The essence of the matter is that the relationship of the landlord and the tenant is clearly admitted. That is the most significant aspect to be examined by the Court in a suit for possession especially when the plaintiff seeks a decree on the basis of admissions.

12. That brings us to the second question, namely, whether the tenancy stands terminated either by lapse of time or by a notice served upon the defendant. The defendant-tenant did not have the benefit of a secure term under a registered lease deed. The result was that the tenancy was only a month to month tenancy that could be terminated upon service of a notice in terms of Section 106 of the Transfer of Property Act. The plaintiff's case in para 6 of the plaint was that a notice was served upon the tenant under Section 106 of the Transfer of

Property Act pointing out that the defendant-tenant had made substantial structural changes in the premises and had not complied with the terms of the lease agreement. The notice was duly served upon the tenant to which the tenant has not replied. Para 6 reads as under:

> *"That since the defendant had carried out substantial structural changes and further did not comply with the covenants of the lease agreement the plaintiff was compelled to serve a notice under Section 106 of the Transfer of Property Act. The said notice was duly served upon the defendant and no reply to the said notice has been received by the plaintiff or its counsel."*

13. In reply, the defendant has not denied the service of a notice upon the defendant. Instead para 6 is entirely dedicated to the defendant's claim that the whole structure standing on the site today has been constructed by her out of her own money. The defendant has not chosen to deny even impliedly leave alone specifically that notice dated 17th March 2003 was not served upon her. In para 6 of the preliminary objections raised in the written statement she has simply disputed the validity of the notice on the ground that that the same is not in accordance with Section 106 of the Transfer of Property Act. Para 6, reads as under:

> *"That the alleged notice dated 17th March, 2003 is not as per the provisions of Section 106 of Transfer of Property Act. It is settled law that notice for termination of lease has to be in mandatory terms so specified in Section 106 of Transfer of Property Act."*

14. Far from constituting a denial of the receipt of the notice the above is an admission of the fact that the notice was received by her but the same was not in accordance with Section 106 of the Transfer of Property Act. In fairness to counsel for the tenant-respondent in this appeal, we must record that the order passed by the High Court was not

supported on the plea of the notice being illegal for any reason. A copy of the notice in question is on the record and the same does not, in our opinion, suffer from any illegality so as to make it non-est in the eye of law.

15. We may, before parting, refer to yet another contention that was raised by the defendant-respondent in her defence before the courts below. In para 1 of the written statement filed by her it was contended that the property in question had vested in the Gram Sabha and that the plaintiff, therefore, could not seek her eviction from the same. The contention was, it appears, based on an order dated 17th February, 1999 passed by the Revenue Authority under the Delhi Land Reforms Act whereby it was directed that the property would stand vested in the Gram Sabha if the plaintiff did not re-convert the land in question for agricultural purposes within three months. What is important is that the tenancy under the lease agreement dated 10th October, 2001 started subsequent to the passing of the said order of the Revenue Authority. In other words, the challenge to the title of the plaintiff qua the suit property was based on a document anterior to the commencement of the tenancy in question. It also meant that the challenge was in substance a challenge to the landlord's title on the date of the commencement of the tenancy. Section 116 of the Evidence Act, 1872, however, estoppes the tenant from doing so. The legal position in this regard is settled by several decisions of this Court and the Privy Council. Reference may in this regard be made to *Mangat Ram v. Sardar Mehartan Singh* (1987) 4 SCC 319 and *Anar Devi (Smt.) v. Nathu Ram* (1994) 4 SSC 251. In the later case this Court observed:

> *"13. This Court in Sri Ram Pasricha v. Jagannath, has also ruled that in a suit for eviction by landlord, the tenant is estopped from questioning the title of the landlord because of Section 116 of the Act. The Judicial Committee in Kumar Krishna Prasad Lal Singha Deo v. Baraboni Coal Concern Ltd., when had occasion to*

examine the contention based on the words 'at the beginning of the tenancy' in Section 116 of the Evidence Act, pronounced that they do not give a ground for a person already in possession of land becoming tenant of another, to contend that there is no estoppel against his denying his subsequent lessor's title. Ever since, the accepted position is that Section 116 of the Evidence Act applies and estops even a person already in possession as tenant under one landlord from denying the title of his subsequent landlord when once he acknowledges him as his landlord by attornment or conduct. Therefore, a tenant of immovable property under landlord who becomes a tenant under another landlord by accepting him to be the owner who had derived title from the former landlord, cannot be permitted to deny the latter's title, even when he is sought to be evicted by the latter on a permitted ground."

16. To the same effect is the decision of Privy Council in *Krishna Prasad v. Baraboni Coal Concern Ltd. AIR* 1937 PC 251, where Privy Council observed:

"The section postulates that there is a tenancy still continuing, it had its beginning at a given date from a given landlord. It provides that neither a tenant nor any one claiming through a tenant shall be heard to deny that that particular landlord had at that date a title to the property. In the ordinary case of a lease intended as a present demise (which is the case before the Board, on this appeal) the section applies against the lessee, any assignee of the terms and any sub-lessee or licensee. What all such persons are precluded from denying is that the lessor had a title at the date of the lease and there is no exception even for the case where the lease itself discloses the defect of title. The principle does not apply to disentitle a tenant from disputing the derivative title of

any who claims to have since become disentitled to the reversion……"

(emphasis supplied)

17. In the light of the above, the trial Court was, in our view, perfectly justified in decreeing the suit for possession filed by the appellant by invoking its powers under Order XII Rule 6 of the Code of Civil Procedure. Inasmuch as the High Court took a different view ignoring the pleadings and the effect thereof, it committed a mistake.

18. We accordingly allow this appeal, set aside the impugned judgement and order of the High Court and affirm the judgment and decree passed by the trial Court. The Parties are directed to bear their own costs.

19. Keeping in view the fact that the premises in question is being used by the tenant for commercial purposes, we grant to the defendant time till 31st December, 2012 to vacate the same on furnishing an undertaking in usual terms before this Court within four weeks from today. Needless to say that the defendant shall be liable to pay the *mesne profit* for the period hereby granted at the rate determined by the trial Court.

20. The appeal is allowed accordingly.

R.P. Appeal allowed.

BENARSI KRISHNA COMMITTEE AND ORS.

v.

KARMYOGI SHELTERS PVT. LTD.

(Special Leave Petition (civil) No. 23860 of 2010)

SEPTEMBER 21, 2012

[ALTAMAS KABIR AND J. CHELAMESWAR, JJ.]

ARBITRATION AND CONCILIATION ACT, 1996:

ss.2(h), 31(5) and 34 - Delivery of copy of arbitral award to 'party' - Held: The expression "party", as defined in s.2(h) clearly indicates a person who is a party to an arbitration agreement and is not qualified in any way so as to include the agent of the party to such agreement - Therefore, proper compliance with s.31(5) would mean delivery of a signed copy of Arbitral Award on the party himself and not on his Advocate, which gives the party concerned the right to proceed u/s 34(3) of the Act.

An award was made on 12.5.2004 by the arbitrator appointed u/s 11 of the Arbitration and Conciliation Act, 1996. The copy of the award duly signed by the arbitrator was received by the counsel for the respondent on 14.5.2004. The respondent filed a petition u/s 34 of the 1996 Act for setting aside the award. The petitioner objected that the petition was filed after a delay of more than 9 months from the date of receipt of the award. The Single Judge of the High Court dismissed the petition as time barred. However, the Division Bench of the High Court remanded the matter to the Single Judge to decide the objections on the award on merits holding that a copy of the award had to be delivered to the party itself and service on its counsel did not amount to service within the meaning of s.31(5) of the Act.

In the instant petition, the question for consideration before the Court was: "whether the service of an Arbitral Award on the agent of a party amounts to service on the party itself, having regard to the provisions of s. 31(5) and s. 34(3) of the Arbitration and Conciliation Act, 1996."

Dismissing the petition, the Court

HELD: 1.1 The expression "party" has been amply dealt with in Tecco Trechy Engineers's* case and also in ARK Builders Pvt. Ltd.'s case. The expression "party", as defined in s.2(h) of the Arbitration and Conciliation Act, 1996, clearly indicates a person who is a party to an arbitration agreement. The said definition is not qualified in any way so as to include the agent of the party to such agreement. Any reference, therefore, made in s.31(5) and s.34(2) of the 1996 Act can only mean the party himself and not his or her agent, or Advocate empowered to act on the basis of a Vakalatnama. In such circumstances, proper compliance with s.31(5) would mean delivery of a signed copy of the Arbitral Award on the party himself and not on his Advocate, which gives the party concerned the right to proceed u/s 34(3) of the Act. [para 15] [1184-D-G]

Union of India Vs. Tecco Trechy Engineers & Contractors **2005 (2) SCR 983 = (2005) 4 SCC 239;** *State of Maharashtra Vs. ARK Builders Pvt. Ltd.* **2011 (4) SCR 432 = (2011) 4 SCC 616 - relied on.**

Pushpa Devi Bhagat Vs. Rajinder Singh & Ors. **2006 (3) Suppl. SCR 370 = (2006) 5 SCC 566; and** *Byram Pestonji Gariwala Vs. Union Bank of India & Ors.* **1991(1) Suppl. SCR 187 = (1992) 1 SCC 31- distinguished.**

National Projects Constructions Corporation Limited Vs. Bundela Bandhu Constgructions Company **AIR 2007 Delhi 202- referred to.**

Nazir Ahmed Vs. King Emperor **AIR 1936 PC 253- referred to.**

1.2 Section 31(5) of the 1996 Act clearly indicates that a signed copy of the Award has to be delivered to the party. Accordingly, when a copy of the signed Award is not delivered to the party himself, it would not amount to compliance with the provisions of s.31(5) of the Act. [para 16] [1185-A-B]

Nilakantha Sidramappa Ningshetti vs. Kashinath Somanna Ningashetti **1962 (2) SCR 551; and** *East India Hotels Ltd. Vs. Agra Development Authority* **2001 (2) SCR 582 = (2001) 4 SCC 175- held inapplicable**

1.3 In the instant case, since a signed copy of the Award had not been delivered to the party itself and the party obtained the same on 15.12.2004, and the petition u/s 34 of the Act was filed on 3.2.2005, it has to be held that the said petition was filed within the stipulated period of three months as contemplated u/s 34(3) of the Act. [para 17] [1185-D-E]

Case Law Reference:

AIR 2007 Delhi 202	**referred to**	**para 6**
2005 (2) SCR 983	**relied on**	**para 6**
AIR 1936 PC 253	**referred to**	**para 6**
1962 (2) SCR 551	**held inapplicable**	**para 8**
2001 (2) SCR 582	**held inapplicable**	**para 8**
2011 (4) SCR 432	**referred to**	**para 9**
2006 (3) Suppl. SCR 370	**distinguished**	**para 10**
1991 (1) Suppl. SCR 187	**distinguished**	**para 10**

CIVIL APPELLATE JURISDICTION : Special Leave Petition (Civil) No. 23860 of 2010.

From the Judgment and Order dated 04.05.2010 of the High Court of Delhi at New Delhi in FAO (OS) No. 578 of 2009.

Ranjeet Kumar, N.N. Aggarwal, Ashish Mohan, Rohit Gandhi, Liz Mathew for the Petitioners.

K.V. Viswanathan, C.S. Rajan, Ashwath Sitaraman, Abhishek Kaushik, Mehul M. Gupta, Rukhsana Choudhury, P. Rajesh, Rutwik Panda for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. In this Special Leave Petition, a question has been raised as to whether the service of an Arbitral Award on the agent of a party amounts to service on the party itself, having regard to the provisions of Section 31(5) and Section 34(3) of the Arbitration and Conciliation Act, 1996, hereinafter referred to as "the 1996 Act".

2. The Petitioner is a Committee of Managing Landlords, who are co-owners of the Benarsi Krishna Estate at the Moti Cinema compound, Chandni Chowk, Delhi. The property apparently belongs to the Khanna family and the Seth family. The Respondent No.1 is a Private Limited Company incorporated under the Companies Act, 1956, and is an estate developer and builder of both residential and commercial properties. The Petitioner Committee entered into a Collaboration Agreement dated 16th November, 1990, by which the Respondent agreed to convert the Moti Cinema compound into a commercial complex. Subsequently, the agreement was amended on 2nd May, 1991, by which certain changes were introduced with regard to the scheme of payment. Inasmuch as disputes arose between the parties over the working of the agreement, the Respondent filed an application under Section

11 of the 1996 Act for appointment of an Arbitrator and by an order dated 14th May, 2001, the Delhi High Court appointed Justice K. Ramamoorthy, a retired Judge of the said Court, as the Sole Arbitrator. After considering the materials brought on record, the learned Arbitrator passed his Award upon holding that the Respondent had committed breach of the terms of the Collaboration Agreement and directed the Petitioner to refund the sum of Rs.41 lakhs which had been received from the Respondent, within three months from the date of the Award and in default of payment within the said period, the amount would carry interest @ 12% per annum from the date of the Award till the date of payment.

3. As will appear from the records, copies of the Award, duly signed by the learned Arbitrator, were received by the counsel for the respective parties. As far as the Respondent is concerned, the endorsement shows that the copy of the Award was received by its counsel on 13th May, 2004. However, no application for setting aside the Award was filed by the Respondent within the period of three months from the date of receipt of the Award, as provided under Section 34(3) of the 1996 Act.

4. On 3rd February, 2005, the Respondent filed a Petition, being O.M.P. No.51 of 2005, under Section 34 of the 1996 Act, to set aside the Award of the learned Arbitrator. According to the Petitioner, the said petition was filed after a delay of more than 9 months from the date of the receipt of the Award. The said objection of the Petitioner was considered by the learned Single Judge of the High Court who by his order dated 28th August, 2009, dismissed the Respondent's petition on the ground that the same was time barred. The learned Single Judge accepted the contention of the Petitioner that the expression "party" used in Section 31(5) of the 1996 Act, would also include the agent of the party.

5. The matter was carried to the Division Bench of the High Court by the Respondent on 5th October, 2009, by way of

F.A.O. (OS) No.578 of 2009. Accepting the case of the Respondent that service of the Award had not been properly effected, the Division Bench remanded the matter to the Single Judge to decide the objections on the Award on merits, upon holding that for compliance with the provisions of Section 31(5) of the 1996 Act, a copy of the Award had to be delivered to the party itself and service on its counsel did not amount to service within the meaning of Section 31(5) of the aforesaid Act. The Special Leave Petition has been filed against the said judgment and order of the Division Bench of the Delhi High Court.

6. In arriving at its decision which has been impugned in these proceedings, the Division Bench of the Delhi High Court referred to its own judgment in *National Projects Constructions Corporation Limited Vs. Bundela Bandhu Constgructions Company* [AIR 2007 Delhi 202] and a decision of this Court in *Union of India Vs. Tecco Trechy Engineers & Contractors* [(2005) 4 SCC 239], which had considered the decision of the Delhi High Court in *Bundela Bandhu's* case (supra). The Division Bench also referred to the decision of the Privy Council in the celebrated case of *Nazir Ahmed Vs. King Emperor* [(AIR 1936 PC 253], wherein it was categorically laid down that if an action is required to be taken in a particular manner, it had to be taken in that manner only or not at all. While observing that all the aforesaid controversies could have been avoided if the Award had been served on the party directly, the Division Bench also observed that in view of Section 2(h) of the 1996 Act, there was no justifiable reason to depart from the precise definition of the expression "party" which means a party to the arbitration agreement.

7. Appearing in support of the Special Leave Petition, Mr. Ranjit Kumar, learned Senior Advocate, reiterated the submissions which had been made before the High Court. Learned senior counsel reiterated that after the Award had been passed on 12th May, 2004, a copy of the same, duly signed

by the Arbitrator, was received by counsel for the Respondent on 13th May, 2004, while the Petition under Section 34 was filed only on 3rd February, 2005, well beyond the period of 3 months prescribed in Section 34(3) of the 1996 Act and also beyond the further period of 3 months as indicated in the proviso thereto. Since the question for decision in the Special Leave Petition largely depends on the interpretation of Sub-section (3) of Section 34 and the proviso thereto, the same is extracted hereinbelow for purposes of reference :-

"34. Application for setting aside arbitral award. -

(1) ……..

(2) ……..

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter. "

8. Mr. Ranjit Kumar urged that service of the Award on the Advocate for the party was sufficient compliance of the provisions of Section 34(3) of the 1996 Act, as had been held by a Four-Judge Bench of this Court in *Nilakantha Sidramappa Ningshetti vs. Kashinath Somanna Ningashetti* [1962 (2) SCR 551], which was later followed in *East India Hotels Ltd. Vs. Agra Development Authority* [(2001) 4 SCC 175]. Mr. Ranjit Kumar submitted that in *Nilakantha Sidramappa Ningshetti's* case (supra) this Court held that intimation to the pleaders of

the parties amounted to service of the notice on the parties about the filing of the Award.

9. Mr. Ranjit Kumar also referred to the decision of this Court in *State of Maharashtra Vs. ARK Builders Pvt. Ltd.*[(2011) 4 SCC 616], in which this Court, following its earlier decision in *Tecco Trechy Engineers's* case (supra), held that Section 31(5) of the 1996 Act contemplates not merely the delivery of any kind of copy of the Award, but a copy of the Award which had been duly signed by the Members of the Arbitral Tribunal. Learned counsel pointed out that in the said decision, the Hon'ble Judges had taken note of the fact that an attempt was being made to derive undue advantage of an omission on the part of the learned Arbitrator to supply them with a signed copy of the Award, but ultimately held that the same would not change the legal position and it would be wrong to tailor the law according to the facts of a particular case.

10. As an additional ground, Mr. Ranjit Kumar referred to the use of the words "signed by parties" under Order 23 Rule 3 read with Order 3 Rule 1 of the Code of Civil Procedure, which provide that any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader appearing, applying or acting, as the case may be, on his behalf. Mr. Ranjit Kumar contended that on the strength of the Vakalatnama executed by the party in favour of his Advocate/agent, service of notice effected on the Advocate holding such Vakalatnama amounted to service of the notice on the party himself, as was held in the case of *Pushpa Devi Bhagat Vs. Rajinder Singh & Ors.* [(2006) 5 SCC 566].

11. A similar view had been expressed by this Court in *Byram Pestonji Gariwala Vs. Union Bank of India & Ors.*[(1992) 1 SCC 31], whereby this Court held that the expression "signed by parties" would include "signed by his

pleader". Mr. Ranjit Kumar submitted that once a Vakalatnama had been executed by a party in favour of his Advocate, the said Advocate was competent to do such acts as could be done by the party himself. Accordingly, the Division Bench of the Delhi High Court had in the teeth of the aforesaid decisions erred in holding that service of the signed copy of the Award by the learned Arbitrator on the Respondent's counsel, did not amount to compliance of the provisions of Section 31(5) of the 1996 Act, which specifically enjoined that the copy was to be delivered to each party.

12. Countering the submissions made by *Mr. Ranjit Kumar, Mr. K.V. Viswanathan,* learned Senior Advocate, firstly urged that once hearing before the learned Arbitrator had been concluded and an Award had been passed by him, the power given to an Advocate by the Vakalatnama executed in his favour, came to an end and the learned Advocate was no longer entitled to act on the strength thereof. Accordingly, service on the said Advocate would not amount to service even on an agent of the party, even if Mr. Ranjit Kumar's submissions were to be accepted. Mr. Viswanathan, however, contended that service on the learned Advocate of the party cannot be treated as service of the Award on the party itself, as had been very clearly held in the very same decision referred to by Mr. Ranjit Kumar in *Pushpa Devi Bhagat's* case (supra).

13. Referring to the decision of the Three-Judge Bench of this Court in *Tecco Trechy Engineers's* case (supra), Mr. Viswanathan submitted that the decision rendered therein completely covered the issue raised in this Special Leave Petition. Learned counsel submitted that on a construction of Sub-Section (3) of Section 34 of the 1996 Act, the learned Judges had held that "service on a party" as defined in Section 2(h) read with Section 34(3) of the 1996 Act, had to be construed to be a person directly connected with and involved in the proceedings and who is in control of the proceedings before the Arbitrator, as he would be the best person to

understand and appreciate the Arbitral Award and to take a decision as to whether an application under Section 34 was required to be moved.

14. As to the decision in *Pushpa Devi Bhagat's* case (supra), Mr. Viswanathan submitted that the same was rendered on a completely different set of facts which could have no application to the facts of this case. Mr. Viswanathan submitted that no interference was called for with the decision of the Division Bench of the High Court impugned in the Special Leave Petition, which was liable to be dismissed.

15. Having taken note of the submissions advanced on behalf of the respective parties and having particular regard to the expression "party" as defined in Section 2(h) of the 1996 Act read with the provisions of Sections 31(5) and 34(3) of the 1996 Act, we are not inclined to interfere with the decision of the Division Bench of the Delhi High Court impugned in these proceedings. The expression "party" has been amply dealt with in *Tecco Trechy Engineers's* case (supra) and also in *ARK Builders Pvt. Ltd.'s* case (supra), referred to hereinabove. It is one thing for an Advocate to act and plead on behalf of a party in a proceeding and it is another for an Advocate to act as the party himself. The expression "party", as defined in Section 2(h) of the 1996 Act, clearly indicates a person who is a party to an arbitration agreement. The said definition is not qualified in any way so as to include the agent of the party to such agreement. Any reference, therefore, made in Section 31(5) and Section 34(2) of the 1996 Act can only mean the party himself and not his or her agent, or Advocate empowered to act on the basis of a Vakalatnama. In such circumstances, proper compliance with Section 31(5) would mean delivery of a signed copy of the Arbitral Award on the party himself and not on his Advocate, which gives the party concerned the right to proceed under Section 34(3) of the aforesaid Act.

16. The view taken in *Pushpa Devi Bhagat's* case (supra) is in relation to the authority given to an Advocate to act on

behalf of a party to a proceeding in the proceedings itself, which cannot stand satisfied where a provision such as Section 31(5) of the 1996 Act is concerned. The said provision clearly indicates that a signed copy of the Award has to be delivered to the party. Accordingly, when a copy of the signed Award is not delivered to the party himself, it would not amount to compliance with the provisions of Section 31(5) of the Act. The other decision cited by Mr. Ranjit Kumar in Nilakantha Sidramappa Ningshetti's case (supra) was rendered under the provisions of the Arbitration Act, 1940, which did not have a provision similar to the provisions of Section 31(5) of the 1996 Act. The said decision would, therefore, not be applicable to the facts of this case also.

17. In the instant case, since a signed copy of the Award had not been delivered to the party itself and the party obtained the same on 15th December, 2004, and the Petition under Section 34 of the Act was filed on 3rd February, 2005, it has to be held that the said petition was filed within the stipulated period of three months as contemplated under Section 34(3) of the aforesaid Act. Consequently, the objection taken on behalf of the Petitioner herein cannot be sustained and, in our view, was rightly rejected by the Division Bench of the Delhi High Court.

18. Consequently, the Special Leave Petition must fail and is dismissed.

19. There will, however, be no order as to costs.

R.P. SLP dismissed.

SURESH SAKHARAM NANGARE

v.

THE STATE OF MAHARASHTRA

(Criminal Appeal No. 1606 of 2008)

SEPTEMBER 21, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

PENAL CODE, 1860:

ss.302/34 and 201/34 - A-1 alongwith A-2 and A-3 stated to have committed the murder of his younger brother by setting him on fire - A-2 turned approver - Trial court convicting A-1and A-3 - Appeal by A-3 only - Conviction and sentence of life imprisonment affirmed by High Court -- Held: Except the evidence of approver, there is nothing on record to inculpate the appellant - Even if the evidence of approver is accepted, the role attributed to appellant is that he caught hold of the legs of the deceased as directed by A-1, after the latter had finished his work of assaulting the deceased - Besides, the doctor, who conducted the post mortem, opined that the death occurred due to 100% burns and not because of assault - This categorical evidence makes it clear that the appellant had nothing to do with the same since the evidence brought in shows that it was A-1 who took the deceased to the other room where he burnt him to death - This important aspect has not been considered by trial court as well as by High Court - Prosecution failed to establish the guilt insofar as appellant is concerned - Both the courts below committed an error in convicting him u/ss 302 and 201 read with s.34 of IPC and sentencing him to imprisonment for life - Accordingly, both the orders are set aside, and appellant is acquitted.

s. 34 - Common intention - Explained.

The appellant (original A-3) was charged alongwith original A-1 for committing the murder of latter's younger brother. The prosecution case was that A-1 was addicted to ganja and liquor and used to ill-treat his wife (PW-2) and other members of the family including the deceased because of which all the family members except A-1 shifted to a different locality. The deceased, who was suffering from deformity and loss of speech used to intervene whenever A-1 assaulted his wife and children, and due to this, A-1 wanted to get rid of the deceased. On 2.3.1995, A-1 came to his other brother (PW-1) and took the deceased to his house on the pretext of performing 'pooja'. On 3.3.1995 between 10.30 A.M. and 11.00 P.M., PW-1 was informed that his younger brother had expired of burn injuries. PW-1 lodged an FIR against A-1. After investigation, the police filed charge-sheet against three accused, namely, A-1, A-2 and A-3. During the trial A-2 turned approver and was examined as PW 7. The trial court convicted A-1 and A-3 u/ss 302/34 and 201/34 and sentenced both of them to imprisonment for life. A-3 filed an appeal which was dismissed by the High Court.

Allowing the appeal filed by A-3, the Court

HELD: 1.1 The first witness examined by the prosecution was PW-1, who deposed that A-3 and A-2 came to his house and told him that the deceased had committed suicide by setting himself on fire. This deposition of PW-1 shows that he has not implicated the appellant (A-3) in the crime. PW-2, the wife of A-1 narrated about the conduct of her husband as well as the disability of the deceased. According to her, the deceased was unable to speak and both his hands were disabled and he had flexed fingers. She also explained about the habits of her husband (A-1) and complained

that he was addicted to Ganja and liquor and used to beat her and her children because of which she used to go to her parents house. In the entire evidence, she has not implicated the appellant. PW-3 and PW-4, the neighbours, though explained about the conduct and character of A-1 and his brother, there is not even a whisper about the role of the appellant in the commission of the crime. [para 8-10] [1194-F-G; 1195-B-F]

1.2 The only person, who named the appellant is PW-5, who was also residing next to the house of A-1. She deposed that she knew all the accused persons. On the day of incident, at about 07:45 p.m., she noticed the appellant coming out of the house of A-1 in a frightened state. She identified the appellant in the court. She further deposed that she heard the shouts of A-1 that the deceased had set himself on fire. Thus, a perusal of the evidence of PW-5 shows that at the time of occurrence, the appellant was coming out of the house of A-1 in a frightened state of mind. She has not stated anything further. [para 11-12] [1195-G-H; 1196-A-D]

1.3 The only evidence, based on which the appellant was convicted with the aid of s. 34 IPC, is of approver (PW-7), who was originally A-2. Even if the evidence of PW-7 is accepted, the role allotted to the appellant was that of only holding the legs of the deceased as directed by A-1. It should be noted that, according to PW-7, A-1 was sitting on the abdomen of the deceased and was holding his neck with one hand and was also fisting his chest with the other hand and after fulfilling the work, at the end, he directed the other two accused persons to catch hold of the legs of the deceased. Beyond this, there is no role assigned to the appellant. PW-7 further stated that when the deceased had stopped his movements, A-1 got down from his abdomen. Thereafter, A-1 told them

to go out. However, PW-7 did not leave that place and saw A-1 lifting kerosene can and pouring it on the person of the deceased. On seeing this, he rushed to his house. [para 13] [1196-E; 1197-C-F]

1.4 A reading of s. 34 IPC makes it clear that to apply the section, apart from the fact that there should be two or more accused, two factors must be established: (i) common intention, and (ii) participation of accused in the commission of an offence. Thus, it requires a pre-arranged plan and pre-supposes prior concert; therefore, there must be prior meeting of minds. This Court is satisfied that there is absolutely no material from the side of the prosecution to show that the appellant had any common intention to eliminate the deceased, who was physically disabled. The only adverse thing against the appellant is that he used to associate with A-1 for smoking Ganja. In the absence of common intention, convicting the appellant with the aid of s.34 IPC cannot be sustained. [para 14-15] [1198-A-C, D-E]

1.5 The other important circumstance which is in favour of the appellant is the evidence of the doctor (PW-10) who conducted the post mortem. In his evidence, PW-10 has stated that the injuries on the dead body were 100% superficial to deep burns. In his opinion, the cause of the death was due to 100% burn injuries. He also issued the post mortem certificate which is Ext. 21 wherein he opined that the death occurred due to 100% burns and not because of assault. The categorical evidence and the opinion of PW-10 for the cause of the death of the deceased makes it clear that the appellant has nothing to do with the same since the evidence brought in shows that it was A-1 who took the deceased to the other room where he burnt him to death. This important aspect has not been considered by the trial court as well as by the High Court. [para 16] [1198-F-H; 1199-A-B]

1.6 On appreciation of the entire material, it is evident that the appellant had no role in the criminal conspiracy and no motive to kill the deceased. Therefore, this Court holds that the prosecution failed to establish the guilt insofar as the appellant (A-3) is concerned and the trial court committed an error in convicting him u/ss 302 and 201 read with s. 34 of IPC and sentencing him to imprisonment for life, and the High Court has also erroneously confirmed the said conclusion. Accordingly, both the orders are set aside, and the appellant is acquitted. [para 17-18] [1199-C; G-H; 1200-A]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1606 of 2008.

From the Judgment & Order dated 04.08.2006 of the Hon'ble High Court of Judicature at Bombay in Crl. Appeal No. 865 of 2001.

Aishwarya Bhati (AC), GP. Capt. Karan Singh Bhati, Sanjoli Mittal, Karmender Singh, Jyoti Upadhyay, Karan Sharma for the Appellant.

Sushil Karanjkar, Sanjay Kharde, 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 04.08.2006 passed by the High Court of Bombay in Criminal Appeal No. 865 of 2001 whereby the Division Bench of the High Court confirmed the order of conviction and sentence dated 15.10.1998 passed by the Court of Additional Sessions Judge, Greater Bombay in Sessions Case No. 816 of 1995 against the appellant herein.

2. Brief facts:

(a) Rajendra Mahadeo Lokhare (PW-1)-the complainant, Kishore Mahadeo Lokhare-(original Accused No. 1) and Sanjay Mahadeo Lokhare @ Sanju (since deceased) are brothers and were residing at Room No. 11, Gangabhaiya Chawl, near K.V.K. High School, Sainath Nagar Road, Ghatkopar (W), Bombay. Suresh Sakharam Nangare-(original Accused No. 3) is the friend of A-1 and Surekha Mahadeo Lokhare (PW-2) is the wife of A-1.

(b) Kishore Mahadeo Lokhare (A-1) was addicted to ganja and liquor and used to ill-treat his wife-Surekha (PW-2) and other members of the family including his younger brother-Sanjay Mahadeo Lokhare-the deceased. Due to the said behaviour, all the family members except Kishore Mahadeo Lokhare shifted to Punjab Chawl, Near Tata Fission Pipe Line, Mulund (W), Bombay. Surekha (PW-2) was very loving and affectionate to Sanjay-the deceased and was used to take care of him as a mother as he was suffering from deformity due to typhoid and had also lost his speech. Sanjay was also having love and affection as a son towards Surekha (PW-2) and he used to intervene whenever his elder brother assaulted his wife-Surekha and children. On this account, Kishore developed enmity against Sanjay and wanted to get rid of him.

(c) On 02.03.1995, Kishore Mahadeo Lokhare came to the house of Rajendra Mahadeo Lokhare (PW-1) and persuaded him to send Sanjay to his house at Ghatkopar on the pretext of performing some Pooja. On the same day, in the afternoon, Sanjay left for his elder brother's home informing that he will return the same night but he did not return. On 03.03.1995, at about 09:30 hrs, Rajendra Mahadeo Lokhare (PW-1) visited his elder brother's house in search of Sanjay but he returned after finding that Kishore was present there.

(d) On the very same day, i.e., on 03.03.1995, between 10:30 pm. to 11:00 p.m., PW-1 was informed by two residents of Ghatkopar at his residence that his younger brother-Sanjay

has expired due to burn injuries. PW-1 lodged an FIR against his elder brother-Kishore Mahadeo Lokhare at Ghatkopar Police Station which was registered as CR No. 76/1995.

(e) After investigation, the police filed chargesheet against 3 persons, namely, Kishore Mahadeo Lokhare, Shabbir Fariyad Khan and Suresh Sakharam Nangare for their involvement in the death of Sanjay Mahadeo Lokhare. The case was committed to the Court of Sessions and numbered as Sessions Case No. 816 of 1995 and charges were framed against the accused persons under Sections 302 and 201 read with Section 34 of the Indian Penal Code, 1860 (in short 'the IPC').

(f) During trial before the Court of Sessions, Shabbir Fariyad Khan turned approver and by impugned judgment and order dated 15.10.1998, the Additional Sessions Judge convicted Kishore Mahadeo Lokhare and Suresh Sakharam Nangare (original accused Nos. 1 and 3 respectively) under Section 302 read with Section 34 of IPC and sentenced them to suffer rigorous imprisonment (RI) for life. The accused persons were also convicted under Section 201 read with Section 34 IPC and sentenced to suffer rigorous imprisonment (RI) for 3 years each alongwith a fine of Rs. 2,000/- each, in default, to further undergo RI for 6 months each and the sentences were to run concurrently.

(g) Being aggrieved, Suresh Sakharam Nangare preferred Criminal Appeal No. 865 of 2001 before the High Court. By impugned judgment dated 04.08.2006, the Division Bench of the High Court dismissed the appeal and confirmed the conviction and sentence passed by the Additional Sessions Judge, Greater Bombay.

(h) Aggrieved by the said judgment, the appellant has preferred this appeal by way of special leave before this Court.

3. Heard Ms. Aishwarya Bhati, learned amicus curiae for the appellant-accused and Mr. Sushil Karanjkar, learned counsel for the respondent-State.

4. Ms. Aishwarya Bhati, learned amicus curiae appearing for the appellant raised the following contentions:

(i) There is no direct evidence showing the complicity of the appellant-accused and he has been convicted on the sole evidence of Shabbir Fariyad Khan (PW-7), the approver, as to his presence and participation in the crime.

(ii) It will not be safe to rely on the sole testimony of PW-7 - the approver which lacks corroboration.

(iii) Even if the evidence of PW-7 - the approver is accepted, still it cannot be said that the appellant-accused shared common intention with Kishore-original accused No.1 to commit the murder of his younger brother-Sanjay Mahadeo Lokhare.

(iv) The medical evidence and the post mortem report (Exh.21) clearly indicates that the victim did not die due to assault but the cause of death is due to 100% burns which was confirmed after receipt of the C.A.'s report.

With these contentions, learned amicus curiae contended that the conviction and sentence insofar as the appellant-original Accused No.3, deserves to be set aside.

5. On the other hand, Mr. Sushil Karanjkar, learned counsel for the respondent-State, submitted that on a conjoint reading of the statements of the prosecution witnesses including that of PW-7-original accused No.2, (Approver) by applying the provisions of Section 34 of IPC, the courts below were justified in convicting the present appellant along with original accused

No.1 under Sections 302 and 201 read with Section 34 IPC.

6. We have carefully considered the rival contentions and perused all the materials including oral and documentary evidence.

7. It is not in dispute that originally, 3 persons, viz., Kishore Mahadeo Lokhare, Shabbir Fariyad Khan and Suresh Sakharam Nangare were implicated as A-1 to A-3 respectively for the cause of death of Sanjay. During the course of trial, Shabbir Fariyad Khan (A-2) turned approver and he was examined as PW-7. Based on the materials led in by the prosecution, the trial Court convicted Kishore Mahadeo Lokhare (original Accused No.1) and Suresh Sakharam Nangare (original Accused No. 3) - the appellant herein under Section 302 read with Section 34 IPC and sentenced them to suffer rigorous imprisonment for life. In addition to the same, both were also convicted under Section 201 read with Section 34 IPC and sentenced to suffer R.I. for 3 years each along with a fine of Rs. 2,000/- each, in default, to further undergo R.I. for 6 months each. Further, it is not in dispute that Kishore Mahadeo Lokhare-(original Accused No.1) has not appealed against his conviction and sentence, hence, we are concerned only with Suresh Sakharam Nangare (original Accused No. 3) - the appellant herein.

8. The first witness examined by the prosecution was Rajendra Mahadeo Lokhare (PW-1), who deposed that the appellant herein (original Accused No. 3) and Shabbir Fariyad Khan-Approver (original Accused No. 2) came to his house and told him that Sanjay has committed suicide by setting himself on fire. His evidence relating to the cause of death by suicide has been negatived by the evidence of Dr. Balkrishna (PW-10) who conducted the post mortem. When a specific question was put to the doctor by pointing out that whether a person like Sanjay, who was having flexed fingers would be in a position to light a match stick or lift a can containing Kerosene, he

specifically negatived the same and confirmed that all the injuries suffered by the victim were ante mortem. He also pointed out that the death was due to 100% burns. We will discuss the evidence of doctor and his report in the later part of our order. The above deposition of PW-1 shows that he has not implicated the appellant herein (original Accused No. 3) in the crime.

9. Surekha - wife of Kishore (original Accused No. 1) was examined as PW-2. She narrated about the conduct of her husband as well as the disability of the deceased. According to her, the deceased was unable to speak and both his hands were disabled and he had flexed fingers. She further explained that when Sanju was young, he had suffered from Typhoid and during that, he had an attack due to which he lost his power of speech and became disabled. Since he was unable to take bath and to wear his clothes etc., she used to hold him. She also explained about the habits of her husband (original Accused No. 1) and complained that he was addicted to Ganja and liquor and used to beat her and her children because of which she used to go to her parents house. In the entire evidence, she has not implicated the appellant herein (original Accused No. 3).

10. In addition to the same, the prosecution has also examined two neighbours - Chandrakant as PW-3 and Durgavati Ashok Thakur as PW-4. Though they explained about the conduct and character of Kishore Mahadeo Lokhare (original Accused No. 1) and his brother, there is not even a whisper about the role of the appellant herein in the commission of the crime.

11. The only person, who named the appellant herein (original Accused No. 3), is Kumari Subhadra Dhondibhau Tagad (PW-5). She deposed that she knows all the accused persons. She narrated that on 03.03.1995, at about 6:45 p.m.,

when she was standing outside her house, she saw the deceased and Kishore Mahadeo Lokhare (original Accused No. 1) in their house. At about 07:45 p.m., on that day, when she was sitting near the door of her house, she noticed Suresh Sakharam Nangare- appellant herein (original Accused No. 3) coming out of the house of Kishore Mahadeo Lokhare (original Accused No. 1) in a frightened state. He was looking here and there and, thereafter, he left the place. She identified the present appellant in the Court. She further deposed that she heard the shouts of Kishore Mahadeo Lokhare (original Accused No. 1) as "Sanjune Jalun Ghetale" i.e., "Sanju has set himself on fire". She also deposed that she made a statement to the police. Like PWs 3 and 4, she was also residing next to the house of A-1.

12. A perusal of the evidence of PW-5 shows that at the time of occurrence, the appellant herein (original Accused No. 3) was coming out of the house of A-1 in a frightened state of mind. She has not stated anything further.

13. The only evidence, based on which the present appellant (original Accused No. 3) was convicted under Section 34 IPC, is of approver (PW-7), who was originally Accused No.2. In the examination, he has mentioned that Kishore (A-1) has two brothers, viz., Rajendra Mahadeo Lokhare (PW-1) and Sanjay (deceased). He also stated that Sanjay was dumb and had flexed fingers and he was unable to lift anything. He further narrated that on 03.03.1995, at about 12 noon, Kishore (original Accused No. 1) met him near K.V.K. School. At that time, Kishore was under the influence of alcohol and requested him to come to his place in the evening. At about 7.30-7.45 p.m., he went to his house. As soon as he reached the house of A-1, Suresh Sakharam Nangre - the present appellant (original Accused No. 3) also came there. There were 2 rooms in the house of A-1. At that time, the deceased was present in the inner room. He along with Kishore (A-1) and Suresh (appellant herein) was sitting in the first room. At that time, A-1 took out

ganja and all of them smoked it. Thereafter, A-1 went inside the inner room where Sanjay was sitting. After some time, he heard the sound of assault. Then A-1 called him and the present appellant (original Accused No. 3) inside the said room. As soon as they went inside, they noticed that Sanjay was lying on the floor and A-1 was sitting on his abdomen and was holding his neck with one hand and fisting with the other hand on his chest and both sides of the stomach. A-1 asked him and the present appellant (original Accused No. 3) to hold Sanjay. Accordingly, the appellant herein caught hold of the legs of Sanjay. Thereafter, A-1 removed his hands from the throat of Sanjay and he (PW-7) caught hold of the throat of Sanjay. When Sanjay had stopped his movements, A-1 got down from his abdomen. Thereafter, A-1 abused them and told them to go out. However, PW-7 did not leave that place and saw A-1 lifting kerosene can and pouring it on the person of Sanjay, who was lying on the floor. On seeing this, he ran away from the place to his house. Even if we accept the evidence of PW-7 (original Accused No. 2), who turned approver, the role allotted to the present appellant was that of only holding the legs of the deceased as directed by A-1. It should be noted that A-1 was sitting on his abdomen and was holding his neck with one hand and was also fisting his chest with the other hand and after fulfilling the work, at the end, he directed the other two accused persons to catch hold of the legs of the deceased. Beyond this, there is no role assigned to the present appellant.

14. Since the conviction of the appellant is based only with the aid of Section 34 of IPC, it is useful to refer the same:

> "34. Acts done by several persons in furtherance of common intention - When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

A reading of the above provision makes it clear that to apply Section 34, apart from the fact that there should be two or more accused, two factors must be established: (i) common intention, and (ii) participation of accused in the commission of an offence. It further makes clear that if common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and common intention is absent, Section 34 cannot be invoked. In other words, it requires a pre-arranged plan and pre-supposes prior concert, therefore, there must be prior meeting of minds.

15. We have already referred to the evidence of prosecution witnesses. Nobody has implicated the present appellant except the statements made by PW-5 and PW-7 (the approver). We are satisfied that absolutely there is no material from the side of the prosecution to show that the present appellant had any common intention to eliminate the deceased, who was physically disabled. The only adverse thing against the present appellant is that he used to associate with A-1 for smoking Ganja. In the absence of common intention, we are of the view that convicting the appellant with the aid of Section 34 IPC cannot be sustained.

16. The other important circumstance which is in favour of the appellant herein is the evidence of the doctor (PW-10) who conducted the post mortem. In his evidence, PW-10 has stated that on 04.03.1995, at about 08:15 a.m., the dead body of one Sanjay Mahadeo Lokhar was brought by the police for post mortem. He started the examination at 2 p.m. and the same was concluded at 3 p.m. According to him, it was a burnt body, averagely nourished with presence of rigor mortis in muscles. His tongue was protruding outside and surface wounds and injuries were 100% superficial to deep burns. In his opinion, the cause of the death was due to 100% burn injuries. He also issued the post mortem certificate which is Exh. 21 wherein he opined that the death occurred due to 100% burns and not

because of assault. The categorical evidence and the opinion of PW-10 for the cause of the death of Sanjay make it clear that the appellant herein - original Accused No. 3 has nothing to do with the same since the evidence brought in shows that it was Kishore Mahadeo Lokhare - (original Accused No. 1) who took Sanjay to the other room where he burnt him to death. This important aspect has not been considered by the trial Court as well as by the High Court.

17. On appreciation of the entire material, we have already concluded that the present appellant had no role in the criminal conspiracy and no motive to kill the deceased. On the other hand, the evidence led in clearly implicates Kishore Mahadeo Lokhare - (original Accused No. 1) in all aspects including motive and the manner of causing death by litting fire. Apart from all the evidence led in by the prosecution, the above position is clear from the evidence of the Doctor (PW-10) - who conducted the post mortem and his opinion for the cause of the death. Merely because the approver (PW-7) has stated that based on the direction of Kishore Mahadeo Lokhare (original Accused No. 1), the present appellant (original Accused No. 3) caught hold of the legs of the deceased, in the absence of any motive or intention, mere act of holding his legs that too at the end of the event when original Accused No. 1 throttled his neck by sitting on his abdomen, the appellant (original Accused No. 3) cannot be mulcted with the offence of murder with the aid of Section 34 of IPC, particularly, when the medical evidence for the cause of death is otherwise, namely, due to 100% burns.

18. In the light of the above discussion, we hold that the prosecution failed to establish the guilt insofar as the present appellant (original Accused No. 3) is concerned and the trial Court committed an error in convicting him under Sections 302 and 201 read with Section 34 of IPC and sentencing him to imprisonment for life. For the same reasons, the High Court has

also erroneously confirmed the said conclusion. Accordingly, both the orders are set aside. The appellant (original Accused No. 3) is ordered to be released forthwith if he is not needed in any other case. The appeal is allowed. We record our appreciation for the able assistance rendered by Ms. Aishwarya Bhati, learned amicus curiae.

R.P. Appeal allowed.